

Complaint Investigation Report
Parent v. RSU #54/MSAD #54
Complaint 19.041C
Complaint Investigator: Jeannette Sedgwick
January 4, 2019

This investigation examined a public school District's responsibility to a state agency client who was residentially placed in a program which operates a special purpose private school located within the District. The Department of Education received this complaint on November 5, 2018. Interviews were conducted on December 11, 2018 with the District's special education co-director and several staff members from the special purpose private school where the Student was enrolled. The investigator also interviewed the complainant ("parent") on December 12, 2018 and the Student's advocate for residential affairs on December 13, 2018. The District's former director of special education and the educational director at the special purpose private school were interviewed on December 17 and 18, 2018, respectively. The investigator reviewed all documents, information, and responses from the parties.

FACTUAL FINDINGS

1. The fifteen-year old Student receives special education and related services based on the qualifying disability of Autism Spectrum Disorder. He also has been diagnosed with the disabilities of Intellectual Disability and Disruptive Behavior Disorder. The Student has Pica, a condition that involves eating items that are not typically thought of as food. He is primarily non-verbal and communicates with support through his communication device, where he has access to pre-stored words and phrases.
2. According to psychological assessments completed in 2017 and 2018, the Student has a history of emotional dysregulation and aggressive behaviors. These behaviors include biting, scratching, pushing, choking staff, and eloping. These assessments show that the Student has severe disabilities in all areas, including daily living skills which were rated below the first percentile, communication skills which were rated below the first percentile, and aggression which was rated in the clinical range. According to the documentation, the Student's ability to use his communication device is significantly reduced during times of dysregulation, when he is typically not able to respond to prompts.
3. One of the serious medical issues involving the safety of the Student and other students is the Student's rectal digging. He has smeared feces on himself and his physical environment and has been thought to have injured himself with this behavior.
4. On October 10, 2017, the Department of Health and Human Services (DHHS) residentially placed the Student at a program operating the special purpose private school (the "private school") located within the District. When the Student became a resident of

the program, he became a state agency client as defined by the Maine Unified Special Education Regulations and the District became responsible for the Student's special education program.

5. The usual procedures for the District when a state agency client is residentially placed in the private school is to hold an initial IEP meeting (the "transfer meeting") to determine the Student's educational needs. The District reviews records, IEPs from former Districts, and the students' current needs when determining what specially designed instruction (SDI) and related services are appropriate for the students who are residentially placed. The District does not assume that students who are residentially placed at the private school will automatically attend the private school's day treatment program as an educational placement. If the Student is educationally placed at the day treatment program at the private school, the District conducts the 30-day review.¹ Generally, after those IEP Team meetings, the District does not conduct meetings or discuss the Student until the next annual review unless the private school brings to the District's attention that a meeting needs to be held or the parent requests a meeting from the District.
6. These procedures were followed with this Student when he entered the District, beginning with the transition meeting held on October 17, 2017. The Student's IEP Team determined that the Student's educational needs would be best met in the private school's day treatment program based on information from assessments and current providers. The 30-day review was held on November 13, 2017, when the IEP Team removed PECS from the Student's IEP and added a post-secondary plan, among other things.
7. The parent stated that when the Student was residentially placed, he had been doing well. The parent's advocate for residential matters stated that prior to entering the private school, the Student was engaging appropriately with others and was interacting with his peers.
8. In late May or early June 2018, the private school unilaterally determined that the Student would receive educational services in the residential unit where the Student lives. The reasons for this change were the Student's increased aggression towards himself and others. The private school did not inform the District of this change.
9. The parent learned in early June 2018 that the private school had restricted the Student to his residence. She expressed her concerns that his educational placement had been unilaterally changed by the private school. The parent did not inform the District about her concerns with this situation.
10. The Student's parent requested information about the Student's annual review date on July 19, 2018. After offering several possible dates that were available for both the

¹ MUSER IX(3)(H).

- District and the private school, and after attempts to schedule a mutually agreeable time, the annual review was scheduled for August 14, 2018.² The parent was unable to attend.
11. The Student's IEP team, which consisted of the private school educational director, the Student's special education teachers, clinician, occupational therapist, speech therapist, and the District's special education director, met for the Student's annual review on August 14, 2018. The District's special education co-director has since left the District and in mid-August, another co-director took on the Student's case management. Neither the previous director or the current director knew that the private school had restricted the Student to the private school residence.
 12. Written Notice from the annual meeting on August 14, 2018, states that the Student "has shown a decline in his academic and functional performance since last year." Written notice also states that compensatory services would be provided for 25 hours of missed speech-language therapy because of many weeks of missed services at the private school. Notice also showed that the Student showed improvement in OT but did not meet his engagement goal "due to emotional dysregulation." The Team considered the Student's behavioral and emotional needs and agreed that a public school educational setting would not be appropriate. The IEP Team recommended continued educational placement at the private school.
 13. The Student's IEP resulting from the annual review in August 2018 contained the following items relevant to this investigation, as well as several accommodations and other supports:
 - SDI for 27 hours and 30 minutes/week by a special educator;
 - Speech and language consultation services 30 minutes/week by a speech-language pathologist;
 - 30 minutes/week of speech and language services by a special educator;
 - 60 minutes/week of OT by an occupational therapist;
 - 60 minutes/week of social work services;³
 - Measurable annual goals and objectives in reading based activities such as identifying upper-case letters of his first name and receptively identifying three or more common sight words;
 - Measurable annual goals and objectives in math based activities, such as identifying numbers 1-3 and identifying which of two groups of objects contains "more";

² The Student's IEP annual review had to occur before August 27, 2018. Because the private school staff were unavailable during vacation week, the meeting had to be scheduled before August 16, 2018. The parent's representative could not attend on August 14, 2018 but could attend after the annual review date had passed.

³ The IEP states 60 hours of social work each week. The investigator reads this to be 60 minutes/week.

- Measurable annual functional goals in OT, such as demonstrating improved sensory integration including sensory motor breaks, motor planning skills for ADLs;
 - Measurable annual goals in speech and language, such as requesting “more, again, all done, and different”;
 - Measurable behavioral goals, such as utilizing strategies to remain safe and appropriate.
14. Through discussions between the private school and DHHS, the Student remained at the private school at the parent’s request while the private school and DHHS continue to search for appropriate residential placements for the Student. These two entities have met weekly during the 2018-2019 school year to discuss the Student’s residential placement.
 15. The parent filed her request for this State complaint investigation on November 5, 2018. When interviewed, the parent stated that she believes that the private school is responsible for the Student’s regression and behaviors. She believes the private school’s staffing was the issue for the private school’s decision to keep the Student at his residence instead of in the educational program. The parent also stated that she wanted some entity to take responsibility for the Student’s education, which has not regularly been in place since the Student’s restriction to his residence. The parent believes that the issues about education are global in nature and that the Student deserves to receive educational services in the least restrictive environment.
 16. After receiving the request for an investigation on November 5, 2018, District staff contacted the private school and discussed the Student’s situation. District staff visited the private school on November 14, 2018 and had multiple conversations about the Student with the private school staff. The District learned in November, for the first time, that the Student had been restricted to his residence since late May or early June 2018, that he has had multiple unsafe incidents, and has had a 2:1 or 3:1 staff-to-student ratio on the residential ward during the 2018-2019 school year.
 17. The Student remained on his residential ward for reasons having to do with his medical needs and aggression. The private school, the District, and DHHS continued to seek other placements for the student that would meet both his residential and educational needs.
 18. During the time of this investigation, the District sent referrals to other educational placements. The Student is no longer residing at the private school as of the date of this Report and is receiving SDI and related services outside of the District.

Other relevant facts are included in the determinations below.

DETERMINATIONS

As stated above, this investigation is limited to the public school District's compliance with special education laws and regulations. The Student is in the residential program in the District because of the choice of the parent with support and assistance from DHHS. The IEP Team's determined that a day treatment setting was the appropriate, least restrictive environment. After that decision, the private school made decisions about the Student's educational services and placement outside of the IEP Team process. The District, which had no knowledge or control over the private school's unilateral decision to remove the Student from the classroom, could only act on the information it possessed. In conjunction with this report, the Department is taking immediate action pursuant to MUSER XII(2)(E) regarding the private school's decisions regarding this Student's educational programming.

The complainants alleged that from November 5, 2017 through the present, the Student was denied a free appropriate public education (FAPE) because of the following:

1. The goals and services on the Student's IEPs were not adequate to meet the Student's needs and were not written so that the Student could make progress towards his annual goals. MUSER IX(3)(A)(1)(b); MUSER IX(3)(A)(1)(d).

NON-COMPLIANCE FOUND.

A free appropriate public education (FAPE) is an education "specially designed to meet the unique needs of the handicapped child, support by such services as are necessary to permit the child the benefit from the instruction."⁴ In a recent decision by the United States Supreme Court, the Court emphasized that IEPs for children with disabilities must take into account the individual and "unique circumstances" of the child.⁵ IEPs must be reasonably calculated to enable the child to receive education benefits.⁶ When determining the appropriateness of an IEP, the fact-finder must consider the IEP as created based on the student's needs at the time the IEP was issued.⁷

When students in Maine are in the care and custody of DHHS and are placed by DHHS in a residential placement for non-educational reasons, they are state agency clients. State agency clients are considered to be residents of the town in which the residential placement is located.⁸

⁴ *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cty v. Rowley*, 458 U.S. 176, 188-189 (1982).

⁵ *Endrew F. v. Douglas Cty. Sch. Dist., 137 S.Ct. 988, 999 (2017)* (citing *Rowley*, 458 U.S. at 207).

⁶ *Id.*

⁷ *Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR 271 (D. Penn, 2018).

⁸ MUSER II(40); MUSER IV(4)(E).

Districts must provide educational services to state agency clients who reside in the residential placements in their districts.⁹ In this case, the Student is a state agency client because DHHS placed the Student for non-educational reasons in a private residential setting and the District must provide special education to the Student because of his state agency client status.

IEPs for state agency clients must be created through the same process as for all special education students, including, among other things, holding annual meetings with an IEP Team that includes the parent, determining the present levels of performance and educational needs of the child, and designing an educational plan that contains SDI, related services, and appropriate goals for the child's needs.¹⁰

According to the documentation and the information gained during the interviews, the District was not aware at the time of the Student's annual IEP meeting in August that the private school had restricted the Student to his residence, and therefore, those concerns were not discussed and did not result in more or different services on the August 2018 IEP. In August 2018, however, the District knew that the Student had not made progress on his goals in the past year. The District also knew that the private school had not been able to provide the Student's speech and language services for a considerable amount of time. The District's answer to this lack of services was to put compensatory time into the Student's IEP and decrease the number of hours of speech language services on the IEP such that the compensatory time and the time on the services grid equaled approximately the speech and language hours that the Student had received in his previous IEP. The section of the Student's IEP involving speech and language was not created in order to provide the Student with educational benefit.

Regarding the provision of SDI and other related services, the IEP Team revised the IEP so that the Student would be able to achieve his goals and objectives during the Student's annual review. These goals and objectives were measurable and attainable for this Student based on the information the District had at the time of writing the IEP.¹¹ With the exception of speech and language noted above, this IEP addressed the Student's individual needs, as demonstrated by the assessments, the Student's present level of performance, and input from his teachers and providers. The IEP also addressed how the Student's disability affected his ability to access the curriculum and his needs for functional living skills. The IEP Team met to discuss the Student's

⁹ *Id.*

¹⁰ MUSER IV(2)(I), MUSER IV(2)(J). Special education means specially designed instruction (SDI), at no cost to parents, to meet the unique needs of a child with a disability, including instruction in the classroom, in the home, in hospitals and institutions, and in other settings. 34 CFR 300.39; MUSER II(37).

¹¹ Written notice from the meeting does not show that the Student's behaviors were significantly impacting his education. Written notice states that the private school was experiencing staffing difficulties. Nowhere in the written notice or the IEP created in August does it state that the Team discussed the fact that the Student was confined to his residence because of safety concerns or any other reasons.

needs at an appropriate time; the meeting was attended by IEP Team members; the parent was offered multiple dates for participation; and the District offered another meeting to occur after the annual meeting at the parent's request. Input from multiple sources was considered and the Team made determinations about the education of the Student that were appropriate given the knowledge of his needs, excepting speech and language.

Corrective action is ordered below.

2. The Student has not received FAPE because the Student's IEP has not been implemented in the following ways:

(a) The Student has not received speech and language services, social work, and psychological consultation as specified on his IEP;

NON-COMPLIANCE FOUND.

When an IEP is unable to be implemented, Districts must reconvene an IEP Team to identify alternative service options. This IEP Team meeting must occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP.¹² The District knew about the Student's lack of services on November 5, 2018. The District did not hold an IEP Team meeting, which is a violation of MUSER IX(3)(B)(3).

Documentation shows that the District knew the private school's speech language therapist had left the private school several months prior to the August annual meeting and that the Student had not received speech and language services for many months. The Student's IEP states that he needs support with his IPAD, and had difficulty using this device when dysregulated, and so the lack of speech and language services may have impeded his ability to access educational programming. The District assumed that the private school would begin implementing the compensatory services for missed speech and language sessions. The District did not identify alternative service options beyond compensatory services to be granted at some point in the future. The District did not comply with MUSER IX(3)(B)(3) and corrective action is ordered below.

Regarding social work, the documentation does not show that the District was aware that the Student's social work services were interrupted or not provided. Psychological consulting does not appear on the Student's August 2018 IEP.

(b) The Student has not had access to his communication device as specified in his IEP; **COMPLIANCE FOUND.**

Given that the Student's need for a communication device is listed on the IEP, the District should have ensured that the Student has access to his communication device at the

¹² MUSER IX(3)(B)(3).

private school. The documentation does not show, however, that the District had notice or knowledge that the Student may not have had this access.

(c) Since July 2018, the Student has not received SDI or related services as specified in his IEP. MUSER IX(3)(B)(2-3); MUSER II 14; 34 CFR 300.101.
NON-COMPLIANCE FOUND AFTER NOVEMBER 5, 2018.

Districts have the responsibility to convene IEP Team meetings to determine if the IEP should be revised to address any lack of expected progress, the child's anticipated needs, and any other matters.¹³ The private school and the District do not have regularly scheduled meetings and do not communicate on a regular basis about the state agency clients in the private school's educational program beyond that which occurs at the annual reviews. The Student's circumstances were therefore not known to the District until November 5, 2018, when the District received the parent's copy of the request for a State complaint investigation.

Since November 5, 2018, the District has communicated with the private school about the Student's circumstances but did not convene an IEP Team meeting when it became aware of the private school's unilateral decision to change the Student's educational placement. When the District became aware of the issues of the private school potentially not providing SDI and related services as specified on the Student's IEP, the District should have convened an IEP Team meeting with the entire team present to discuss the Student's current educational needs and lack of expected progress in accordance with MUSER IX(3)(D). The District should have fulfilled its responsibility to provide education for the Student by seeking out other educational placements and alternatives to providing services.¹⁴

3. The Student has not been educated in the least restrictive environment since August 2018. MUSER X(2)(B). **COMPLIANCE FOUND.**

The private school determined to change the Student's educational experience, which had been at the private school's day treatment program, to a very restrictive setting of his residence at the private school. The Student's non-educational needs, including medical needs that may be causing some of the Student's behavioral issues, were a source of concern for all involved, particularly staff at the private school, the parents and the parents' representatives, and DHHS staff who meet regularly to discuss this Student.

¹³ 34 CFR 300.324(b)(i-ii); MUSER IX(3)(D).

¹⁴ The private school has deemed the Student unavailable for education and the District appears to have accepted the private school's determination on this matter. The Department notes that a determination of a student's availability for educational services because of medical or other reasons is a decision to be made by an IEP Team. See MUSER IX(3)(D).

All those interviewed during this investigation agree that the Student has not received educational services as specified on his IEP. There is disagreement among the parent and District, however, about who is responsible for IEP non-implementation.¹⁵ Because of the unique circumstances of this Student's experience in the private school, the District has not had the opportunity to provide educational programming for this Student. Documentation and information garnered through this investigation demonstrate that the District was unaware of the private school's restriction of the Student to his residence. The District assumed that the private school was implementing the IEP, with the exception of speech and language services, a non-implementation which the District attempted to remedy in the August 2018 IEP. The lack of information is a factor in determining the District's responsibility. The dearth of communication about the change in the Student's programming and needs is troubling not only for the questions it raises about the educational well-being of the Student, but also because the lack of communication gave the District no opportunity to revise the IEP to address any changed needs of the Student until receipt of the complaint, months after the restriction to the residence had occurred.

Ancillary Issue: The District has not complied with the parent's request to access student records. MUSER XIV. **NON-COMPLIANCE FOUND.**

In the parent's document submission of December 6, 2018, the parent requested that an additional allegation regarding student records be added to the complaint investigation. The parent listed several types of student records believed to be missing from the student record. When interviewed, the District stated that it had emailed requests for documents to the Student's former educational settings. The District did not provide documentation to substantiate their actions after the investigator requested that information. Parents have the right to access student records pursuant to MUSER XIV. Corrective action is detailed below.

¹⁵ The District argued that the Student has been unable to access education and has exhibited such unsafe behaviors that education was not provided as specified in his IEP. One example of this is when the Student was attending an off-site activity and attempted to choke the driver of the vehicle carrying the Student, as reported by the private school. The parent, on the other hand, stated that she wishes to see the Student in an educational placement where his IEP can be implemented in the least restrictive environment.

As part of its program approval for programs for children with disabilities, the Department will immediately address the issues with the private school raised in this State complaint investigation.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The District must create a plan for compensatory services for speech and language therapy to compensate for services missed from August 2018 to the date the Student entered his new educational placement. The plan must be in keeping with the Student's current needs. The District must provide that plan to the parent and Department by **January 31, 2019**.
2. The District must create a plan for compensatory services for all SDI and related services missed from November 5, 2018 to the date the Student entered his new educational placement. The plan must be in keeping with the Student's current needs. The District must provide that plan to the parent and Department by **January 31, 2019**.
3. The District must provide access to the educational records in the District's possession to the parent and submit to the Department evidence of the date the District made them available **by January 31, 2019**.
4. The District's Superintendent and Special Education co-directors must write a statement of assurances that when it learns of any lack of expected progress, a change in the child's anticipated needs, and any other matters that may require a revision of an IEP, it will convene the Student's IEP Team pursuant to MUSER IX(3)(D). The statement should be submitted to the Department **by January 31, 2019**.