

Complaint Investigation Report
Parent v. RSU #16
Complaint 19.036C
Complaint Investigator: Jeannette Sedgwick
December 4, 2018

The Department of Education received this complaint on October 18, 2018. The investigator interviewed the District's Superintendent, Special Education Director, and Principal of the elementary school where the Student attended on November 15, 2018. The complaint investigator also spoke with the District's social worker, general education teacher, and the special education teacher of an in-District program not attended by the Student. The complainant submitted additional information through email on November 23, 2018. All documents, information, and responses from the parties were considered during the investigation.

FACTUAL FINDINGS

1. The Student enrolled in the District on August 29, 2018. The Student is in sixth grade and qualifies for special education and related services based on the disability of OHI.
2. The Student's IEP contained the following specialized instruction and related services:
 - Specially designed instruction by a special educator in writing ___/week for 120 minutes, in reading 5x/week for 50 minutes, and in math 5x/week for 45 minutes;¹
 - Special transportation to and from school 5x/week;
 - Social work by a social worker 1x/week for 30 minutes; and
 - Social skills by a social worker 1x/week for 45 minutes.
3. The Student was evaluated in October 2016. According to the Student's IEP, the Student's performance on the WISC-V showed very low (4th-6th percentile) in verbal comprehension, fluid reasoning, working memory, and full scale IQ. The Student's performance on the BASC-III indicated clinically significant concerns in the areas of anxiety, depression, learning problems, withdrawal, aggression, and externalizing and internalizing problems.
4. The Student's needs as specified on the IEP include decoding words, applying phonics, learning basic multiplication facts, spelling, adding capitals, and using correct punctuation at the end of her sentences.
5. Based on the IEP from the Student's former school, the District placed the Student in the Future Leaders program ("in-district program" or "program"), a program for children with disabilities that was housed at the elementary school.

¹ The IEP did not specify the time per week for SDI in writing.

6. The Students who attended the in-district program live in the District and are in grades 2, 3, and 6. The program was taught by a general education teacher and a special education teacher, both of whom were hired two weeks before the 2018-2019 school year started.
7. The general education teacher of the program, who is in her first year of teaching, stated that the students in the second grade generally did not exhibit behaviors that were disruptive to the entire class. The teacher stated that she and the special education teacher had had the benefit of experienced District staff to assist in setting up the program prior to the start of the school year. The Principal of the Elm Street School where the program was housed reported that the program required her assistance nearly every day because of climate in the classroom.
8. At some point in September 2018, the special education teacher left the District. At that point, there was no specialized instruction for the children with disabilities, including the Student, in that program.
9. In the evening of Saturday, September 22, 2016, the Superintendent wrote an email to the special education director and other District staff that stated he was closing the program immediately. He explained that his reasons for closing the program included the lack of staff, the students not being served properly, and non-compliance with students' special education programming. In this email, the Superintendent unilaterally ordered changes in IEPs for all students in the program, including changes in educational programming and placement for all the students. The Superintendent further ordered staffing changes such as tutoring to be performed by current staff. The Superintendent stated that he believed the children in the program had not been served for a long time and that he wanted the Student's needs to be met.
10. The special education director sent an email to the Student's parent on September 23, 2018 stating, "the Superintendent has decided to close the program that [the Student] has been attending at Elm Street School effective immediately due to the safety of the students. Please do not send [the Student] to school Monday. I will call you tomorrow so we can schedule an emergency IEP and figure out the best educational setting for [the Student]."
11. The Student's IEP Team met on September 27, 2018. This meeting was initially scheduled to adopt or change the Student's IEP from the former school and was used to discuss the Student's educational programming as a result of the program closure. The Student's IEP was changed to add 3 hours/week of academic tutoring.
12. The District's special education director has made referrals to day treatment programs and stated that she has stopped sending referrals to out-of-district placements because she believes the two possible placements she has identified are appropriate for the Student, even if those placements cannot accept the Student for several months.
13. The Student remains out of school because of lack of educational placement. She has received some academic tutoring; however, no special education teacher oversaw the Student's work or provided information to the tutor. At the time of this report, the

Student has missed approximately two months of her sixth grade year and has not received the specialized instruction and related services as mandated by her IEP.

14. The Student has been accepted at a day treatment program but will not be able to join the program until it hires more staff. The date of enrollment is not yet certain.

Other relevant facts are included in the determinations below.

DETERMINATIONS

The complainant alleged the following:

1. The complainant alleged that after the District closed an in-District program where the Student was being educated in September 2018, the District sent the complainant an email on September 23, 2018 instructing the Student to not attend school. The District did not educate the Student from that time until the present. MUSER IX(3)(B)(3).

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

A free appropriate education for a child with a disability must be provided by public agencies that receive federal and State funding.² Without advance warning to parents or staff, the District closed the Student's in-District special education program and ordered the Student to not come to school. This decision fully disregarded the District's responsibility to educate the Student and the other students with disabilities in that program. The District has not provided a free appropriate public education (FAPE) to the Student because of the reasons discussed below.

Districts must provide special education services to all children with disabilities whose parents reside within the District.³ Every public agency that receives federal or State funds to provide FAPE to children with disabilities must comply with the provisions of the Maine Unified Special Education Regulations (MUSER). The District violated law and regulation when it instructed the Student not to come to school. The Department notes that the discriminatory action of not allowing children with certain disabilities to attend school violates several federal and State civil rights laws and regulations, including Section 504 of the Rehabilitation Act of 1973, as amended, and its implementing regulations at 34 CFR 104.1; the Americans with Disabilities Act and its implementing regulations at 28 CFR 36.202(b); the Individuals with Disabilities

² MUSER I and MUSER IV(4). *See Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

³ *Id.*

Education Act, as amended, and its implementing regulations at 34 CFR 300.1; and the Maine Human Rights Act, 5 M.R.S.A. §§ 4601-4602.

The District has not implemented the Student's IEP since September 23, 2018 in violation of MUSER IX(3)(B)(3).⁴ The Student's IEP specifies that the Student will receive social work weekly. The social worker stated that he was unable to schedule individual social work sessions with the Student during the 2018-2019 school year because the social worker's time was taken up with group classroom dynamics and crises. The Student has not received individual social work services throughout this school year.

Additionally, the Student's IEP states that the Student will receive specially designed instruction ("SDI") in order for the Student to progress towards her goals of reading and writing.⁵ No SDI was provided to the Student after September 23, 2018. After the District improperly modified the Student's IEP (see below), the content of tutoring was provided by the general education teacher. The complainant wrote that he was attempting to teach the Student on his own but does not have the expertise. He wants the Student to be enrolled in school and receive instruction there. The District has not complied with MUSER IX(3)(B)(3).

It is unclear why the Superintendent believed he had the right to circumvent the IEP Team process and order children with disabilities to not attend school in contravention of federal and State law and regulation. When Teams discuss the educational placement of a child with a disability, the Team decision must be made by a group of people, including the parents. The Superintendent's actions did not follow the IEP Team process. The annual IEP review date for the Student, which was originally scheduled for September 27, 2018, resulted in a discussion about placement. It appears from the written notice and information garnered through interviews that the placement emergency overshadowed the discussion of the Student's progress on goals and the appropriateness of the Student's revised goals. The Student's IEP Team did not make joint, informed decisions regarding the child's needs. Rather, as evidenced by email communication and written notice, the Team focused primarily on educational placement crisis caused by the Superintendent's decision to close the program. In this instance, the Student's Team did not discuss the Student's educational needs in depth and the District appeared to propose a new educational placement based on the District's decision to close an in-district program. The Student's IEP was not individually tailored to meet her educational needs based on data or recent academic results. The District did not comply with MUSER VI(2)(J).⁶

⁴ Because the Student's special education teacher is no longer employed by the District, there is no information relating to the provision of SDI to the Student for the first month of school.

⁵ Academic goals on the Student's IEP included spelling grade-level words, demonstrating an understanding of text, developing and strengthening writing, interpreting products of whole numbers, and applying grade-level phonics and word analysis skills in decoding words accurately. There are also several behavioral goals on the IEP.

⁶ *Andrew F.*, 137 S. Ct. 988 at 1000 (educational program must be appropriately ambitious in light of the child's circumstances).

The District also violated regulations regarding schooling for a shortened day. An IEP Team may decide that an abbreviated day schedule is permissible under the regulations because of a student's medical or educational circumstances. If a student's IEP Team determines that an abbreviated school day may be appropriate, regulations require that the IEP Team must address how the child will meet the system of learning results; address how the child will participate in local and statewide assessments; develop a revised IEP with a re-entry plan for the child to return to a full-time school day within a reasonable period of time; describe the actions the District will take to assist the child to participate in a full day of school; and document in the Written Notice the basis for the determination of an abbreviated school day and how the determination is based on the individual needs of the child.⁷ Here, the Student was improperly given an abbreviated day schedule when there was no medical or educational need. The District did not comply with MUSER VI(2)(L).

Regarding tutoring, the District used tutoring improperly when the Superintendent ordered that the Student receive tutoring because of a lack of staffing for the Student's program. Tutorial instruction is only to be used in conjunction with abbreviated school day (MUSER VI.2.L) or Discipline of Children with Disabilities (MUSER XVII.). An IEP Team may consider tutorial instruction as a component of a child's program while assuring consistency with the federal requirements of least restrictive environment. In order to provide the least restrictive educational environment for children with disabilities, Districts must ensure that children with disabilities are educated with children who are not disabled to the maximum extent appropriate. Tutorial instruction may not be used in lieu of specialized instruction.⁸

While it may be appropriate in some instances, tutoring is not suitable for the Student in these circumstances. Rather than educate the Student in the least restrictive environment, the District imposed tutoring because of the District's staffing issues and not because of the Student's need for an abbreviated school day or discipline. This Student was educated in the District while she was in elementary school. District staff stated that the Student would now be better placed at an out-of-district placement. The facts do not show that the District found the Student's presence in the District to be untenable. Based on the specific facts of this case, the District should have served the Student within the District while seeking an educational placement that best fits her needs. Additionally, the District did not provide transportation to and from tutoring but rather required the Student's parent to travel to the tutoring site, forcing the

⁷ MUSER VI(2)(L).

⁸ MUSER X(2)(B); "When students are out of school because of discipline, an abbreviated school day, or medical reasons, tutoring may be provided as a short-term measure to ensure that students receive instruction." Tutoring is not specially designed instruction. Schools should make every effort, including re-entry plans and proposals for definitive placements, to ensure that students with disabilities are enrolled and attending school. "Tutoring for students who receive special education."
<https://mainedoenews.net/2017/11/15/tutoring-for-students-who-receive-special-education/>.

parent to pay for what should have been free and appropriate. The District did not comply with MUSER X(2)(4).

While the Department recognizes the need for programming to be fully and appropriately staffed and appreciates the difficulty of hiring certified special education teachers, the District's decision to immediately close the program resulted in this young Student's lack of programming for months. The District has not complied several special education laws, has not provided FAPE, and must complete the following corrective action plan.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

The Department offers technical assistance regarding the following corrective action plan.

1. Within three school days of receipt of this letter, the Student must be placed in District and must receive SDI and related services that are based on her educational needs.
2. Within 10 school days after receipt of this letter, the Student's IEP team should discuss which educational evaluations of the Student should be conducted to determine her current educational needs and whether the Student's qualifying disability is currently accurate. Consent forms must be provided within regulatory guidelines and no later than December 23, 2018.
3. By March 15, 2018, the District must conduct training with the Superintendent and special education director. Training must be provided by an attorney or member of the Department and must review the following regulatory provisions:
 - MUSER IX(3)(B)(3)
 - MUSER I and MUSER IV(4)
 - MUSER VI(2)(J)
 - MUSER VI(2)(L)
 - MUSER X(2)(4)
 - MUSER X(2)(B)
4. Compensatory education for the Student (to be provided *in addition to* the Student's resumed educational programming) must occur beginning January 2, 2018. The compensatory plan should include the following minimum requirements
 - The District will provide 125 hours of specially designed instruction to be delivered by a special education teacher or an Educational Technician 3 supervised by a special education teacher. The specialized instruction must be delivered in accordance with the Student's current reading, writing, and mathematics needs and is to be offered in

conjunction with the Student's full-time schedule and/or ESY depending upon the Student's and parent's schedule. The Student's IEP Team must determine how and when the compensatory SDI will be delivered in accordance with this corrective action plan. These hours must be completed by November 30, 2019 and the District must submit the time, date, and content of each hour of SDI provided to the Student as part of this plan.

- The District will provide monetary reimbursement for the parent's travel to and from home to the tutoring site at the federal rate of reimbursement (currently 54.5 cents/mile) for each session of tutoring attended by the Student since September 23, 2018.

5. If the Student's IEP Team believes FAPE can only be provided to the Student through out-of-district programming, the District must continue to seek special education programming for the Student until the Student is accepted at an out-of-district program. The District must submit evidence of referrals for the Student to the Department by December 23, 2018 and every two weeks thereafter.