

Complaint Investigation Report

██████████ v. Bangor Public Schools
August 12, 2019

Complaint # 19.121C

Complaint Investigator: David C. Webb, Esq.

Date of Appointment: June 17, 2019

I. Identifying Information

Complainant: ██████████, Parent

██████████

██████████

Respondent: Bangor Public Schools
Dr. Betsy Webb, Superintendent
73 Harlow St.
Bangor ME 04401

Patti Rapaport, Director of Pupil Services

Student: ██████████

DOB ██████████

II. Summary of Complaint Investigation Activities

On June 13, 2019, the Maine Department of Education received this complaint. The complaint investigator was appointed on June 17, 2019.

The complaint investigator received 294 pages of documents from the respondents and 14 pages of documents from the parent. Interviews were conducted with the following people: ██████████, Parent; Nicole Pinkham, IEP and Special Education Coordinator for the High School; Dr. Andrew Kahn, School Psychologist; Patti Rapaport, Director of Pupil Services; Kimberly Butler, Teacher; and Renee Perron, School Social Worker.¹

III. Preliminary Statement

The Student is 16 years old and attended Bangor High School as a 10th grader between March 28, 2019 and July 11, 2019. At the time of her withdrawal from Bangor High School, she was receiving section 504 services and was being evaluated to determine if she qualified for special education services.

¹ As per the standards of practice for conducting complaint investigations, the Complaint Investigator used his discretion with regard to witnesses interviewed, and therefore not all of the witnesses identified by the parties were interviewed as part of this investigation.

This complaint was filed by the Student's parent ("Parent") alleging that Bangor Public Schools ("District") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on June 20, 2019, alleging 3 separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on July 9, 2019.

IV. Allegations

1. Failure to follow required child find procedures in violation of MUSER §IV.2;
2. Failure to follow required evaluation procedures in violation of MUSER §V;
3. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4).

V. Summary of Findings

1. The Student is 16 years old and attended Bangor High School as a 10th grader between March 28, 2019 and July 11, 2019. During the time that the Student attended Bangor High, she resided at NFI North, Summit View residential treatment facility in Bangor.² The Student currently resides at the NFI North, Beacon Residential treatment facility in Buxton, Maine and is the educational responsibility of MSAD #6.
2. The Student has been diagnosed with Persistent Depressive Disorder and Borderline Personality Disorder (adolescent onset). Prior to attending Bangor High School, the Student attended ██████████ in Bath, Maine.³
3. At the time that the Student withdrew from the District, she had been evaluated but had not yet been determined to be eligible for Special Education services.
4. On April 11, 2019, shortly after the Student enrolled, a section 504 team meeting was held at the District. The Parent participated in this meeting by phone and the notes from this meeting state that the Parent "expressed concerns about the Student's behaviors." The notes from this

² The Student was placed at this residential treatment facility due to her unsafe and challenging behaviors, primarily in the home and community setting. According to the Parent, the Student's behaviors included self-cutting, inappropriate use of the internet, sexual encounters with older men, and drug use.

³ The Student was receiving a section 504 accommodation plan at ██████████ and was identified with an adjustment disorder combined with hearing and vision loss, but was not receiving special education services.

meeting state that the Parent requested that the “team make a referral to special education.”

5. The notes from the April 11, 2019 meeting also state: “Dr. Leach (Case Manager) explained that accommodations could be made under 504 to address [the Parent’s] concerns, but [the Parent] preferred to have [the Student] on an IEP. Dr. Leach explained the process for referral and notified the team that we would reconvene the 504 team as soon as possible to initiate the IEP referral.” At this meeting, the Student’s 504 team implemented a plan where the Student would have access to supportive instruction in emotional regulation, access to safe locations for self-care and other behavior management tools, such as taking breaks when the Student feels anxious.
6. In an interview with the complaint investigator, the Parent stated that the Student did not demonstrate the same behaviors at school as she did in her residential setting. However, the Parent was concerned about the Student’s unsafe behaviors out of school as well as in-school behaviors including attendance and use of smoking paraphernalia. The Parent also expressed concerns regarding the Student’s interactions with a teacher who mispronounced the word “Muslim,” causing the Student to become upset.⁴
7. A second 504 team meeting was convened on April 30, 2019. The notes from this meeting indicated that the Student “has not exhibited any of the behaviors in question at Bangor H.S.” The meeting notes referenced a verbal confrontation between the Student and one of her teachers regarding the pronunciation of the word “Muslim.”
8. In an interview with the Complaint Investigator, the Parent stated that Patti Rapaport told her that she “needed to complete a special education referral form” before the Student’s eligibility could be considered. After the Parent said she was unwilling to complete the form, the “referral for special services” form was completed by Patti Rapaport on May 3, 2019 while she spoke with the Parent on the phone.
9. An IEP team meeting was held on May 16, 2019 for the purpose of an initial referral to special education. Pursuant to the written notice prepared in connection with this meeting, the following evaluations were ordered: Full file review, clinical interview with the Parent and the Student, behavioral rating scales, Woodcock Johnson Achievement testing and a classroom observation.⁵

⁴ According to the Parent, the Student identifies as an active practitioner and member of the Muslim faith.

⁵ The team did not order a psychological examination for the Student since she had a full psychological evaluation in 2018.

10. The District's child find policy (Policy IGBAC) provides in relevant part: "A referral will be considered received by the school unit on the date that the written referral is received by the office of the Director of Pupil Services. The referral shall be signed and dated by the Director of Pupil Services or designee, thereby indicating the date of receipt."
11. In an interview with the complaint investigator, Renee Perron, School Social Worker, stated that the Student had "no behavior issues at all" in school, and that she was "one of the most well-behaved residential placement students she has ever worked with."
12. In an interview with the Complaint Investigator, Kimberly Butler, the Student's history teacher, said that the Student was very articulate in class, participated on the first day that she arrived in class, and seemed "quite astute, capable, and interested in history." She said that the Student worked well with other students in class. Ms. Butler noted that while the Student only received a C minus in her class, this grade was not indicative of her ability, but rather reflective of two missing assignments and one lower test grade.
13. Ms. Butler said that she had no issues with the Student's behavior in class except for an incident where the Student argued with her about the pronunciation of the word "Muslim", where the Student "seemed aggressive." Ms. Butler said that after this interaction the Student complied with her request to leave the class and report to the guidance counselor's office.
14. In an interview with the Complaint Investigator, Patti Rapaport, Director of Pupil Services, said that at the April 11, 2019 504 meeting the Parent talked about a special education referral but "didn't sign" any form requesting the referral or a request to evaluate. Ms. Rapaport said that the 504 team reviewed the Student's record from [REDACTED], which indicated that she was an average student with passing grades. She also said that [REDACTED] staff reported that while the Student recently had a full psychological evaluation and was on a 504 plan at [REDACTED], the Student did not have any concerning behavior issues while she attended [REDACTED].
15. Ms. Rapaport said that the Student's 504 plan was updated at the meeting on April 11th and that the team rescheduled their meeting for April 30th, 2019 to determine the need for additional testing/evaluations with regard to the Parent's special education referral. Ms. Rapaport said that the Parent "was upset" that she needed to fill out a special education referral form, as she did not believe that the form was necessary for a referral. Ms. Rapaport said that she helped the Parent complete the form while talking to her on the phone.

16. On April 30, 2019, Patti Rapaport sent a letter to the Parent advising her that “in order to initiate the child find process for [the Student], a referral for special services form needs to be completed. Once the form is returned to school, an [IEP] team meeting will be scheduled.”
17. Ms. Rapaport stated that between April 30, 2019 and May 16, 2019 (the date of the initial IEP team meeting) the IEP team gathered all of the Student’s mental health reports, gathered information from the Student’s case manager and group home staff.
18. On May 3, 2019, Ms. Rapaport asked Dr. Kahn to develop a Student Behavior and Reintegration Plan to address concerns raised by the Parent at the April 30 meeting regarding the Student’s behaviors. This plan was presented and reviewed at the May 16, 2019 IEP team meeting.
19. A “Parental Consent for Evaluation” form was provided to the Parent on May 16, 2019. This form was signed by the Parent and returned to the District on May 28, 2019.
20. An academic evaluation report, consisting of the Woodcock Johnson Psycho-Educational report and a clinical observation, was completed by the District on June 6, 2019. The report summarized that the Student’s broad achievement scores fell within the average range in reading, written language and math. The evaluator concluded that the Student “should be able to succeed at a level commensurate to same age/grade peers” in mainstream settings.
21. Ms. Rapaport said that the team requested that Dr. Kahn conduct a psycho-educational evaluation on or about June 18, 2019, which was completed on July 10, 2019.
22. Ms. Rapaport noted that through the end of the 2018-2019 academic year, there were no reported incidents of significant behaviors at school. She stated that the only behavior of any consequence was an argument between the Student and one of her teachers about the pronunciation of the word “Muslim.”
23. Ms. Rapaport reported that while the Student’s grades dropped during the fourth quarter, she noted that the Student’s teachers would send work home to the Student’s residential placement that did not get completed, and that the lower grades were reflective of a “work completion” issue rather than her difficulty with the subject matter.
24. In an interview with the Complaint Investigator, Nicole Pinkham, the Special Education Coordinator for Bangor High School, said that she

met and got to know the Student soon after she enrolled at the high school in March of 2019. Ms. Pinkham was aware of some “emotional and behavioral” issues going on for the Student in her home life. She said that she noticed some scars on the Student’s legs from cutting injuries, but could see that they “were old” and “were healing.”⁶ She said that she did not hear from any teachers, social workers or other staff about concerns regarding the Student’s behavior in school. Ms. Pinkham added that the Student was taking honors classes and was ranked in the “middle of her class.” Ms. Pinkham added that the Student volunteered with a school program to help other at-risk students called “Project Transition.”

25. In an interview with the Complaint Investigator, School Psychologist Dr. Andrew Kahn stated that the Student’s challenges were in the “emotional/behavioral” realm, not intellectual. Dr. Kahn noted, however, that while at times the Student’s emotional functioning is not well regulated, the Student showed strength with regard to her academic abilities, and that she has typically obtained average to above averages grades during her educational career.
26. Dr. Kahn noted that the Parent and Student had a challenging relationship, and that the Student had many stressors in her home setting, both before and after she was residentially placed. He reported that the student seemed to be “safe” at Bangor High, even while her discomfort at the group home escalated. Although the Student had a past history of “cutting” he said that there was no indication that this was a continuing or active safety issue at School.
27. As a result of his evaluation, Dr. Kahn diagnosed the Student with Persistent Depressive Disorder and Borderline Personality Disorder (adolescent onset). He recommended that the Student receive special education including social work services, mental health services, skill building with regard to her responses to challenging situations and how to deal with uncomfortable situations. He also recommended that the Student utilize her daily safety plan and receive specially designed instruction within a small group or individualized setting due to her “significant emotional functioning and safety challenges that have impeded her ability to remain in the home...”

VI. Conclusions

1. Failure to follow required child find procedures in violation of MUSER IV.2.

PROCEDURAL VIOLATION FOUND; NO DENIAL OF FAPE FOUND

⁶ Ms. Pinkham said that District staff had coordinated with the Student’s residential staff, the Parent and the school nurse, who had also met with the Student to confirm that she was not actively cutting herself.

MUSER IV.2 governs Child Find policies for children ages three through twenty, and states, in relevant part:

Each IEU or SAU shall develop a written policy, consistent with this rule (specifically section V), regarding referral to the IEP Team. All referrals to the IEP Team must be acted upon in a timely manner. The IEP Team shall review existing evaluation data and determine the need for additional I. The IEP Team may conduct its review without a meeting (V.3.B). If additional evaluations are needed, the IEU must send a consent to evaluate form within 15 days of the receipt of referral.

(1) Date of referral receipt – The SAU’s policy on referral must define what date constitutes the receipt of a referral. The referral must be submitted in writing to the Special Education Director, authorized designee, or superintendent. An oral referral shall be reduced to writing by designated school personnel...

(3) Referral by parent – A parent may refer at any time. The parent of a child receiving general education interventions may request that the agency conduct a full and individual evaluation for possible eligibility determination at any time during the implementation of these general education interventions. MUSER IV.2 E

20 U.S.C. § 1412(a)(3) provides that school districts must ensure that: All children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

Child Find extends to children "who are suspected of [having] ... a disability ... and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1); *D.K. v Abington School District*, 696 F. 3d 293 (3d Circuit, 2012); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010). A school's failure to comply with Child Find may constitute a procedural violation of the IDEA. *Id.*, see also *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010) (calling the Child Find requirement a "procedural regulation[]"); *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (characterizing noncompliance with Child Find as a procedural violation).

As the court in *D.K. v. Abington* noted, a school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." *Id.*, citing *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 226 (D. Conn. 2008). The *Abington* court held that "schools [are required to] identify disabled children within a reasonable time after school

officials are on notice of behavior that is likely to indicate a disability." *Id.*, quoting *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995) (other citations omitted).

In the present case, multiple witnesses confirmed that the Student did not have any outward behaviors *at school* to put the District on reasonable notice that she had a disability. (emphasis added). Academically, the Student's grades were in the average range, and she took several honors level courses. However, the Student's residential placement history and safety concerns raised by the Parent at the April 11, 2019 504 team meeting, combined with the Parent's special education referral request, placed the District on notice that the Student should be referred for special education services.

The District's child find policy (Policy IGBAC) provides in relevant part:

A referral will be considered received by the school unit on the date that the written referral is received by the office of the Director of Pupil Services. The referral shall be signed and dated by the Director of Pupil Services or designee, thereby indicating the date of receipt." Ex. A-2(a).

In the present case, the Parent orally requested a special education referral on April 11, 2019. The District committed a procedural violation by not immediately "reducing this request in writing by designated school personnel" as required by MUSER IV.2 E. Instead, the District sent a letter to the Parent on April 30, 2019 advising her that "in order to initiate the child find process for [the Student], a referral for special services form needs to be completed." The District did not start the process of gathering the Student's evaluation records until finally completing the referral form over the phone with the Parent on May 3, 2019. Additionally, the District did not send the Parent a consent to evaluate form until May 16, 2019. Under these circumstances, the evidence supports a finding that the District committed a procedural violation by waiting over 20 days after the Parent's request to start the referral process and over 35 days to start the evaluation process.⁷

2. Failure to follow required evaluation procedures in violation of MUSER §V;

PROCEDURAL VIOLATION FOUND; NO DENIAL OF FAPE FOUND

MUSER V(1)(A) provides in relevant part that a School Administrative Unit (SAU) shall conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability.

⁷ The evidence does not support a finding that that this violation resulted in a loss of FAPE for the Student. First, the District made a substantial effort to convene an IEP team meeting and evaluate the Student after she was ultimately referred for special education services on May 3, 2019. In addition, the District had the School Psychologist draft a behavior and emotional support plan for the Student following the April 30, 2019 504 team meeting, which was completed and reviewed at the May 16, 2019 IEP team meeting. Further, there is no evidence that this delay impacted the Student's ability to access her general education curriculum, nor were there any significant academic, behavioral or social concerns that arose as a result of this delay.

MUSER V(2)(B) provides, in relevant part, that in conducting the evaluation, the SAU shall:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining:
 - (a) Whether the child is a child with a disability under 34 CFR 300.8 [Section VII]; and
 - (b) The content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

In the present case, the evidence supports a finding that the District met its obligation with regard to the use of relevant and varied assessment tools. Although a full psychological evaluation was performed on the Student in 2018, the District ordered a psycho-educational evaluation of the Student, a full file review by the School Psychologist, a clinical interview with the Parent and the Student, Behavioral Assessment Scale for Children (BASC-3) and a behavioral observation. These assessments allowed Dr. Kahn to make a recommendation in his July 8, 2019 report that the Student receive special education services.

MUSER V.1.A(3)(a)(i) regulates the timing of evaluations. It states that for children under the responsibility of the school system an evaluation shall be completed within 45 school days of receiving parental consent.

In the present case, the “consent to evaluate” form was mailed to the Parent following the IEP Team meeting on May 16, 2019 and received back at the school on May 28, 2019. The academic evaluation was completed on June 6, 2019 and sent to the Parent on June 10, 2019; the psychological evaluation was completed on July 8, 2019 and sent to the Parent on July 10, 2019. All evaluations were completed by July 8, 2019, and received by the parties by July 10, 2019, which is within 45 *school days* of the Parent’s initial request on April 11, 2019 that the Student be referred to special education.⁸

⁸ See MUSER 2.(7).

Although the District provided its evaluations within the 45 school day requirement of MUSER V.1.A(3)(a)(i), the District committed a procedural violation of the child find provisions of MUSER IV.2 E. This provision provides that if additional evaluations are needed after a referral request, the LEA must send a consent to evaluate form *within 15 days of the receipt of the referral.*⁹ (emphasis added). As noted, the Parent requested a special education referral on April 11, 2019. The District committed a procedural violation by not reviewing the Student’s additional evaluation needs or sending the consent to evaluate form to the Parent within the 15 day window as required by MUSER IV.2.E.¹⁰

3. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4).

NO VIOLATION FOUND

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to develop or revise an Individualized Education Program ... to provide each identified child with a disability a free appropriate public education.

The First Circuit Court of Appeals has declared that “the IDEA entitles qualifying children to services that target ‘all of [their] special needs,’ whether they be academic, physical, emotional, or social.” Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1089 (1st Cir. 1993) “Educational performance in Maine is more than just academics.” Mr. and Mrs. I v. Maine School Administrative District No. 55, U.S. Court of Appeals, First Circuit 06-1368 06-1422 107 LRP 11344, March 5, 2007.

In Roland M. v. Concord Sch. Comm., 910 F.2d 983, 989 (1st Cir. 1990), the First Circuit Court held:

Congress indubitably desired “effective results” and “demonstrable improvement” for the Act’s beneficiaries. Burlington II, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency of educators’ policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, “related services,” 20 U.S.C. § 1401(17), are required to address a Student’s needs. Irving Independent School Dist. V. Tatro, 468 U.S. 883, 889-90 (1984); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

Among the related services which must be included as integral parts of an appropriate education are “such development, corrective, and other supportive services (including psychological services . . . and counseling services) as may be required to assist a handicapped child to benefit from special education.” 20 U.S.C. § 1401(17).

⁹ See Bangor High School 2018-2019 school calendar <http://www.bangorschools.net/wp-content/uploads/2018/04/2018-2019-BSD-School-Calendar.pdf>


¹⁰ This procedural violation did not result in the loss of FAPE for the Student for the same reasons as articulated under allegation conclusion #1 above.

In the present case, the IEP team met on May 16, 2019 to consider the Student's initial referral to special education. At this meeting, the team reviewed the Student's existing assessments and ordered additional evaluations spearheaded by the School's psychologist, Dr. Kahn. The IEP team reviewed the most recent evaluations of the Student and ordered additional evaluations to consider her specific emotional and behavioral needs.¹¹ As a result of this evaluation, Dr. Kahn recommended that the Student receive special education including specially designed instruction, social work services, mental health services and skill building with regard to her responses to challenging situations. Although the District committed several procedural violations as noted above, the District ultimately responded to the Student's evaluation needs and was prepared to consider her eligibility and programming needs prior to her withdrawal from the District. Accordingly, there is no violation of MUSER §VI.2.J.(4).

VII. Corrective Action Plan (CAP)

1. The District shall make appropriate modifications to its child-find policy to clarify that it is not necessary for a parent to sign any form requesting a referral to special education. Additionally, if an oral referral is received, the policy should clarify that designated school personnel will reduce the referral request to writing in a timely manner and provide a copy to the Special Education Director, authorized designee, or superintendent.
2. A copy of this policy and written assurance from the Superintendent that the revised referral policy has been provided to all special education staff within the District should be submitted to the Department by **November 15, 2019**.

Dated: August 12, 2019



David C. Webb, Esq.
Complaint Investigator

¹¹ In addition to a psycho educational evaluation of the Student, Dr. Kahn's evaluation included a full file review, clinical interview with the Parent and the Student, Behavioral Assessment Scale for Children (BASC-3) and a behavioral observation.