

Parent v. RSU #6 / MSAD #6
Complaint 19.093C
Complaint Investigator: Jeannette Sedgwick
June 4, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on April 5, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On May 9, 2019, the investigator conducted interviews with the parent. On May 10, 2019, the investigator interviewed the parent, and during the week of April 22-26, 2019, the investigator conducted interviews with the school's principal and assistant principal, the District's special education director and BCBA behavior consultant, and the Student's former classroom teacher and educational technician. On May 13, 2019, the investigator interviewed the Student's case manager from an agency outside of the District.

The investigation covers one year, from April 5, 2018 - the present.

FACTUAL FINDINGS

1. The twelve-year old Student, who is described as a funny, very bright, and caring towards others, qualifies for special education and related services based on other health impairment for ADHD and disruptive mood disorder.
2. Assessments dated September 2018 show average or superior academic skills. Some evaluations indicate that reading comprehension, math calculation, written expression are areas of challenge for the Student.
3. The service delivery grid on the Student's IEP from September 2018 specifies specially designed instruction (SDI) in executive functioning 45 minutes/five days each week; 20 minutes of direct instruction by a special educator/once a week; and the related services of social work service, consultation by a special educator, and consulting for behavioral needs. The IEPs during the 2018-2019 school year specified the same SDI and services. The IEPs contain goals for academic areas of English / Language Arts, Mathematics, and behavior.
4. The Student was enrolled in the District's Compass classroom, a self-contained classroom for students with behavioral and other needs, from the beginning of the 2018-2019 school year until approximately April 2019. The Student had been educated in this program in the previous school year. Many students with varying disabilities attended this class.
5. Beginning in September 2019, the teacher in the Compass program, who was new to the District, slightly modified classroom expectations and practices, including the

expectation that students would attend general education classes as the norm and use the Compass classroom as a resource. Accordingly, the Student received academic instruction in general education settings and was to receive executive functioning skills instruction in the Compass classroom. In the fall of 2018, the Student expressed that he did not understand the material in the general education classes.

6. According to the special education teacher, instruction in executive functioning was offered within the Compass classroom and focused on the individual academic needs of the Student in relation to his work in the general education classes. Executive functioning skills are taught during an academic block called "RTI". The Student's schedule also characterizes this time as "RTI". According to the District, when the Student requires extra help, the teacher and educational technicians (ed. techs) provide it during this time.
7. The ed. tech who worked with the Student in the Compass classroom stated that the Student has trouble with assignments involving reading and writing. For instance, in social studies, he participates in discussions but has difficulty reading the assignments. He also has difficulties in science when the instruction calls for reading. The Student's ed. tech would often read to him because reading is so frustrating for the Student. The District staff stated that a laptop with speech-to-text is available, and that the Student's access to that technology was sometimes limited because of improper use of the laptop.
8. The Student's IEP Team met on September 21, 2018 to discuss the Student's evaluations. At that time, the IEP Team proposed to integrate an ed. tech on an as-needed basis. The parent disagreed with this determination. Written notice from this meeting states that the parent agreed with all determinations.¹
9. The Student had an existing behavioral plan upon entering the middle school in September 2018.² On September 5 and 19, 2018 the parent signed consent for an FBA and the BCBA began work on that FBA started immediately. While the FBA was conducted, an interim behavioral plan, as well as the previous behavior plan, were in effect.
10. The Student was restrained on September 27, 2018 and September 28, 2018. The parent filed a request for a review of the restraints after those restraints, and the District completed an internal review in accordance with 05-071 CMR Ch. 33 ("Chapter 33").³

¹ The parent and District staff had multiple conversations about this point throughout October 2018. Ultimately, the provision of an educational technician remained on the Student's IEP "as needed" for the 2018-2019 school year.

² This behavioral plan listed several strategies to increase the Student's motivation and participation, in academic activities, such as visual charts and checklists, and a decrease in unwanted behaviors such as work refusal and "hiding."

³ The parent also filed a complaint in accordance with the Department of Education's procedures outlined in 05-071 CMR Ch. 33 ("Chapter 33").

The District and parent came to an agreement regarding restraining the Student on October 19, 2018.

11. Around this time and continuing through the year, there were multiple discussions between the parent, the Student's caseworker, the classroom teacher, and the special education director about the reasons and types of restraints, the Student's behavior, and the Student's use of his cell phone during school.⁴ In one of these conversations, the Student's caseworker documented that District staff had not seen the Student's behavioral support plan.
12. On October 25, 2018, the IEP Team met at the parent's request.⁵ The Team determined to keep in place certain accommodations, including ed. tech support as needed. The Team also planned to meet again to review the behavior support plan created while the FBA was being conducted.
13. The IEP Team met again on November 28, 2018 to discuss the behavior support plan and conduct an annual review.⁶ The new IEP for the Student included mathematics goals, reading goals, and functional goals such as increasing independence in general education classes.
14. The Student was restrained in January 2019 after an incident in the classroom involving a remote control. After that date, the parent removed the Student from school beginning on January 18, 2019. The parent stated that she kept the Student out of school because she did not feel the Student was safe based on that incident. Another incident occurred in February 2019. Documentation shows that the Student was not marked absent during this time and documentation from a previous incident demonstrates that District staff had informed the parent that if the Student was kept home, he would not be marked absent. The parent and caseworker stated that there have been more restraints and seclusions than what has been reported and disagreed with what they considered to be elevated responses to the Student's work refusal or refusal to comply with directives.
15. The parent removed the Student from school for a total of approximately 20 school days during the 2018-2019 school year, from January 18, 2019-January 23, 2019 and February 25, 2019 through March 18, 2019.

⁴ Using a cell phone during school hours is prohibited in the Student's school. The parent wishes the Student to have contact with her based on concerns that stem from the restraint incidents, and the District agreed to allow some cell phone use during the school day.

⁵ Although the Student was attending academics in the general education classroom, written notice from some IEP Team meetings states that the general education teacher was N/A. The Department notes that IEP Teams must have a general education teacher as part of a student's full IEP Team, and because this Student was receiving instruction in primarily general education classes, the lack of a general education teacher means the IEP Team was not complete.

⁶ The new behavior support plan was implemented after the parent signed it in November, and the final behavior support plan was implemented after December 17, 2018.

16. The Student received tutoring for one week and then attended school for an abbreviated day from March 20, 2019 until approximately the end of April 2019. The Student's IEPs do not contain information about abbreviated day programming.
17. The parent requested a full day of programming on April 23, 2018 and the Student began attending school full-time shortly after that date. Part of the Student's re-entry plan was to create another schedule for him outside of the Compass program. His schedule from April until the end of the school year included social studies, science, mathematics, special education class, and industrial tech. The schedule did not include English/Language Arts or contain instruction in executive functioning. Some of the curriculum in the general education classes has been modified for the Student, such as having him perform a few mathematics problems rather than all of them. The District made efforts to include motivational opportunities within the Student's new schedule.
18. The Student's parent and caseworker, as well as the ed. tech who works with the Student, stated that the Student becomes frustrated with written work and routinely refuses to complete it. The parent continues to feel that having a 1:1 ed. tech assigned to the Student for his mainstream classes will ensure his participation in those classes.
19. District staff stated that the Student's motivators are often difficult to ascertain and that when the Student "shuts down" or removes himself from the classroom to a quiet place, they remain concerned about his safety. This year, the Student has primarily engaged in work refusal and has ripped up papers or sought a quiet space when becoming frustrated.
20. From November 2018 to the present, the District's BCBA met with the family and District staff more than 25 times to discuss the Student's behavior support plan, train staff, and facilitate implementation of that plan. During this time, the behavior support plan was updated at least twice and approved by the parent. The parent stated that the Student's behavior support plan has been followed this year and that she has recently signed the updated version of that plan.
21. The Student's IEP was amended on December 21, 2018 and March 26, 2019 after IEP Team meetings. The service delivery grid during the school year remained essentially the same despite changes in the Student's education programming.

Other relevant facts are included in the determinations below.

DETERMINATIONS

The complainant alleged the following:

1. From April 4, 2018 until August 30, 2018, the Student did not receive receiving a free appropriate public education (FAPE) because the Student was removed from school outside of the IEP process and was told not to return to school. MUSER IX(3)(B)(3).

COMPLIANCE FOUND.

When the parent made this allegation, she was referring to time outside of this complaint investigation. From April 4, 2018 until August 30, 2018, the Student was not removed from school outside of the IEP process. There is no violation of law or regulation regarding this allegation.

2. From August 30, 2018 to the present, the Student has not received FAPE because of the following:

- The Student has been removed from his educational programming for restraints and seclusions, notably in September 2018 and January 2019.
- The Student's IEP and behavioral plan are not being followed by staff.
- The Student's 1:1 educational technician was not provided from August 30, 2018 – September 17, 2018;
- Services on the Student's IEP are not being delivered. 34 CFR 300.1; MUSER I; MUSER VI(J)(4); MUSER IX(3)(B)(3).

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

The parent and District disagreed about the appropriate placement of the Student beginning early in the school year. The District convened IEP Team meetings to discuss the Student's needs and how they impact educational programming. The IEP Team's emphasis appears to have been the Student's behavior and may not have been the Student's difficulties with processing information, reading and writing. These factors could be the impetus for many of the Student's frustrations, along with the manifestations of disruptive mood disorder.⁷ The interim behavior plan, the FBA and resulting final behavioral plan have assisted the parent and District in ensuring consistency and safety for the Student. Both parties agree that this plan will be in place for the remainder of the school year.

The parent's decision to remove the Student from school for approximately 20 days made it difficult for the District to provide services for the Student. On the first occasion the parent removed the Student, the District reached out to the parent immediately and the Student returned to school within a few school days. After January 2018, the second time the parent removed the Student from school, the re-entry plan included several methods to assist the Student, such as changing his schedule, appointing a new case manager, and offering opportunities to motivate the Student to participate in school.

However, the District has not implemented the Student's IEP which has resulted in a denial of FAPE. Specifically, the District has not provided the provision of specially designed instruction and executive functioning during the 2018-2019 school year. Special education does

⁷ The parent stated that the Student has been given several different diagnoses in the past several years. The diagnosis of a mood disorder is written into the Student's behavioral plan in place at the beginning of the 2018-2019 school year.

not include general education procedures that are a part of formal general education intervention, such as RTI.⁸ While the Student was in the Compass program, there was no direct instruction in executive functioning skills beyond the assistance with general education schoolwork. After the Student left that program and returned to school, no instruction in executive functioning was provided. There is no documentation that the Student has progressed in his goals, and with the absence of instruction in English/Language Arts for the last two or more months of school, the opportunity to progress in that area is unlikely. Additionally, since leaving the Compass program and returning to school, the Student has not received SDI as specified in his IEP. From September until approximately mid-April, the Student was in the behavioral classroom for a period called “RTI,” or response to intervention, which did not comprise specially designed instruction either in academics or executive functioning. The Student’s goals are ambitious enough that more or different types of SDI on the Student’s IEPs are warranted.⁹

The Student’s IEP in place at the beginning of the school year called for a 1:1 ed. tech as needed. When interviewed, the parent stated she believed that the individual support was needed for the Student to be able to understand classroom instruction in the mainstream setting. The IEP is written so that the Student receives this support “as needed,” and he has received that support since the beginning of the school year.

The behavioral plan that was in place in the beginning of the 2018-2019 school year was modified when the new behavioral plan was established. The BCBA provided consultation to the Student’s case manager on October 2, 15, 23, and 30, 2018,¹⁰ and an IEP Team meeting to review procedures regarding Student behavior held on October 2, 2018. The parent stated that there were no problems regarding the behavioral plan later in the year.

While removal from school because of restraint and seclusion can result in a denial of FAPE, that is not the case here. The two incidents of restraint in September did not result in the Student’s IEP not being followed or the Student being unable to access his education. The restraint incident in January 2018 was followed by the Student’s parent removing him from school. On other occasions, the Student elected to sit in a quiet space with adult supervision as specified in the Student’s behavior plans. The District’s response to the Student’s need for a quiet space has been reasonable and ensures the Student’s safety.

The District has made significant efforts to engage the Student by using motivating schedule, creating opportunities for success, and establishing ongoing support and consultation to staff by the BCBA, though, on balance, the District has not offered a free appropriate public education for the Student during the 2018-2019 school year.

⁸ MUSER II(16); MUSER II(37).

⁹ For instance, the goal in English /Language Arts is to determine the meaning of words and phrases as they are used in a text and analyze the impact of a specific word choice on meaning and tone.

¹⁰ The BCBA also provided behavioral consultation to the Student’s case manager approximately twelve times after October 2018.

3. The Student's IEP Team has not considered the use of positive behavioral interventions and supports, and other strategies, to address that behavior that impedes the child's learning or that of others. MUSER IX(3)(C)(2). **COMPLIANCE FOUND.**

According to the documentation and information gained in interviews, the Student's disability affects his self-regulation. On September 5, 2018 the parent signed consent for a functional behavior evaluation. While that evaluation was ongoing, the BCBA put into place an interim plan to which the parent agreed. At each team meeting during the 2018-2019 school year, the District and parent discussed the Student's behavioral needs and possible supports and strategies; in fact, the IEP Team met nearly monthly to discuss the Student's needs. The Team discussed motivating activities for the Student to be used as "rewards" or as part of a point system. Because the Student's motivations continue to change, the rewards have also changed. For example, part of the Student's current schedule includes attending a class to assist other students, which is a preferred activity.

Documentation shows that the District provided multiple behavioral interventions and supports to the Student within the Compass classroom from the beginning of the year. District staff who work directly with the Student know the Student's strengths and weaknesses and staff assists the Student when his behavior impedes that of others in formal ways such as point systems and informal ways, such as reaching out to him personally to create good relationships between the staff and the Student. The BCBA has created a thoughtful and well-researched behavioral plan and has provided many hours of consultation to District staff. There is no violation of law or regulation regarding this allegation.

4. District staff was not aware of the Student's IEP and behavioral plan during the 2018-2019 school year. MUSER IX(3)(B)(4)(b). **COMPLIANCE FOUND.**

While it may be that the Student's special education teacher had not initially been familiar with the Student's behavioral plan at the onset of the school year, the BCBA created a new, interim plan within the first few weeks of school, the contents of which all staff was aware. During the whole of the 2018-2019 school year, District staff discussed, understood, and implemented the Student's behavioral plans, with specific guidance and instruction by the BCBA who wrote those plans. There is no violation of law or regulation regarding this allegation.

5. At the September IEP Team meeting, the Student's IEP Team revised the provision of services, specifically, removed the 1:1 ed. tech for the Student, without recording the parent's disagreement on the Written Notice. MUSER App.1; 34 CFR 300.503(9). **COMPLIANCE FOUND.**

Based on the documentation, the Student's IEPs all stated that the Student would receive support of an ed. tech as needed. The Student received that support as needed. As stated above, the parent believes that an ed. tech is necessary to assist the Student in accessing his education. Whether this or other accommodations are necessary for the Student to make progress in his goals is a conversation for the IEP Team. The Department reminds the IEP Team to ensure written notices accurately reflect parent concerns and responses to IEP Team proposals. There is no violation of law or regulation regarding this allegation.

6. The District has not provided access to the Student's records that were requested by the parent within 45 days. MUSER XIV(3). **COMPLIANCE FOUND.**

The parent made this allegation referring to a time outside of this complaint investigation and there has been no record request made during the time of this complaint. There is no violation of law or regulation regarding this allegation.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The Student's full IEP Team must meet by the last day of the 2018-2019 school year and must discuss the following;
 - A. The possibility of conducting further evaluations regarding the Student's abilities to read, write, and process information.
 - B. Next year's schedule that will allow the Student to continue making progress in all areas of the general education program.
 - C. The Student's disability category.
 - D. Implementation of the Student's behavior plan in next year's educational setting.
 - E. The inclusion of goals, specific specially designed instruction, and related services to be included on the Student's IEP that are individualized and will ensure the Student can make progress in the general education curriculum.
2. The District must provide the Student with 40 hours of individual direct instruction for executive functioning skills to be completed by December 31, 2019.
3. The District must provide the Student with English / Language Arts in accordance with the goals on his IEP and the general education curriculum for 20 hours to be completed by December 31, 2019.

4. A statement of assurances from the District administration that it will mark students who miss school as absent in accordance with truancy and special education law and regulation.
5. The special education director and middle school administrative team will review the requirements of an abbreviated day scheduling for students with special needs (MUSER II(1) and MUSER VI(2)(L)).