

Parent v. RSU #20
Complaint 19.104C
Complaint Investigator: Jeannette Sedgwick
June 24, 2019

COMPLAINT INVESTIGATION REPORT

The Department of Education received this complaint on April 25, 2019. The complaint investigator reviewed all documents, information, and responses from the parties. On May 29, 2019, the investigator conducted interviews with the District's special education director and athletic director, the Student's case manager, and a behavioral consultant who had worked with the Student. On May 31, 2019, the investigator conducted interviews with the parent. The investigation covers the time period from April 25, 2018 - the present.

FACTUAL FINDINGS

1. The Student is seventeen years old, in grade 12, and qualifies for special education with the qualifying disability of emotional disturbance. The Student has not been evaluated for his three-year review, with the exception of a functional behavioral assessment (FBA) in December 2017.¹ He has been psychiatrically hospitalized in the past.
2. Previous evaluations of the Student state that the Student has diagnoses of bipolar disorder, ADHD, and Tourette Syndrome.² The psycho-educational evaluation conducted when the Student was 16 stated that Tourette Syndrome is one of the Student's diagnoses.
3. According to the FBA dated December 2017, the Student used to engage in unpredictable behaviors and would become aggressive when asked to complete tasks. Aggression was limited to self-harm and posturing, swearing and shouting, or holding his fist in a "punch" position. At the time of the 2017 FBA, the Student was reported to be dangerous at home. The FBA was revised in February 2018 with a two-page addendum. As part of that report, the Student reported that he swears when he is tired or angry and engages in

¹ The District has stated that the Student will not take part in evaluations. The Department notes the Student took the SATs as part of school-wide assessments. The last recorded full set of evaluations occurred in December 2013, five years ago.

² Tourette syndrome is a neurological disorder characterized by repetitive involuntary movements and vocalizations. In the Student's case, repetitive vocalizations included swearing, sometimes as frequently as 85 times in one class period.

verbal threats when people demand things of him.³ A new behavior plan resulted from that update to the FBA.

4. The Student's annual IEP meeting occurred on April 30, 2018. On the IEP resulting from this meeting, the Student's concerning behaviors are reported to be task refusal and swearing. The academic goals and objectives were to "meet the standards of English/Language Arts by reading critically and with comprehension and researching."⁴ Other goals included study skills goals and behavior goals. The Student's educational placement was stated to be a self-contained classroom, and the service delivery grid stated he would receive specially designed instruction for 65 minutes/20 times each week. The IEP included no related services. Written notice from this meeting states that he was attending school on an abbreviated day schedule, had completed approximately half of his on-line geography class, and had completed 68% of history class.
5. The Student attended ESY during the summer of 2018. District staff reported that he did well at summer school and that he was attending regularly.
6. When the Student started school in September 2018, he was placed into two mainstream academic classes, English and Mathematics, in addition to his gym class. The District arranged more time in the general education setting than had been in the past year. The IEP in place at this time specified a self-contained classroom.
7. The Student's mother stated that at the beginning of the year, she told the school that she did not wish him to be in any mainstream setting because he needs "minimum exposure with other people." She objected to the Student joining two mainstream classes when his IEP specified a self-contained classroom.
8. On October 3, 2018, the Student did not follow a directive from District staff. He was sent home without any disciplinary action. The next day, on October 4, 2019, the Student became upset after he returned to school and his parent was called to pick him up again. After he punched a wall while waiting for a ride home, he was suspended for 10 days and

³ Identified triggers for the Student included being confronted with difficult classwork, not being prepared for class, having to read aloud or answer a question in front of class, participating in multi-step work or projects, and changing activities.

⁴ The Department notes that curriculum standards are not goals. The Student's goals lacked specificity to his individual academic or functional needs.

the school notified the police about the Student's behavior. There was no manifestation determination meeting regarding this suspension.⁵

9. At the October 17, 2018 IEP meeting, the general education teachers stated that the Student was making academic progress but that he was below grade level in academic skills. Areas of concern continued to be the Student leaving the areas where he is supposed to be and not responding to staff re-direction. Staff remain concerned about the Student's use of inappropriate and threatening language. The parent asked that the Student be returned to a self-contained classroom, with no mainstreaming, and the IEP Team rejected that proposal. The resulting IEP stated that the Student would receive specially designed instruction by a special education teacher for 65 minutes, 20 times each week. This IEP did not contain the following services which had been on been on the Student's previous IEP: (a) speech/language services 30 minutes/once a week; (b) OT 30 minutes/once a week; (c) social work services 30 minutes/once a week; and consultation with an occupational therapist 1 hour/once a month.
10. Also included on the October 2018 IEP is a list of primary target behaviors, which include swearing at people, repeated refusal to follow expectations, as well as verbal threatening and hitting or punching and leaving assigned areas.⁶ The Student was meeting standards in gym, math and English/Language Arts at this time.
11. The Student remained out of school. On October 18, 2019, a working draft of a behavioral plan for the Student called "Positive Behavior Support Plan/Safety Plan Protocols was established."⁷ The final version was disseminated to the Student in language he could understand at some point after that. This plan involved points earned for behavior such as being on task, following directions, participating positively, and role modeling for others. The plan also included definitions of indicators of unsafe escalation/unsafe behaviors, which included leaving assigned areas, jumping down the

⁵ Documentation states that an IEP Team meeting was held on October 17, 2019, 13 days after the decision to remove him from school. Written notice for the meeting was sent to the parents one month after the meeting, on November 14, 2019 and does not contain the title manifestation determination meeting as the purpose of the meeting. Written notice also states that the Student could not return to school until a safety plan was "refined."

⁶ The behavior plan included places where the Student could calm himself. District staff stated that an ideal place for the Student to deal with his emotions would be a completely quiet and separate area without any other person nearby. This space is unavailable at the middle school where the substantially separate classroom is located.

⁷ The consultant had unsuccessfully attempted to conduct an in-person interview in order to update the FBA, and the Student took part through a written questionnaire.

stairs, swearing at people in anger or loudly, listening to inappropriate music and being unable to discontinue after 3 prompts, hitting items, breaking items/using items inappropriately, and repeated refusal to follow instructions. The behavioral plan specified that the District should send the Student home without suspension or expulsion if interventions at school did not work to ameliorate what the District termed escalated behavior (“Level 3 behaviors”).⁸ Part of the Student’s behavioral plan point system allows him to opt out of academics and this practice of missing classes impacted his grades, according to the December 2018 IEP and written notice.

12. The Student was allowed to return to school at some point after this plan was put into place. After that time, the Student was sent home on 9 occasions, according to the parent, and 5 occasions, according to the District.
13. The parent stated that she did not know of the details of the behavioral plan prior to its going into affect. The parent stated that initially she had been willing to come to school and pick up the Student if he ever became aggressive but that the other parts of his behavioral plan punish him for actions that are related to his disability. She stated that the Student has Tourette Syndrome and that the District continues to send him home simply for swearing at other people.
14. The Student’s IEP was amended in December 2018. By this time, the Student was not doing any academic work except his English/Language Arts. The amended IEP stated that the Student would receive specially designed instruction by a special education teacher 65 minutes, 20 times/week; however, it is not clear whether the Student was accessing this in the general or special education setting.
15. The District has provided detailed weekly progress monitoring the Student’s behavior. The reports show that on multiple occasions, in accordance with the plan, the District sent the Student home for lack of compliance with a directive or for swearing. On one of these occasions, District staff requested that the District’s school resource officer bring the Student home.
16. On March 26, 2018, the Student’s IEP Team met. This IEP states that the Student’s cognitive deficits impact the Student in the areas of reading, writing, and mathematics, and that he needs specially designed instruction for writing, reading, and math, especially word problems. The IEP resulting from the March 26, 2018 meeting stated that the Student will receive specially designed instruction for 6 hours/five times each week, as well as OT once a month, social work 30 minutes/once a month, special transportation for

⁸ Level 3 behaviors include non-compliance with direction and excessive swearing.

ESY, and BCBA consultation one hour each quarter. Unlike the previous IEPs, the March IEP contains no math goal and no reading goal.

17. The District reported that the Student is a success story. He is now engaging in school, has a peer group that supports him, and is doing well behaviorally compared to the past. District staff has kept data about two of the Student's target behaviors, swearing and leaving his supports, both of which have diminished in frequency during the year. District staff reports that behavioral incidences have decreased significantly throughout the year. The Student is reported to have increased his tolerance for re-direction, other people, and unfamiliar situations, such as visiting the technical center where he may be able to take classes in the future. All this progress, according to the District, enables the Student to better access his academic instruction.
18. During a school basketball game, a referee ejected the Student from playing in that competition based on Student's actions at that game. After this incident, the District followed the policies in the athletic handbook and the Student was excluded from basketball for the season. A few months later, the Student tried out for the District's baseball team. District staff stated that the District hosted one baseball team, but had some students who would be pulled from that team to play in JV games that were in the process of being scheduled. The Student was the only student on the team who was told he could not participate in away games. District staff stated that there was concern about the Student's behavior on the long bus rides to and from the games and that while the Student had supports in place for practices and home games, the District did not have supports in place for the Student to participate in away games.
19. On April 22, 2019, the Student was given a 10-day in-school suspension. The IEP Team met on May 1, 2019 to conduct a manifestation determination meeting. The Team determined that the Student's behavior was not a manifestation of his disability.
20. District staff who were interviewed state that the Student has made significant progress in his day-to-day functioning within the school. The parent states that she has seen no difference in the Student's behavior at home and agrees that the Student, though doing better, has in the past harmed himself and others.

DETERMINATIONS

The complainant alleged the following:

1. The District is not providing a free appropriate public education (FAPE) to the Student because of the following:

- A. The District is not following the Student's IEP, specifically, the safety plan that states that the Student should not be touched or restrained. MUSER IX(3)(B)(3).

NON-COMPLIANCE FOUND.

The District has not provided specially designed instruction or related services that address the Student's disability of emotional disturbance.⁹ The goals do not reflect individualized and measurable targets in academic, functional, and behavioral areas of the Student's education. The Student has deficits in English/Language Arts and mathematics that were addressed in goals on the IEPs in the first part of the 2018-2019 school year. However, in March 2019, those goals were dropped from the IEP despite the Student's needs as reported by the IEP Team.

Documentation does not show that the Student received specialized instruction by a special educator because in large part he was to take part in three general education classes. Based on the Student's schedules and lack of schooling throughout the 2018-2019 school year, as well as the abbreviated day programming in the last two months of the 2017-2018 school year which was not instituted in accordance with regulation, the Student's IEPs were not implemented.

The Department notes that the Student's IEPs are devoid of SDI and related services that address the Student's ability to access the curriculum with his disability of emotional disturbance. There is no specificity of specially designed instruction in academic areas on all the Student's IEPs, even though the Student lacks academic skills and some of the Student's IEPs in place during this time contain academic goals. Additionally, the type and level of services appear to be inadequate for the Student's present levels of functioning and emotional disability. The lack of appropriate goals and services have resulted in a lack of progress in the general education curriculum.

Regarding the safety plan the parent alleges was not followed, there was a single incident in March 2019 when a District staff member moved the Student away from another student during a heated exchange. Staff moved the Student away from a situation thought to be dangerous, which is an action fully within Maine law and regulation.

- B. The Student has missed more than 10 days of school through being sent home without discipline, resulting in a loss of educational services, an abbreviated school day, and a change of educational placement without having a manifestation determination review. MUSER IX(3)(B)(3); MUSER XVII(1)(E); MUSER XVII(5); MUSER VI(2)(I)(L). **NON-COMPLIANCE FOUND.**

⁹ The exception to this is the IEP written in March 2019 and implemented in April 2019, which contains the related services of the provision of direct social work once a week for thirty minutes.

Districts must provide educational services to Students with disabilities and not exclude them from education because of their disability.¹⁰ The established IEP Teams for students with disabilities must ascertain whether an action of misconduct was caused by or had a substantial relationship to their disability. This is an IEP Team decision and a procedural safeguard for all students with disabilities when educational placements are changed because of discipline.

MUSER states, in relevant part, that

“within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the SAU, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the SAU) must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine—

- (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
- (b) If the conduct in question was the direct result of the SAU’s failure to implement the IEP.”

The Student has missed multiple days of school through two long-term suspensions, with only one manifestation determination meeting. The Student was not allowed to return to school after his suspension in October until a plan was “refined.” In conjunction with the Student’s suspension and the District’s refusal to re-admit him after that suspension, the Student’s placement was effectively changed without an interim alternative educational setting in place and without a determination of whether the disability was a manifestation of the Student’s disability.

In addition, District staff have implemented a behavioral plan that includes removal from school as a behavioral intervention tool.¹¹ The IEP Team has not followed procedures regarding abbreviated day programming. Sending the Student home without the IEP Team creating an abbreviated day educational program in accordance with MUSER violates special education regulations and does not offer the Student FAPE. This Student has missed the specially designed

¹⁰ *Nickerson v. Lexington Pub. Sch.*, 893 F. Supp. 2d, 276, 285 (Districts must provide ‘instruction and support services sufficient to permit the child to benefit educationally from that instruction.’ (internal citations omitted); See *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 998, 1002 92017); Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Plans, 68 IDELR 76 (August 1, 2016).

¹¹ Written notice from December 3, 2018 states that the team observed that de-escalation takes 20 to 40 minutes and is impacted by the presence of peers. The consultant recommended that if the Student should not re-engage with his scheduled activities, he should go home. If he could re-engage with this schedule within a 5 minute period, he could return to his schooling. The Principal was the “last chance,” for de-escalation, and if the Student could not engage in a required task within five minutes, the Student was told to leave school for the day.

instruction and related services on his IEPs for the time the District removed him from school without the proper procedural special education protocols in October 2018 and throughout the school year when it sent him home without discipline.

It is important to note that one of the Student's disabilities is Tourette Syndrome. One of the manifestations of this disability for the Student is swearing repetitively. He has been sent home on multiple occasions because of the manifestations of his disability, i.e., using inappropriate language with staff. District staff believed swearing and not following directions, the types of behavior listed as Level 3 behaviors and reasons to send the Student home, were precursors to other, more aggressive behaviors. The incident of the Student punching a wall in October 2018 caused concern about the Student's and others' safety. However, behavioral intervention strategy must not deny a child with a disability access to school.

Finally, the Department notes that the Student's special education teacher has developed a very good relationship with this Student and has assisted him in making significant strides in school during this past year. All staff interviewed demonstrated an understanding of the Student and a genuine desire to see him do well in school. Staff who work directly with the Student have invested much of themselves and the Student appears to be responding to the special educators' positive interactions.

- C. The IEP states that the Student will receive support services during District-sponsored sports but those services are not being provided and the Student has not been allowed to participate. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

Based on interviews and review of the District athletic policy, the Student's excusal from winter basketball was based on District policy, which had been reviewed by the Student prior to joining the team. During baseball season, the District supported the Student with an aide who attended practices. The District stated that when the Student learned he was being excluded from baseball games out of the District, he became upset and was sent home that day.

No educational deprivation occurred based on the District's failure to provide services during away baseball games based on the information gained during the investigation; however, the resulting action of sending the Student home after he was told he could not participate because of fear of the Student's actions affected the Student's educational experience and the provision of FAPE (see discussion above).

- D. The District is not allowing the Student to take part in the full day of the school. MUSER VI(2)(L); MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

Maine regulations require that children with disabilities are expected to attend school the equivalent amount of time each day as children without disabilities in the same school and/or

school program. MUSER VI(2)(L). MUSER also states that an abbreviated school day can be initiated only by the IEP Team for one of two reasons: 1) based upon the child's individual educational needs or 2) based upon the child's individual medical needs.

If the team considers that an abbreviated school day is appropriate and necessary, the IEP Team must document that it has done the following:

(a) Address how the child will meet the system of learning results (which may include a core of standards in English language arts and mathematics for kindergarten through grade 12 established in common with other states), and receive full access to the general curriculum and services on the IEP, as determined by the individual child's need;

(b) Address how the child will participate in local and statewide assessments;

(c) 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, no longer than 45 calendar days; and,

(d) Delineate in the revised IEP with the re-entry plan the actions the SAU will take to assist the child to participate in a full day of school; and

(e) 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.

The IEP Team meeting to review partial day programming does not include the requisite information about abbreviated day programming. Written notices from April 30, 2019 shows that the IEP Team discussed credits earned towards graduation and proposed a full-day schedule for the Student.

Additionally, the Student was not allowed to attend school full time based on a behavioral plan written by an outside consultant specifying administration sending the Student home after two levels of intervention aimed at de-escalating unwanted behavior.¹² Sending the Student home for more than ten days constituted a change of placement, created an abbreviated day situation for the Student, and circumvented the IEP process and decision-making.

¹² It appears the District believed a safety plan was the same as a behavioral plan. The FBA from 2017 and the subsequent update to the FBA recommend a safety plan for "extreme behaviors" in order to maintain the Student's and others' safety when preventive methods "have failed to quell a volatile situation." The District may wish to share the findings in this report with the consultant who created the behavior/safety plan. At the December 2018 meeting, the Parent objected to the plan requiring the Student to leave his educational programming. This practice occurred from approximately October 2018 to the present.

CORRECTIVE ACTION

1. **By September 1, 2019**, the District administration at the high school, including the principal, assistant principal, District special education director, must take part in training conducted by either a special education law attorney or a member of the Maine Department of Education regarding the following regulations: MUSER IX(3)(B)(3); MUSER XVII(1)(E); MUSER XVII(5); MUSER VI(2)(I)(L).
2. The portion of the Student's behavioral plan requiring the Student to be sent home is invalid upon receipt of this report. **By September 1, 2019**, a new behavioral plan that does not include "send-homes" must be proposed to the parent. The practice of sending the Student home without disciplinary action must cease immediately upon receipt of this report;
3. The parent and special education director must meet **no later than July 8, 2019**, to obtain consent for and plan for the three-year re-evaluation. The evaluations must be sufficiently comprehensive to determine the Student's current level of performance and areas of need in academic instruction and supports. Evaluations must be conducted by an evaluator who has not previously evaluated the Student. Written Notice from this meeting must be submitted to the Department.
4. **By September 1, 2019**, the high school principal and assistant principal must submit a statement of assurances to the Department that a manifestation determination meeting with the IEP Team will be held in accordance with the regulations when a student with disabilities commits an infraction of the Code of Conduct and a change of placement occurs as a result of the discipline.
5. The Student's IEP must be revised and proposed to the parent by **September 1, 2019** to reflect appropriate goals, instruction and related services that enable the Student to make progress in the general education curriculum. The IEP must contain goals specific to the needs of the Student in light of his disability and consider educational placements for the Student that will allow him to progress in the general education curriculum. The IEP must contain clear transition information and goals.
6. The District must provide 75 hours of a combination of specially designed instruction and transition services to the Student, in addition to those services already on the Student's IEP **during the 2019-2020 school year**. The District must submit reports that detail the amount and type of services provided to David Emberley, Due Process Consultant, on the first of each month beginning in September 2018.