

Complaint Investigation Report

Parent v AOS #77

August 23, 2016

Complaint #17.002 C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parent

[REDACTED]

Respondent: Kenneth Johnson, Superintendent
P.O. Box 190
Eastport, ME 04631

Special Services Director: Elizabeth Cushing

Student: Student
DOB: [REDACTED]

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on July 5, 2016. The Complaint Investigator was appointed on July 22, 2016 and issued a draft allegations report that day. The Complaint Investigator conducted a complaint investigation meeting on August 2, 2016, resulting in a set of stipulations. On August 9, 2016, the Complaint Investigator received 103 pages of documents from the Complainant, and received a 2-page memorandum and 62 pages of documents from A.O.S. #77 (the "District") on August 11, 2016. Interviews were conducted with the following: Elizabeth Cushing, special services director for the District; and [REDACTED] the Student's father.

III. Preliminary Statement

The Student is [REDACTED] years old and is currently receiving special education under the eligibility criterion Other Health Impairment. This complaint was filed by the Student's father, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to allow the participation as a member of the Student's IEP Team, at the meetings on December 3, 2015, January 14, 2016, March 8, 2016 and May 10, 2016, of someone invited by the Student's parent as an individual with knowledge regarding the Student in violation of MUSER §VI.2.B(5) and (8);
2. Failure to properly consider input from all IEP team members in violation of MUSER §VI.2.J;
3. Failure to amend information contained in Advance Written Notices and Written Notices, alleged to be inaccurate or misleading, at the request of the Student's parent within a reasonable period of time, or else notify the parent of its refusal to do so, in violation of MUSER §XIV.8.

V. Stipulations

1. On April 13, May 15 and May 17, 2016, the Student's parent sent to the District written requests to modify Advance Written Notices and Written Notices of the Student's IEP Team meetings.
2. The District did not make the modifications to the Advance Written Notices and Written Notices requested by the Student's parent.

VI. Summary of Findings

1. The Student lives in [REDACTED] primarily with his father, and the remainder of the time with his mother (his parents are divorced), and will be attending [REDACTED] grade at [REDACTED] School (the "School").
2. On December 3, 2015, the Student's father arrived at the Student's IEP Team meeting with Michelle Thompson, whom he identified as the Student's tutor and advocate. The Student's father had not previously indicated that Ms. Thompson would be attending the meeting, and she was not identified on the Advance Written Notice ("AWN") for the meeting. The Student's mother objected to Ms. Thompson's attendance based on the lack of notice, and the District would not allow her to attend. The WN for the meeting stated that the Student's mother "did not give consent" to Ms. Thompson's attendance as she was not identified in the AWN for the meeting.
3. Ms. Thompson attended the Student's IEP Team meetings of January 14, March 8 and May 10, 2016 at the request of the Student's father. She was identified in the AWN and Written Notice ("WN") for each of those meetings as an "Other Participant." In the WN for the January 14th and May 10th meeting Ms. Thompson is also identified as a "Tutor" and a "Tutor/advocate," respectively.
4. On April 13th, the Student's father requested that the AWN for the meeting that day be amended to identify Ms. Thompson as the Student's tutor/advocate, and that she be so identified on all future documents. Ms. Cushing responded that Ms. Thompson would be so

identified on all future documentation. On May 17th, the Student's father requested that all past A WNs and WNs be amended to reflect Ms. Thompson's status as a tutor/advocate. Ms. Cushing responded that the previous identifications of Ms. Thompson were not inaccurate and would not be amended, but that the email requesting the amendment would be added to the Student's educational records.

5. On May 25th, the Student's father requested that a letter titled "IEP Meeting 5/10/2016" be included in the WN for the May 10th meeting, and that the WN be amended to reflect: his opinion about the Student's academic grades; that the Student's mother has not seen any of the Student's writing or worked with him on that skill; that he asked that the Student be directed to date all of his schoolwork; and that it was pointed out at the meeting that the Student's goals are not at grade level and that the District declined to change that. Ms. Cushing responded that the 5/10/2016 letter had been attached to the WN and maintained in the Student's records, but that the WN is not intended to include all points of discussion, contained the required information from the meeting, and would not be further amended:

6. During the course of the May 10th IEP Team meeting, Ms. Thompson participated fully in discussion which was often contentious and combative as between the Student's father and Ms. Thompson, on the one hand, and the Student's mother and School staff, on the other hand. After approximately 45 minutes, upon Ms. Cushing describing the basis for the decision as to the Student's placement and upon the Student's father and then Ms. Thompson stating that they disagreed, Ms. Cushing stated to Ms. Thompson "You're not a part of the IEP Team" and the Student's mother stated "You can't vote. You have no voting privileges." Ms. Cushing appeared to confirm the latter statement.

7. During an interview conducted by the Complaint Investigator with Elizabeth Cushing, Ms. Cushing stated the following: She is the special services director for the District. On December 3, 2016, when the Student's father appeared at the IEP Team meeting with Ms. Thompson, the Student's mother objected to Ms. Thompson participating because she wasn't listed on the A WN. She met with both parents and told them that they could either go forward with the meeting without Ms. Thompson or else the meeting could be rescheduled. The Student's father agreed to go forward without Ms. Thompson. She advised them that, in the future, they should let her know in advance if they were bringing someone to the meeting.

For the entire school year, the District has been subject to almost constant challenges from the Student's father and Ms. Thompson. She received over 80 emails from them just since February. She and the school staff are never doing anything right in their view. By the last IEP Team meeting on May 10th, tensions were running high and she let her frustration get the better of her. She said that Ms. Thompson wasn't a member of the IEP Team because Ms. Thompson only ever acts in the role of an advocate – she never brings anything to the table from the perspective of a tutor. She's never seen any work that Ms. Thompson has done with the Student, or heard examples of something with which Ms. Thompson has had success with the Student. Ms. Thompson's participation has only ever been to question school staff and tell her and the staff what they should be doing.

She has never interfered with Ms. Thompson's participation in meetings she attended. At the last meeting, the Team agreed to make three amendments to the IEP that were suggested by Ms. Thompson and the Student's father.

8. During an interview conducted by the Complaint Investigator with the Student's father, the Student's father stated the following: The December 3, 2015 IEP Team meeting was the only time the District did not allow Ms. Thompson to attend. At the meetings after that date, Ms. Thompson shared her knowledge of the Student's academic levels, but the District didn't consider what she had to say. When it came to consensus, the District said that everyone agreed except the Student's father; nothing was said about Ms. Thompson. In the Written Notices from the meetings, Ms. Thompson's input was not recorded in Section 3 or 4; there was a single line in section 5 that said: "Ms. Thompson, Father's advocate and tutor for [the Student] input, comments and questions." The Written Notice doesn't describe what that input was.

He agrees that, at the May 10, 2015 IEP Team meeting, the District agreed to make three amendments to the Student's IEP that were requested by him and Ms. Thompson.

VII. Conclusions

Allegation #1: Failure to allow the participation as a member of the Student's IEP Team, at the meetings on December 3, 2015, January 14, 2016, March 8, 2016 and May 10, 2016, of someone invited by the Student's parent as an individual with knowledge regarding the Student in violation of MUSER §VI.2.B(5) and (8)

VIOLATION FOUND

MUSER §VI.2.B identifies all the members of an IEP Team, and includes as a member (at MUSER §VI.2.B(5)) "[a]t the discretion of the parent or the [SAU], other individuals who have knowledge or special expertise regarding the child." MUSER §VI.2.B(8) provides that the determination of whether an individual has knowledge or expertise regarding a child "shall be made by the party (parent or public agency) who invited the individual to be a member of the IEP Team." The Student's father thus exercised his discretion in identifying Ms. Thompson as an individual with such knowledge or expertise, and she was entitled to attend the Student's IEP meetings.

Of the meeting dates referenced in this allegation, December 3rd was the only meeting which Ms. Thompson was prohibited from attending. The basis for that action was asserted to be the failure of the Student's father to notify the District in advance of the meeting that he intended to be accompanied at the meeting by Ms. Thompson. Although the AWN for a meeting must indicate "the persons who will be in attendance" (MUSER §VI.2.A), there is no requirement that a parent provide notice to the SAU in advance of the meeting as to individuals whom the parent intends to bring to the meeting. In fact, MUSER §VI.2.A also provides that the AWN must inform parents of their right to have individuals participate who have knowledge or expertise regarding the child, thus suggesting that the parents might choose to exercise that right by bringing someone not already identified in the AWN. Indeed, the state-required

AWN form contains the language: “*Additional* participants who have knowledge or special expertise regarding the child may be invited at the discretion of the parents or agency” (emphasis added). The use of the word “additional” signals that individuals in addition to those identified on the AWN form may be invited. See *Letter to Andel*, 67 IDELR 156 (OSEP February 17, 2016) (There is no requirement in the IDEA for a parent to inform a public agency, in advance, if he or she intends to be accompanied by an individual with knowledge or special expertise regarding the child).

Neither was there any basis for requiring the consent of the Student’s mother to allow Ms. Thompson to attend. Nothing in the regulations confers a duty on a District to obtain a parent’s consent to the selection of IEP Team members, or gives a right to a parent to object to same.

Allegation #2: Failure to properly consider input from all IEP team members in violation of MUSER §VI.2.J

NO VIOLATION FOUND

It is true that at the May 10th meeting Ms. Cushing told Ms. Thompson that she was not a member of the IEP Team. That was incorrect. The more important issue, however, is whether she was given the same right to participate in the meeting as any other member. The recording of that meeting reveals that she was, being freely given the opportunity to ask questions of other team members and to make comments and suggestions. The fact that other members of the Team may not have agreed with her or became defensive in response to her questions and comments does not mean that she wasn’t listened to. Neither is there any such thing as a right to vote at these meetings. As described in MUSER §VI.2.I, the IEP Team should work towards building consensus (i.e., a decision to which all the people in the group can agree), but that in the absence of consensus it is the District which must make the decision. Thus, IEP Team decisions are not made by a vote of the majority; there is open discussion directed at finding consensus, but without consensus the District decides. Ms. Thompson fully participated in that open discussion.

Ms. Thompson’s dual role as the Student’s tutor and also an advocate makes it somewhat difficult to properly capture her input in the Written Notice: to the extent that she provides information she has about the Student based on her working with him as a tutor, it should be reflected in Section 3 or 5 as Ms. Thompson’s report; to the extent that she is acting in her role as advocate, it is appropriate to consider that input as points made by the parent in Section 6.

Allegation #3: Failure to amend information contained in Advance Written Notices and Written Notices, alleged to be inaccurate or misleading, at the request of the Student’s parent within a reasonable period of time, or else notify the parent of its refusal to do so, in violation of MUSER §XIV.8

VIOLATION FOUND

MUSER §XIV.8(A) provides that a parent who believes that information in educational records is inaccurate or misleading may request that the SAU amend the information.

MUSER §XIV.8(C) provides that, if the SAU decides to refuse to amend the information as requested, it must "inform the parent of the refusal and advise the parent of the right to a hearing under 34 CFR 300.619." The latter federal regulation provides that the SAU must provide an opportunity to parents for a hearing to challenge information in education records alleged to be inaccurate or misleading.

In this case, the Student's father made a request to amend records, and the District duly notified him of their refusal to do so. The District did not, however, notify the Student's father of his right to a hearing on the question of whether the records contained information that was inaccurate or misleading, and thus the notice was not fully compliant with the regulatory requirements.

VIII. Corrective Action Plan

The District, within 30 days from the date of its receipt of this Report, shall provide to the Department, with a copy to the Student's father, written assurance that, in the future: 1) individuals identified by a parent or guardian as having knowledge or special expertise about their child shall not be precluded from attending an IEP Team meeting based on the parent or guardian's failure to provide notice of their anticipated attendance in advance of the meeting; and 2) any notification to a parent or guardian by the District of its refusal to amend an educational record at the request of the parent or guardian shall also provide notice of the right of that parent or guardian to a hearing on the issue of whether the educational record is inaccurate or misleading. The District shall also promptly notify the Student's father of that right, and afford him the opportunity to request a hearing on that issue with respect to his previous requests to amend the Student's educational records, providing a copy of that notification to the Department.