

Complaint Investigation Report

Complaint # 22.026C
Complaint Investigator: Leigh Lardieri

Report Date: January 31, 2022

Date of Appointment: December 8, 2021

I. Identifying Information

Complainant: Parent

Respondent:

Student:

II. Summary of Complaint Investigation Activities

On December 2, 2021, the Maine Department of Education received this complaint. The complaint investigator was appointed on December 8, 2021. Therefore, the current investigation covers the period of December 2, 2020 to present. See MUSER XVI(4)(B)(3). The complaint investigator received 270 pages of documents from the _____ (“the School”). The investigator also received 46 pages of documents from the parent (“the Parent”). On January 4, 2022 the following staff were interviewed from the School: the CEO¹, the Special Education Administrator, the Attendance/ Engagement Coordinator, the Program Manager of Operations, the Registrar, the Special Education Case Manager/ Teacher and the Speech and Language Pathologist. On January 5, 2022 the Parent was interviewed.

The complaint investigator reviewed all documents, emails and information obtained through interviews, as well as the responses provided by the parties to complete this complaint investigation.

III. Preliminary Statement

The student is a _____ old _____ grader who was attending _____. The Student received specially designed instruction and related services under the disability category of Autism. In July 2021 the Student began attending Extended School Year (ESY) services. During the time of general registration for the 2021-22 school year, all _____ students and families were required to provide updated immunization information.² Among the total number of families who

¹ The CEO is also the Head of School and Special Education Director.

² Each year, families have to register their children in order to attend _____. In the registration process, an updated immunization form is one of the documents completed by the parents.

completed the registration process, a smaller subset³ were contacted individually. These families were informed that they needed to provide proof of immunization, proof of immunity or documentation of the immunization waiver as prescribed by the law.⁴ On July 20, 2021 the school contacted the Parent.⁵ She was informed that since the Student was not immunized, she needed to provide the information mentioned above. As the Parent of a child with an IEP, if she chose not to immunize, she would be required to submit evidence that a physician, nurse practitioner, or physician's assistant reviewed with her the risks and benefits associated with immunization.⁶ Upon receiving this information from the School, the Parent stated that she didn't agree and was not comfortable what she perceived to be a "change in attitude" of the administration.⁷

On July 22, 2021 the Student suddenly stopped attending ESY services. When the new school year began in September, the Student did not resume participation in classes. However, continued to work with speech and language pathologist until September 27, 2021.⁸ In the weeks that followed, during the 90-day period,⁹ the School staff reached out to the Parent on several occasions in an attempt to support her in the process of obtaining the waiver necessary for the Student to remain in school. In addition, three IEP meetings were held during this time. When the 90-day period expired, the Student was withdrawn as the School had not received the documentation necessary to continue enrollment.

The present complaint was filed by the Parent, alleging that the School has 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 December 10, 2021 alleging three violations of MUSER. In addition, three issues that pertain to other state education statutes and/or regulations apart from MUSER are alleged by the present complaint. These allegations were included in the investigation as they were potentially inextricably intertwined with the alleged violation of the provision of FAPE for the student on whose behalf the investigation is being conducted.¹⁰ A telephonic Complaint Investigation meeting was held on December 15, 2021.

³ Families with non-immunized students were contacted via emails, phone calls or texts.

⁴ See interview notes, and forms from the School regarding MRS 20-A 6355.

⁵ During this phone call, the Parent was told a follow up email would be coming. The email was sent to the Parent on 7/22/2021.

⁶ See email from the School dated 7/22/2021.

⁷ See interview notes from the Parent.

⁸ See Speech Pathologist session logs.

⁹ See MRS 20-A 6355; See Section 3: Exceptions, Section A item 1 in 10-144 CODE OF MAINE RULES CHAPTER 261 Department of Health and Human Services Maine Center for Disease Control and Prevention AND 05-071 CODE OF MAINE RULES CHAPTER 126 Department of Education, effective 9/25/2021.

¹⁰ See MDOE Complaint Investigation Handbook: A Guide for Parents and Educators, Section E (2).

IV. Allegations

The following MUSER violations are alleged by the present complaint:

1. The Student was not attending school and was denied FAPE from the summer of 2021, and up until the filing of the complaint. **MUSER II (13); 34 CRF 300.101(a); 34 CFR 300.530.**
2. The District held an IEP team meeting without the parent being in attendance while having failed to meet the minimum number of attempts required by statute. **MUSER VI (2)(H)(1)(3)(4)**
3. The team made changes to the Student's IEP without parental participation and also gave no notice prior to IEP changes being implemented. **MUSER VI (2)(H)(I)**

The following issues that pertain to other state education statutes and/or regulations apart from MUSER are alleged by the present complaint. These allegations will be included in the investigation as they could be inextricably intertwined with the alleged violation of the provision of FAPE for the student on whose behalf the investigation is being conducted. ¹¹

1. Illegal enforcement of stated Title. **(20-A 6355)**
2. Failure to follow and comply with State of Maine truancy requirements. **(20-A 5051-A)**
3. School unenrolled the Student on grounds of stated Title's vaccine attendance requirements deadlines. **(20-A 6355)**

V. Factual Findings

1. During the 2020-21 school year the Student had participated in the general education setting for a small portion of day and spent the majority of time receiving special education services. IEP included specially designed instruction in: ¹² math/science; English/ social studies; social skills; behavioral consultation/ check-in and ESY services. related services included: ¹³ direct speech and language therapy; occupational therapy; and speech and language therapy during ESY. IEP also had a post-secondary transition plan.

It was reported that although the Student had made academic and functional gains during the 2020-21 school year, academic achievement skills remained significantly below grade level, and functional performance, specifically language and social skills were also delayed compared to typically developing peers. The IEP referenced above

¹¹ Ibid.

¹² See prior written notice from 10/13/2020 and the IEP from 10/15/2020 – 10/14/2021.

¹³ Ibid.

reflects the amount of support the Student needed to successfully access education at
14

2. During the interview with the School staff,¹⁵ they said the Student is “really funny” and was an active participant in classes. They recalled that during the past two years, the relationship with the parent had been generally positive. The Parent had given a great deal of input into the Student’s education.¹⁶
3. During the interview with the Parent,¹⁷ she recalled that over time, the Student made progress at the School both academically, and in social-emotional functioning. She attributed this to the staff with whom the Student worked directly. The Parent added that now her has conversations with people and has made huge personality growth.¹⁸
4. On June 22, 2021, the Student began attending ESY services. Records indicate that the Student had successfully accessed the system.¹⁹ Staff reported that was participating in the academic programming as well as speech and language therapy.²⁰
5. On July 22, 2021, the Parent received an email from administration about the new immunization requirements for the 2021-2022 school year.²¹ On the same day, the Student stopped attending ESY program.²² continued to access the speech and language services until stopped participating on September 27, 2021.²³
6. At the start of the 2021-22 school year, when the Student had not yet attended school, the Attendance/ Engagement Coordinator reached out to the Parent.²⁴ She explained to the Parent that the Student needed to attend school. The Parent stated that it was against the law and asked the staff to file for truancy. She requested a meeting and was told that since the Special Education Administrator was unable to attend a scheduled meeting on Friday, she would reach out to the Parent to reschedule.²⁵
7. From early September on, the School staff reached out to the parent multiple times in an effort to support the completion of the necessary waiver to satisfy the requirements of the

¹⁴ See prior written notice from 10/13/2020.

¹⁵ See interview notes from the School staff on 1/4/2022.

¹⁶ Ibid.

¹⁷ See interview notes from the Parent on 1/5/2022.

¹⁸ Ibid.

¹⁹ uses the platform for their programming. The 20/21 Summer and 21/22 Fall system login report shows when the Student accessed account.

²⁰ See interview notes from 1/4/2022.

²¹ See email exchanges between administration and the Parent.

²² During the staff interview, it was reported that on 7/22/2021, the Student began to participate in a field trip, but then abruptly left the session.

²³ See Speech Pathologist’s session notes. For the two sessions that followed, the Speech Pathologist reached out to the Parent via email to see if the Student was going to log in. She also offered times for make-up sessions.

²⁴ See documentation of staff phone call log notes from 9/8/2021.

²⁵ Ibid.

immunization law.²⁶ The School staff were very concerned about the Student's lack of attendance. At no time did the School prohibit the Student from attending school. On the contrary, ongoing attempts were made to urge the Student to return to classes.²⁷

8. Over the same time frame, three IEP team meetings were held. The first meeting was on September 15, 2021.²⁸ The purpose of the meeting was to discuss the Student's engagement and attendance in school and to try to come together as a team to discuss how the student could be supported. The team reviewed progress up to the point in time when stopped attending on July 22, 2021.²⁹ At the meeting the parent stated her objection to Public Law, Ch. 154 (introduced as LD 798).³⁰
9. On September 30, 2021 another IEP meeting was held. The purpose of the meeting was an annual review and a review of the Student's post-secondary goals and transition plan.³¹ The issue of the Student's lack of attendance and engagement was also discussed at the meeting.³² The parent reiterated her objection to the immunization law.³³ The School offered to provide transportation for the parent to see a medical provider, as well as support in completing the paperwork for the waiver.³⁴ The School also advised the Parent of the options to educate her child if she chose not to complete the waiver within the 90-day period.³⁵ Since the team did not have time to go through the process of the annual review, a determination was made to reconvene at a later date to conduct the Student's annual review.³⁶
10. On October 5, 2021 the Special Education Administrator reached out to the Parent via email presenting two options for the annual review date and time.³⁷ The annual review IEP meeting was held October 14, 2021. At the start of the IEP meeting, the Parent was not present. The Attendance/ Engagement coordinator reached out to her by phone and text to ask if the meeting link was accessible, and if she was joining the meeting. The Parent

²⁶ Emails, phone calls and text messages were exchanged with the parent.

²⁷ Ibid.

²⁸ See prior written notice from 9/15/2021.

²⁹ Ibid.

³⁰ The law known as *An Act to Protect Maine Children and Students from Preventable Disease by Repealing Certain Exemptions from the Laws Governing Immunization Requirements* was signed into law by Governor Janet Mills on May 24, 2019. The amended rule issued jointly by the Commissioner of Education and the Director of the Maine Center for Disease Control and Prevention, within the Department of Health and Human Services, to implement the provisions within (20-A MRS §§ 6352-6358) went into effect on 9/25/2021.

³¹ See the advanced written notice from 9/30/2021.

³² See the prior written notice from 9/30/2021.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ In the 10/5/2021 email, the parent was provided with an advanced written notice for 10/14/2021. However, the Special Education Administrator also offered 10/12/2021 as a possible date, stating "we [the School] are happy to make that change."

responded by text message stating that she was not joining the meeting due to personal reasons.³⁸

11. For each of the IEP meetings held in September and October 2021, advance written notice was provided to the Parent within seven days.³⁹ Emails and phone calls were also sent to as reminders for the days and times of the virtual IEP meetings.⁴⁰
12. From the end of September through November 30, 2021 School staff continued to reach out to the Parent to follow up regarding the plan to submit documentation of the immunization waiver. On October 28, 2021 another email was sent to the Parent following up with regard to a discussion that occurred a month prior about the required paperwork.⁴¹ On the same day, in her reply the Parent thanked the staff for the information and stated that a response would be coming shortly.⁴²

On November 30, staff sent an email reminding the Parent that the it was the last day to submit the immunization compliance paperwork from the Student's doctor.⁴³ The Parent was told to submit it by the end of the business day in order to avoid a state compliance related withdrawal from public school.⁴⁴

13. On December 1, 2021, the Parent sent an email to stating the following:⁴⁵

*Good morning Ladies,
I waited all afternoon for my notification and none was received. Based on your previous behaviors, I believe you are again simply making empty threats in an effort to wield power that you don't actually possess. You have until noon today, then it will be my turn.*

At 10:49am on December 1, 2021 staff sent the following email to the Parent:⁴⁶

*Good morning,

Your student [the Student named in this complaint] was withdrawn from the effective 12/1/2021 for non-compliance of Maine Immunization Requirements as described in Title 20-A 6355. You will receive a letter in the mail from the school.*

³⁸ See prior written notice from 10/14/2021.

³⁹ See advance written notices dated 9/8/2021, 9/21/2021, and 10/5/2021.

⁴⁰ See email documentation from 12/5/2021.

⁴¹ See email from Program Manager of Operations to the Parent on 10/28/2021.

⁴² Ibid.

⁴³ See email from Program Manager of Operations to the Parent on 11/30/2021.

⁴⁴ Ibid.

⁴⁵ See email from the Parent sent at 8am on 12/1/2021.

⁴⁶ See email from the Registrar to the Parent from 12/1/2021. Note: this email also included a link for the parent to complete the withdrawal survey. See also the withdrawal letter from .

As a part of the withdrawal process, I am sending you the link to the withdrawal survey. A prepaid shipping label will be emailed to you so you can return the loaner computer.

Please reach out with any questions.

Thank you

VI. Determinations

1. The Student was not attending school and was denied FAPE from the summer of 2021, and up until the filing of the complaint. **MUSER II (13); 34 CRF 300.101(a); 34 CFR 300.530. NO VIOLATION FOUND.**

From the time when the Student stopped attending ESY services, the School made every effort to communicate and work with the Parent to re-engage the Student in classes. Throughout this investigation, substantial evidence has been brought forth documenting the efforts of the School to support the Parent and maintain the Student's enrollment. At no point in July 2021, or during the 90-day period did the School deny the Student access to education and special education services. The School also sought guidance from the Department of Education on the matter.⁴⁷ Under no circumstances did the School have the authority to override the requirements of the state immunization law. Thus, after exhaustive efforts to avoid the Student's withdrawal from , the School had no choice but to do so to remain in compliance with the law. The School was compliant.

2. The District held an IEP team meeting without the parent being in attendance while having failed to meet the minimum number of attempts required by statute. **MUSER VI (2)(H)(1)(3)(4). NO VIOLATION FOUND.**

In MUSER, there is no requirement for a minimum number of attempts that must be made to ensure parent participation in an IEP meeting. Instead, the parent must receive seven days advanced written notice of a meeting. The meeting should be scheduled at a mutually agreed on time and place.⁴⁸ In addition, a public agency may conduct an IEP meeting without a parent in attendance as long as it documents (a) Detailed records of telephone calls made or attempted and the results of those calls; and (b) Copies of correspondence sent to the parents and any responses received.⁴⁹ Throughout this investigation, substantial evidence was presented verifying the steps taken by the School to ensure the Parent received notification of the IEP meetings being held including the advanced written notices, email reminders containing the date and time of each

⁴⁷ See email from the MDOE School Nurse Consultant.

⁴⁸ MUSER VI (A)

⁴⁹ MUSER VI (H)(1)(4)(a)(b)

meeting, and follow up communication.⁵⁰ Given the documentation provided, the School met its obligation. The School was compliant.

3. The team made changes to the Student's IEP without parental participation and also gave no notice prior to IEP changes being implemented. **MUSER VI (2)(H)(I) NO VIOLATION FOUND.**

Following the IEP meetings held on September 15, 2021, and September 30, 2021 no amendments were made to the Student's IEP.⁵¹ Knowing that the annual review date was approaching, the School convened another meeting on September 30, 2021 for the purpose of the conducting the annual review.⁵² As with the previous meeting, the team ran out of time due to the length of the discussion about the immunization law.⁵³ Subsequently a third meeting needed to be scheduled to conduct the annual review. On October 5, 2021 the Special Education Administrator reached out to the Parent giving her two options for the upcoming annual review IEP meeting.⁵⁴ Ultimately an advanced written notice was sent for the meeting to be held on October 14, 2021.⁵⁵

On the day of the meeting, when the Parent declined to participate due to personal reasons, the team had no other choice but to meet on October 14, 2021 as it was the annual review date. Following the meeting, the prior written notice was sent to the Parent on October 21, 2021.⁵⁶ On October 28, 2021 the Special Education Administrator sent an email to the Parent.⁵⁷ Attached was the new IEP, along with a message to the Parent inviting her to review the document and respond if she had questions or concerns. As documented above with regard to allegation #2, the Parent had ample opportunity to participate in the decision-making process. The School met their obligation based upon the evidence provided in this case. The School was compliant.

The following issues that pertain to other state education statutes and/or regulations apart from MUSER are alleged by the present complaint. These allegations were included in the investigation as they were inextricably intertwined with the alleged violation of the provision of FAPE for the student on whose behalf the investigation is being conducted.⁵⁸

⁵⁰ See copies of the advanced written notices for the meetings held on 9/15/2021, 9/30/2021 and 10/14/2021. Each provides a list of attendees; the time and date of each meeting; and the purpose of the meeting. Also, see email and phone communications with the Parent.

⁵¹ See prior written notices from 9/15/2021 and 9/30/2021.

⁵² See advanced written notice from 9/30/2021.

⁵³ See prior written notice from 9/30/2021.

⁵⁴ See email dated 10/5/2021.

⁵⁵ See advanced written notice from 10/14/2021. It was noted that this was also the date that the IEP was due to expire.

⁵⁶ See prior written notice from the 10/13/2021 meeting.

⁵⁷ See email from 10/28/2021.

⁵⁸ See MDOE Complaint Investigation Handbook: A Guide for Parents and Educators, Section E (2).

1. Illegal enforcement of stated Title. **(20-A 6355).**

On May 24, 2019 the governor signed into law *An Act To Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization*.⁵⁹ Pertinent to this case, a key amendment to the law allowed for students covered by Individualized Education Plans to continue to attend school as long as: The parent or guardian of the student provides a statement from a licensed physician, nurse practitioner or physician assistant that the physician, nurse practitioner or physician assistant has consulted with that parent or guardian and has made that parent or guardian aware of the risks and benefits associated with the choice to immunize.⁶⁰ In addition, a directive was issued to the Department of Education and the Department of Health and Human Services to work jointly to amend their rules to remove any rules exempting persons from immunization requirements because of their religious or philosophical beliefs.⁶¹ This joint guidance and technical rule change, known as *IMMUNIZATION REQUIREMENTS FOR SCHOOL CHILDREN 10-144 C.M.R. Ch. 261/05-071 CMR Ch. 126*, was first published July 7, 2021.⁶² On July 26, 2021 a public hearing was held via Zoom, where oral and written comments were accepted for consideration. Following this hearing, written comments were accepted through August 5, 2021.⁶³ The adopted rule changes included: a revised definition of a “school” which now comprises in-person and remote learning programs offered by the school;⁶⁴ and, under Section 3: Exceptions, Section A: Enrollment or Attendance without Immunization Information⁶⁵:

A child who does not provide a certificate of immunization or proof of immunity against a disease listed in this rule is not permitted to enroll in or attend school unless one or more of the following circumstances apply:

⁵⁹ See Public Law Chapter 154 129th Maine Legislature, effective 9/1/2021.

⁶⁰ See Sec. 3. 20-A MRSA §6355, sub-§4 and Section 3: Exceptions, Section A item 4a, in 10-144 CODE OF MAINE RULES CHAPTER 261 Department of Health and Human Services Maine Center for Disease Control and Prevention AND 05-071 CODE OF MAINE RULES CHAPTER 126 Department of Education.

⁶¹ See PL Ch 154, Section 11, Rules.

⁶² See 10-144 CODE OF MAINE RULES CHAPTER 261 Department of Health and Human Services Maine Center for Disease Control and Prevention AND 05-071 CODE OF MAINE RULES CHAPTER 126 Department of Education.

⁶³ See SUMMARY OF PUBLIC COMMENTS DEPARTMENTS’ RESPONSE AND LIST OF CHANGES MADE FOR FINAL RULE ADOPTION IMMUNIZATION REQUIREMENTS FOR SCHOOL CHILDREN 10-144 C.M.R. Ch. 261/05-071 CMR Ch. 126.

⁶⁴ See 10-144 CODE OF MAINE RULES CHAPTER 261 Department of Health and Human Services Maine Center for Disease Control and Prevention AND 05-071 CODE OF MAINE RULES CHAPTER 126 Department of Education.

⁶⁵ Pertinent to this case, see Section 3: Exceptions, Section A item 1 in 10-144 CODE OF MAINE RULES CHAPTER 261 Department of Health and Human Services Maine Center for Disease Control and Prevention AND 05-071 CODE OF MAINE RULES CHAPTER 126 Department of Education.

1. Written Assurance from Parent of Private Effort to Immunize Child: The parent provides the school with a written assurance that the child will be immunized by private effort within 90 days of enrollment or of the child first attending, whichever date is the earliest, in accordance with 20-A MRS § 6355(1). The granting of this 90-day period is a one-time provision.

If, after 90 days have passed, the parent fails to provide the required certificate of immunization or proof of immunity against each of the diseases listed in this rule, then the superintendent must exclude the student from school and may permit the student's return upon receipt of evidence of the required immunizations, immunity or exemption under law.

Ultimately, the School did not illegally enforce the immunization law. At no time was the Parent told that the only option was to have her child immunized. Instead, the staff worked diligently to engage and support the Parent in the process of obtaining the waiver so that the Student could remain in school. The School presented substantial evidence verifying that this ongoing effort occurred for the full 90-day period. In the end, the School had no other choice but to follow the law and withdraw the student from the school.

2. Failure to follow and comply with State of Maine truancy requirements. (20-A 5051-A)

No one in this case disputes the truancy of the Student.⁶⁶ In an attempt to resolve the truancy issues, the school staff reached out to the Parent multiple times by phone, text and email in an effort to resolve the issue.⁶⁷ Two IEP meetings were convened with the purpose of discussing the Student's attendance in order to attempt to resolve the issues as a team.⁶⁸ The Parent, for reasons known only to her, continued to try to goad the School into reporting the student's truancy. The School elected not to file for truancy due to the complicated situation given the requirements of the immunization law.⁶⁹ Contacting law enforcement to report the student's truancy would have had no bearing on the immunization issue. The Student could not return to a public or private school in Maine unless was either immunized or satisfied the criteria for a waiver.

3. School unenrolled the Student on grounds of stated Title's vaccine attendance requirements deadlines. (20-A 6355)

As already explained in the response in the above allegation [Illegal enforcement of stated Title (20-A-6355)], the School was proceeding in accordance with the immunization law when it unenrolled the Student after the 90-day period expired.

⁶⁶ See interviews with the School staff and Parent.

⁶⁷ See communication with the Staff including the Engagement/ Attendance Coordinator.

⁶⁸ See prior written notices from meeting held on 9/15/2021, and 9/30/2021.

⁶⁹ See response by the School.

VII. Conclusion

At the center of this case is a year old student who by all accounts was doing very well in programming at . Parties on both sides of this case indicated that the student was well liked and made progress during time of full attendance at . Then in July, a watershed moment occurred where suddenly the student stopped attending classes and did not return to school.

Just like some of the commenters who objected to the joint rule amendments during the public hearing in July, the Parent in this case had the right to object to the immunization law and amended joint rule that went into effect in September 2021. However, objection does not exempt persons from abiding by the law. In this case, the Parent’s perception about the law compelled her to stand her ground and seek support from the school by not requiring her to obtain a waiver from a medical professional on behalf of her child. Simultaneously, the School sought to gain the Parent’s cooperation in obtaining the waiver through their ongoing efforts to offer support in the process, so that the Student could remain in school.

In the end, that did not happen in this case. The School, having no authority to circumvent the law, had no choice but to withdraw the student. The reason that the Student is not receiving FAPE is because the Parent has not satisfied one of the legal requirements for attending public school in Maine – that the Student either be immunized or satisfy an exemption to the immunization requirement. In light of the evidence presented in this case and as stated above, the School was found to be compliant on all of the allegations brought forth in this complaint.

VIII. Corrective Action Plan

As this complaint investigation has found no violations of MUSER and IDEA, no corrective action is required.

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Leigh Lardieri, Ph. D.
Complaint Investigator