

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Parent)
)
v.) **DECISION AND ORDER**
)
Child Development Services)

Representing the Parents: [REDACTED], Mother
Representing the District: Nathaniel Bessey, Esq.
Hearing Officer: Sheila Mayberry, Esq.

This hearing was held and this decision was issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), Title 20-A M.R.S.A. § 7202 *et seq.*, Title 20 U.S.C. § 1415 *et seq.*, and accompanying regulations. The hearing took place before Sheila Mayberry, Esq. on March 29, March 30, and April 13, 2017 in Biddeford and Portland, Maine. Present for the proceeding were: Nathaniel Bessey, Esq., counsel for Child Development Services (“CDS”) and [REDACTED] (“Parents” or individually as “Mother” or “Father”) of [REDACTED] (“[REDACTED]”).

Testifying at the hearing were:

- Juli Sibley (Regular education teacher, North Berwick Head Start)
- Lisa-Kay Folk (Director, CDS, York office)
- Rebekah Bickford, Psy. D., BCBA-D (Psychologist and Assistant Director, Margaret Murphy Centers for Children)
- Hannah Marston, MS Ed. (Special Education Consultant, CDS, York office)
- Cheryl Neiverth (Friend of the Mother)
- [REDACTED] (Mother)

- Gary Grover (CEO, Back to Basics Behavior Health)
- Jennifer Metcalfe (IEP Coordinator, CDS, York office)
- Tiffany Haskell, NCSP, BCBA (Director of Clinical Treatment Services, Waban Projects)
- Lori Goulding (IEP Administrator, CDS, York office)

I. PROCEDURAL BACKGROUND

This hearing concerns the evaluation, identification, and provision of FAPE to, a 5-year old child with a disability who is eligible for special services under the category of autism. The Due Process Hearing Request, dated January 19, 2017, was received by CDS on January 20, 2017.

A resolution session was convened by CDS on January 30, 2017. On February 1, 2017, the Mother communicated to CDS that she had accepted CDS's offer of resolution, but on February 2, 2017 she withdrew this acceptance. Mediation, held on February 17, 2017 was also unsuccessful. A prehearing conference was originally scheduled for February 24, 2017, but was extended at the request of the Mother, who on February 22, 2017 sought an extension of the prehearing and hearing dates for the purposes of engaging counsel. The rescheduled prehearing was held on March 10, 2017. The Mother was represented at the prehearing conference by attorney Rachel Violette, Esq. Attorney Violette informed the Hearing Officer on March 17, 2017 that she was withdrawing as counsel for the Mother.

The hearing took place on March 29 and 30, 2017 in Biddeford City Hall, and on April 13, 2017, at the Portland District Court. On March 31, 2017, after the second day of hearing, the Mother filed a motion for summary judgment, which was denied in an Order dated April 12, 2017. Both parties requested to keep the hearing record open until May 12, 2017, to allow the parties to prepare and submit closing arguments. The deadline was extended to May 15, 2017 by order of the Hearing Officer on May 8, 2017.

CDS provided the Mother and the Hearing Officer with exhibits identified as S-56 and the Mother provided an index of exhibits identified as P-76. All exhibits for CDS were admitted

with the exception of S-49. The Parents' exhibits admitted into the record were as follows: P-3 through P-9, P-11, P-12, P-13, P-16, P-17, P-18, P-24, P-26, P-29, P-32, and P-33. Joint Exhibits J-1 and J-2, and Hearing Officer exhibit H.O.-1 was admitted.

II. ISSUES PRESENTED

1. Whether CDS failed to timely identify and conduct relevant evaluations of the Student in the spring, summer and fall of 2016. (MUSER §§IV.1.E.1(b) and 2.A and E(3); V.2C(4),(6), and (7); VI.2.J.(1) and (2); IX.3.C(1)(d)).
2. Whether the initial IEP developed on October 4, 2016, was reasonably calculated to provide educational benefit at the time it was developed, and therefore provided FAPE. (MUSER §§X.2.A(7); IX.3.A(1)(a),(b)(ii),(d), and (g); IX.3.C(2)(a)).
3. Whether the delay and failure to implement portions of the October 4, 2016 IEP, and further revisions of it, resulted in a denial of FAPE.
4. Whether the IEP developed on December 5, 2016 was reasonably calculated to achieve educational benefit based upon the information available at the time and therefore provided a FAPE.
5. Whether CDS failed to revise the Student's IEP based upon agreements made at the IEP meeting on December 5, 2016. (MUSER VI.2.J(4)).
6. Whether the CDS's offer to implement the IEP dated December 5, 2016 through a placement at the Waban Fraser-Ford Center was a valid offer of FAPE refused by the Parents.
7. Whether the IEP developed on February 2, 2017 was reasonably calculated to achieve educational benefit based on the information available at the time and therefore provided FAPE.

8. Whether CDS's offer to provide interim services until the IEP dated February 2, 2017 could be implemented at the Margaret Murphy Children's Center ("MMCC") was a valid offer of FAPE that was refused by the Parents.
9. Whether CDS's offer to implement the IEP dated February 2, 2017 through a placement at the Waban Fraser-Ford Center or Back to Basics Behavioral Health Services was a valid offer of FAPE that was refused by the Parents.
10. Whether CDS failed to adequately consider the Parents' concerns during the IEP process from July 15, 2016. (MUSER §§VI.2(I)(1) and (2); IX.3.C(i)(b) and (d); VI.2.J(2) and (4); X.2.B.).
11. Whether CDS failed to consider evaluations from outside providers presented to the IEP Team by the Parents since July 5, 2016.
12. Whether CDS failed to conduct appropriate IEP meetings on November 17, 2016, December 5, 2016 and December 22, 2016.
13. If any of the actions on the part of CDS in paragraphs 1 through 12 failed to provide the Student with a FAPE, what remedy is appropriate?

III. FACTS

1. [REDACTED] was born on [REDACTED]. [S-4, S-7]. He resides in [REDACTED], Maine with his mother, father, and [REDACTED]. [S-7 at 4]. His family moved to Maine from [REDACTED] on October 30, 2014, two days before his [REDACTED] [REDACTED]. [Test. Mother at 475:13-22; S-7 at 4].
2. In mid- to late-2014, the Parents first noticed a problem with [REDACTED]'s articulation and poor intelligibility compared with other children. They also noticed that he had

difficulty sitting and listening for long periods of time, and they had difficulty getting his attention. [S-4].

3. Between 2014 and 2016, [REDACTED]'s pediatrician was Dr. Bustamante, in New Hampshire. [Test. Mother at 476:17-23]. Dr. Bustamante had no suspicions of autism. [Test. Mother at 476:21-23].
4. In October 2015, [REDACTED] was referred by Dr. Bustamante for a speech-language evaluation at Frisbie Memorial Hospital ("Frisbie") in New Hampshire. Speech pathologist Kristen Faye, M.S., CCC-SLP found [REDACTED] to be in the below-average range in speech sound production, sentence structure, and word structure, while noting that expressive vocabulary is among [REDACTED]'s relative strengths. The evaluation concluded that "Results of the evaluation indicate the presence of an articulation/phonological delay as well as a mixed expressive and receptive language delay" and recommended that [REDACTED] receive individualized speech therapy for one hour per week. [S-4 at 4].
5. [REDACTED] received speech therapy at Frisbie starting in the fall of 2015 [S-5, Test. Mother at 475:25]. By March 2016, the Student made progress in receptive language and understanding basic concepts; improved articulation of target speech sounds at the phoneme and word level; and improved in other areas. [S-5]. Continued speech therapy was recommended. [S-5].
6. In the spring of 2016, the Mother was given information by a daycare provider about CDS and services available from it. [Test. Mother at 477:24 – 478:14].
7. In June of 2016, Dr. Bustamante made a referral to Dr. Dalzell of Maine Medical Partners for evaluation regarding the possibility of an autism spectrum disorder. [S-7 at 1]. The evaluation took place over three visits (June 29, 2016, August 5, 2016, and September 6, 2016), and the written evaluation was sent to [REDACTED]'s new pediatrician, Dr. Scarponi, on September 12, 2016. [S-7].

8. On July 14, 2016, after the initial meeting with Dr. Dalzell but before [REDACTED] received a diagnosis of autism, the Mother first made contact with CDS. Jennifer Metcalfe, the CDS case manager initially assigned to [REDACTED], followed up the next day. She left a message for the Mother explaining the referral process. [P-1; S-3].
9. On July 25, 2016, CDS received referral paperwork from the Mother for [REDACTED], including a copy of the 2015 speech evaluation. [S-3]. Ms. Metcalfe attempted to follow up with Mother the following day, but was not able to connect until August 5, 2016. As of that date, CDS was only aware of a potential speech-language impairment, based on the prior speech evaluation and the report from the Mother that [REDACTED] had been receiving speech therapy. [S-3; Test. Metcalfe at 530:14-20]. Ms. Metcalfe does not recall Mother sharing any suspicion of autism or mentioning that [REDACTED] had been referred for an evaluation, and there is no mention of a suspicion of autism in CDS's contemporaneously created contact log [S-3; Test. Metcalfe at 538:22- 539:1].
10. On August 9, 2016, Ms. Metcalfe called the Mother to relay CDS's recommendation that a new speech evaluation be performed, since the previous evaluation was nearly a year old. [S-3, P-3]. The Mother agreed, and CDS sent a written notice documenting the IEP Team's agreement to order a new speech evaluation, as well as the consent to evaluate, on August 16, 2016. [S-3, S-6].
11. In mid-September, [REDACTED] began attending the regular education program at Head Start in [REDACTED], Maine. [S-3].
12. A speech evaluation was performed by Gina Hewins, M.S. CCC-SLP. [S-8]. The evaluation report, dated September 12, 2016, concluded that [REDACTED] was "demonstrating "low average" to "below average" language skills, with areas of strengths and weaknesses. Expressively, [REDACTED] scored in the average range on the Expressive Vocabulary subtest." [S-8]. Specifically, [REDACTED] demonstrated adequate oral motor skills and his voice and fluency were within normal limits. [S-8]. His articulation and speech intelligibility were assessed using the Goldman Fristoe Test of Articulation-3. He

earned a standard score of 76, falling below the mean of 100, placing him within the 5th percentile. The evaluator was able to understand about 80% of [REDACTED]'s speech, a below age level expectations where at least 95% is age typical. The results of his language skills using "Clinical Evaluation of Language Fundamentals-Preschool (CELF-P), it was determined that [REDACTED] possessed "low average" to "below average" language skills.[S-8]. It was also determined that [REDACTED] had delayed language pragmatic skills and social communication behaviors. It appeared to the evaluator that [REDACTED] appeared to take lengthy pauses to process questions and answers posed to him. He scored a 48 given the CELF-P Descriptive Pragmatic Profile survey completed by the Mother. The score indicated delayed pragmatic language abilities.

13. In summary, Ms. Hewins reported that [REDACTED] demonstrated delayed expressive and receptive language abilities and challenges with pragmatic language. "He shows difficulty initiating and maintaining conversations, as well as socially interacting with peers and reduced imaginative play."[S-8]. His strengths were in the areas of vocabulary and concept knowledge. [S-8]. His language needs were in the areas of grammatical morphemes, specifically pronouns, and following multi-step directions. [S-8]. Ms. Hewins recommended the following goals:
 - [REDACTED] will initiate play and have 4-5 verbal exchanges with a peer on a play topic over a 7-minute play sample in 4/5 opportunities independently.
 - [REDACTED] will independently answer WH questions 8/10 opportunities.
 - [REDACTED] will maintain a conversation or tell a story up to 4 sentences/turns in 4/5 opportunities independently.
 - [REDACTED] will use pronouns "I," "he," "she," and "they" in sentences independently in 8/10 opportunities.
[S-8].
14. Dr. Dalzell completed her psychological evaluation of [REDACTED] on September 6, 2016 and sent the evaluation to Dr. Kyla Scarponi, [REDACTED]'s pediatrician, on September 12, 2016. [S-7]. Dr. Dalzell concluded that [REDACTED] "does meet criteria for an autism spectrum disorder and would benefit from educational supports from CDS in the mainstream setting. CDS will likely have to do a classroom observation to see how his diagnosis of autism spectrum disorder ("ASD") is impacting his educational progress but it is likely

that it is affecting it as he had trouble with circle time, group activity time and social interactions in his last setting.” [S-7 at 8].

15. In summary, Dr. Dalzell reported that [REDACTED] had persistent deficits in social communication and social interaction across contexts, not accounted for by general developmental delays. [S-7 at 7]. Specifically, his deficits included those in social-emotional reciprocity; nonverbal communicative behaviors used for social interaction; and development and maintenance of relationships expected at his developmental level. [S-7 at 7]. [REDACTED] was found to have restricted, repetitive patterns of behavior, interests, or activities. Specifically, his deficits included stereotyped or repetitive speech, motor movements, or use of objects; highly restricted fixated interests that were abnormal in intensity or focus; and hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (indifference to pain/heat/cold, adverse responses to specific sounds or textures.) [S-7 at 7].
16. Dr. Dalzell’s evaluation notes that Karen Dube at the [REDACTED] pre-school completed a Teacher Questionnaire as part of the evaluation. “Regarding learning and academics she did not note any concerns. Regarding flexibility and transitions she did not note any concerns.” [S-7 at 3].
17. Dr. Dalzell recommended that [REDACTED] “would benefit from educational supports from CDS in the mainstream setting. CDS will likely have to do a classroom observation to see how his diagnosis of ASD is impacting his educational progress, but it is likely that it is affecting it as he had difficulty with circle time, group activity time and social interactions in his last setting. [S-7 at 8]. She stated that he would benefit from speech and language therapy and assistance with his social interactions in addition to his receptive and expressive language. [S-7 at 8]. She recommended accommodating for his sensory overload by providing activities to decrease his stimulation and spending time in a setting with reduce distractions and allowing him to work independently rather than in a group. [S-7, at 8].

18. Dr. Dalzell also recommended that [REDACTED] would benefit from “some direct teaching and coaching in social skills, including anticipatory guidance for social interactions.” [S-7 at 8]. She also stated that, “To build social pragmatic skills, this will need to be addressed not only in treatment settings, but also generalized to the mainstream setting, which can be done using his educational technician. A positive behavior plan can be implemented targeting specific social pragmatic goals and his education technician can coach him using these skills with peers in real-life settings as well as to provide frequent feedback on how to interpret social interactions and interact with others. [S-7 at 8].
19. Dr. Dalzell also noted generally that children with ASD can manifest apparently oppositional or rude behavior, and if of those behaviors became a concern, [REDACTED] would need an individually designed behavioral intervention program. [S-7 at 8].
20. Mother informed CDS about the existence of the evaluation and about [REDACTED]’s autism diagnosis in a telephone call on September 12, 2016, and delivered a copy of the report to CDS on September 20, 2016. [S-3, S-7, Test. Metcalfe at 532:12-14]¹
21. An IEP meeting was scheduled for Friday, September 30, 2016 for the purposes of reviewing the speech evaluation and the psychological evaluation and making an initial eligibility determination. [S-3; S-9]. The meeting was postponed for two days, to Tuesday, October 4, 2016, due to the illness of Lori Goulding of CDS, the IEP administrator with authority to commit CDS funds. [P-4; S-9].
22. In attendance at the IEP meeting on October 4, 2016 were the Mother, Juli Sibley, the regular education teacher at [REDACTED] Head Start, Jennifer Metcalfe, CDS IEP Coordinator, and Lori Goulding, CDS IEP Administrator. [S-11].

¹ The Mother testified that she recalls dropping the evaluation off on September 6, 2016. [Test. Mother 481:16]. Jennifer Metcalfe testified that the Mother dropped the evaluation off on September 20, 2016, a date that is

23. The IEP Team reviewed Dr. Dalzell's psychological evaluation and Gina Hewins' speech evaluation; they also heard reports from Juli Sibley and Mother regarding [REDACTED]'s first few weeks in the Head Start classroom. At that time, the class had nine students. [S-11; Test. Sibley at 63:17-18].
24. The IEP Team determined that based upon the evaluations it had, [REDACTED] qualified for special services under the category of autism, which was having an adverse effect on his education. [S-11; S-12]. The Written Notice from the IEP meeting on October 4, 2016 noted that "[REDACTED] is having difficult with circle time, group activity time and social interactions. He is demonstrating moderately delayed speech sound production, expressive language skills and challenges with pragmatic language. He shows difficulty initiating and maintaining conversations as well as socially interacting with peers and reduced imaginative play." [S-11].
25. At the meeting on October 4, 2016, the IEP Team discussed appropriate services and goals for [REDACTED] [Test. Goulding at 611:19-24], and also discussed the least restrictive environment. No academic concerns had been raised for [REDACTED], and Ms. Sibley, the regular education teacher, indicated no concerns regarding disruptive or unsafe behaviors. [Test. Sibley at 65:1-3; Goulding Test. At 608:5-7]. The Mother had no concerns for [REDACTED]'s safety in the Head Start classroom, and was pleased he was able to attend the Head Start Classroom. [Test. Mother at 486:11-487:22]. Lori Goulding testified that at the time of the IEP meeting on October 4, 2016, [REDACTED] was participating in class "the way any typical three, four, five year old would participate in a Head Start classroom that's new to them. He was able to attend at all of the activities other than, you know, he maybe needed some redirection from the teacher to stay seated to finish the activities." [Test. Goulding at 616:21-617:1].
26. The IEP Team discussed different placement options and agreed that at the present small class size, the Head Start classroom was an appropriate placement for [REDACTED]. The Team discussed that it would be important to keep an eye on the class size, and

potentially revisit placement if the class began to grow. [Test. Sibley at 63:18-23; Test. Goulding at 608:15-609:4; Test. Metcalfe at 534:1-15; Test. Mother at 488:4-11].

27. To address the concerns identified for [REDACTED], the IEP Team agreed to three hours per week of Specially Designed Instruction (“SDI”) from an itinerant special educator, 90 minutes per quarter of consultation from the special educator to the regular education teacher, 60 minutes per week of direct speech therapy, and 90 minutes per quarter of consultation from the speech language therapist to the regular education teacher. [S-11].
28. The Written Notice from the IEP meeting on October 4, 2016 was sent to the Parents on October 12, 2016. [S-11]. The Mother reviewed the consent for initial provision of services and signed it on October 19, 2016. [S-11]. The Written Notice reflected that the Mother “is happy that [REDACTED] is attending head start. Her primary concern for [REDACTED] is participation and interaction with peers in the classroom.” Regarding placement, the Written Notice stated, “The team considered and rejected least restrictive environment as a special purpose classroom as although [REDACTED] had difficulty with circle time, group activity time and social interactions he is able to participate in classroom, group, and peer activities with support. The least restrictive environment can be discussed at any time.” [S-11].
29. The IEP dated October 4, 2016, included three social goals and one speech and language cited in Section 4.C. – Developmental Performance, based upon his present level of performance showing difficulty initiating and maintaining conversations as well as socially interacting with peers. [S-10]. These goals were:
 - a. By October 17, 2017, [REDACTED] will interact with peers as play partners 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist observation and data collection.
 - b. By October 17, 2017, [REDACTED] will watch, listen and participate during small group activities 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist observation and data collection.
 - c. By October 17, 2017, [REDACTED] will watch, listen and participate during large group activities 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist observation and data collection.

- d. By October 17, 2017, [REDACTED] will use words to communicate his wants and needs with peers and adults 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist and data collection.
[S-10].
30. IEP Administrator, Lori Goulding, is a certified special educator with a master's degree in special education, 14 years of experience in special education, and experience on IEP teams programming for autistic children. [Test. Goulding 614:18-24]. She believed that for a child aged [REDACTED] such as [REDACTED], these goals could have been written in the IEP under Section 4.B (Functional Performance) or Section 4.C (Developmental Performance), since they address the same areas. [Test. Goulding at 651:15 to 652:9].
31. The IEP also included three hours per week of SDI; 1.5 hours per quarter for SDI consultation; one hour per week of speech and language services; 1.5 hours per quarter for speech and language consultation; and transportation services. [S-10]. The IEP also indicated that the least restrictive environment was the regular preschool setting with support of an itinerant special education teacher and speech language therapist. [S-10].
32. Ms. Goulding believed that based on what was known to the IEP Team in October 2016, three hours a week of itinerant SDI, plus the consultation shown on [REDACTED]'s IEP, would provide sufficient support to permit [REDACTED] to successfully participate in classroom, group, and peer activities. [Test. Goulding 614:18-24]. However, Ms. Goulding did not know why the specific goals recommended by Ms. Hewins were not included in the IEP or why some of the social behavioral issues raised in Dr. Dalzell's report were not addressed in the IEP. [Test. Goulding 642:20]. She also acknowledged that behaviors seen at Head Start could impede his learning and that of others. [Test. Goulding 635:8].
33. Although Dr. Dalzell's evaluation had indicated that CDS might need to do a classroom observation in order to determine whether [REDACTED]'s diagnosis was impacting his educational performance (and, thus, whether he qualified for special services at all), Ms. Goulding believed the Head Start teacher's report of her own observations in the classroom was sufficient for determining eligibility. [Test. Goulding at 615:12-616:5; 629:10-12].

34. On October 18, 2016, CDS obtained parental consent for a physical therapy evaluation for [REDACTED] [S-3]. The referral was completed by physical therapist Pam Winsor on December 12, 2016. [S-55, Test. Mother at 447:17-23]. [REDACTED]'s standard score on the PDMS-II was a 10, in the average range for a boy his age. [S-55, Sec. 3].
35. On October 20, 2016, CDS conducted developmental screenings of all children in the Head Start classroom, including [REDACTED]. Jennifer Metcalfe administered the DIAL-4 screening tool, which assesses development in four skill areas: Fine Motor, Cognitive, Gross Motor, and Speech/Language. [REDACTED]'s total score on the DIAL-4 was 58, within the average range of 53-105 for children his age. The results of the screening indicated no concerns in fine motor, cognitive, and gross motor. In the language area, [REDACTED] scored 12, slightly below the average range of 14-35. [J-2].
36. On October 28, 2016, Wiggle Worms declined a CDS referral for a physical therapy evaluation for [REDACTED] [S-3].
37. Sometime in early November of 2016, the Mother met Cheryl Neiverth. [Test. Mother at 442:14-24]. Ms. Neiverth is a social worker and the parent of a child with autism. [Test. Neiverth at 398:23- 399:12]. She is pursuing certification as a board certified behavior analyst ("BCBA") but has not sat for the boards and has completed fewer than half of the required field hours for that certification. [Test. Neiverth at 418:24-419:2; 428:7-17]. Her state certification relevant to education is that of an Ed. Tech III. [Test. Neiverth at 399:11-12].
38. On November 14, 2016, the Mother obtained an occupational therapy ("OT") evaluation for [REDACTED] by occupational therapist Jill Farwell at South Berwick Pediatric Therapy. [S-13]. The evaluation stated that [REDACTED]'s "fine motor scores show a mild delay in fine motor development. Standard score was 88 (average is 90-110)." [S-13]. His "Rehab Diagnosis" noted "mild fine motor skill delay, low tone, decreased attention to task." [S-13]. Ms. Farwell recommended weekly OT to address ways to help [REDACTED]

improve his attention to tasks and to screen out noises in his environment; support his development of fine motor skills; and increase his ability to adequately motor plan new motor tasks. [S-13]. On November 21, 2016, the Parents shared Ms. Farwell's OT evaluation with CDS. [S-13].

39. In a short note, dated November 16, 2017 and addressed "To Whom It May Concern," Dr. Dalzell stated that [REDACTED] had ADS, and that he "would benefit from more intensive therapy such as ABA therapy." [S-14].
40. Ms. Neiverth began advising the Mother regarding programming for [REDACTED], and accompanied her to several meetings with CDS in the fall of 2016 and winter of 2017, although she did not meet [REDACTED] until February 2017. [Test. Neiverth at 418:3-20; P-26]. Based upon her consultation with Ms. Neiverth, the Mother came to believe that [REDACTED] should be provided with 40 hours a week of ABA therapy at MMCC. [Test. Mother at 442:23-25; 488:25-489:2; 506:15-21; Test. Neiverth 399:23-25].
41. On November 17, 2016, the Mother and Ms. Neiverth met with Ms. Folk and Ms. Metcalfe, CDS IEP Coordinator. It was the first time Ms. Folk had met the Mother. [Test. Folk at 187:17-188:11]. At the meeting, Ms. Folk discussed with the Mother the fact that services on [REDACTED]'s IEP, dated October 4, 2016, had not begun within 30 days of identification, and were owed to [REDACTED]. They also discussed Mother's request that [REDACTED] be provided with ABA therapy. [Test. Folk at 188:20-189:1]. They discussed different programs that served CDS children with diagnoses of ASD, including Margaret Murphy Centers for Children ("MMCC"), the Waban Fraser-Ford Center ("Waban"), the Morrison Center, and Woodfords. [Test. Folk at 189:17-190:4]. Ms. Folk and Mother agreed to schedule an IEP meeting for purposes of amending [REDACTED]'s IEP to provide more intensive services, in light of [REDACTED]'s increasing struggles in the Head Start classroom, as reported by the Mother. An IEP meeting was scheduled for December 5, 2016 to discuss alternative programming options for [REDACTED] [S-17].

42. On November 21, 2016, CDS continued to acknowledge that it had not yet been able to provide the SDI and speech therapy services listed in [REDACTED]'s IEP, dated October 4, 2016. [S-16].
43. On November 22, 2016, in an email chain between the Mother and CDS, Ms. Folk again acknowledged that SDI and speech therapy had not started yet but that they would be compensated for in hours. She also informed the Mother that the physical therapy evaluation would be re-referred to New Beginnings because Wiggle Worms declined the evaluation. [S-16].
44. On November 22, 2016, the provision of speech services to [REDACTED] started. [Test. Mother at 443:15; S-16, November 21, 2016 Email from Mother to Jennifer Metcalfe].
45. On November 21, 2016, the Mother provided CDS the note from Dr. Dalzell, dated November 16, 2016. [S-14].
46. On November 23, 2016, the Mother provided to CDS a letter she had requested from Dr. Scarponi, [REDACTED]'s pediatrician, dated November 22, 2016. The letter was titled "Certificate of Medical Necessity," and included a billing code for Anthem Blue Cross Blue Shield. It stated that Dr. Scarponi was authorizing [REDACTED] to receive Applied Behavior Analysis, and stated Dr. Scarponi's belief that "with [REDACTED]'s diagnosis of Autism Spectrum Disorder, he will greatly benefit from ABA and therapy." The letter did not indicate a recommended amount of therapy, or a level of intensity/restrictiveness (e.g. 4:1, 3:1, 2:1 or 1:1 therapist/paraprofessional/student ratio). [S-15; S-16].
47. By late November 2016, CDS had been able to hire an additional itinerant special educator, but she had not begun to work with [REDACTED] by Thanksgiving. [S-16, November 22, 2016 email from Lisa-Kay Folk to Mother].

48. On December 5, 2016, an IEP meeting was held to discuss changing ██████'s IEP. [S-19]. All required team members were invited. [S-17]. Only the Mother, Ms. Neiverth, and Ms. Folk were in attendance, despite the Written Notice indicating that other team members were present. [Test. Ms. Folk]. Ms. Folk testified that Mother informed her at the beginning of the IEP meeting on December 5, 2016 that Ms. Sibley, the regular education teacher, could not attend, but that the Mother wanted to continue the meeting regardless. [Test. Folk at 136:16-22].
49. Ms. Folk testified that the IEP Team considered the Mother's report of ██████'s increased struggles in the Head Start classroom based upon the increased number of students in the room, as well as the two letters she had requested from Dr. Dalzell and Dr. Scarponi. [S-19, Test. Folk at 310:20- 312:7]. At the time of the IEP meeting on December 5, 2016, all the information available to the IEP Team continued to indicate that ██████'s autism diagnosis was impacting his education in functional / developmental areas. The OT evaluation produced by Ms. Farwell was considered and it was agreed that OT consultation services were to be added to the IEP. [S-19]. There continued to be no indication of academic needs. [Test. Folk at 309:5-16; 312:8-18].
50. Ms. Folk believed that she recommended a 2:1 service level because, in her view, at that time there was sufficient evidence to support moving ██████ from the mainstream environment into the much more restrictive special school environment. [Test. 312:1-312:7; 139:17-20]. She agreed to make a referral to MMCC, the Mother's desired placement for ██████ [P-6]. The Written Notice indicated that, while the Mother desired to have ██████ attend MMCC, other placements would be discussed. [S-19].
51. Based upon the information from the December 5, 2016 IEP meeting, the IEP was amended to include a 2:1 student-teacher ratio in the regular education setting; 30 hours a week of SDI; calling for 270 hours of Extended School Year programming at the same special school; and OT consultation services [S-18]. It indicated that his behavior was not impeding his learning or that of others and that he did not need a positive behavior plan. It indicated that he needed assistive technology devices and services. It

also indicated that he did not have any academic needs. [S-19, sections 3-4]. The IEP added a functional performance goal, which stated:

Given sensory strategies and supports, [REDACTED] will demonstrate the ability to work in a session and stay on task with a variety of sounds/noises in his environment by using any one of the following strategies: self-talk headphone, etc. in 3 out of 5 session[s] with 80% success as measured by clinical judgment, data collection and teacher report. [S-18].

52. The IEP indicated that the least restrictive environment was a special purpose placement with low student-teacher ratio and that interaction with typically developing peers would be facilitated in the community. [S-18]. It did not specifically name MMCC.
53. On December 6, 2015, Ms. Folk emailed Rebekah Bickford, Assistant Director of MMCC, stating that CDS would be making a referral to MMCC the next day and described [REDACTED]' services plan. [S-20]. The Mother was copied on the email. [S-20].
54. Ms. Folk testified that she understood that this initial email would be sufficient to place [REDACTED] on MMCC's waiting list while CDS prepared the formal referral paperwork. [Test. Folk at 197:8-18].
55. Ms. Bickford responded the next day, December 7, 2016, at 2:03 p.m., stating that, "we currently have a waiting list that will likely take us into February or March." [S-20]. She also indicated that MMCC was primarily serving 1:1 students at that time. [S-20].
56. Ms. Folk responded two minutes later², copying the Mother and writing "Well I think your program is the most appropriate program for this child. I will let Mom weigh in as well to get her thoughts. He is going to Kindergarten next year so time is of the essence." [P-8].

² Exhibit P-8 was the source of some confusion at the hearing. First, the time/date stamp reads 12/7/16 at 11:05 am, although it is in response to an email sent at 2:03 pm on the same day. It was discussed at the hearing that the Mother's email program sometimes displays times in Pacific Time (e.g. three hours earlier), so it is apparent that this email was sent at 2:05 p.m. Eastern Standard Time.

57. In a separate response to Ms. Bickford's email on December 7, 2016, Ms. Folk wrote again at 2:50 pm, copying the Mother and writing, "We can amend his plan to 1:1 and see how he does. 2:1 was not etched in stone. The hard part is getting him in sooner than later." [S-20].
58. On December 8, 2016, Ms. Folk wrote to Ms. Bickford again, copying the Mother, writing "Just checking in again to see if changing child to 1:1 speeds things up at all and what the time frame would be?" Ms. Bickford responded that "Even with 1:1, we would still be looking at March." Ms. Folk asked whether there were openings at MMCC's location in Auburn, and was told the waiting list was even longer there. [S-21].
59. On December 9, 2016, Ms. Folk reached out to Waban's Director of Children's Programs Operation, Sarah Mehlhorn, to determine if there was availability for the Student. [S. 23]. The Mother was copied on the email (*Id.*) Ms. Mehlhorn replied that there was be an opening for the Student on December 16, 2016, and stated that she would contact the Mother to set up a tour for the following week. [S-23, P-9].
60. Waban serves children from ages 3 to 5 who have an ASD diagnosis. It uses ABA-based methodology along with intervention strategies and positive behavior supports in low student-teacher ratio to deliver a curriculum based program. [Test. Haskell 596-597].
61. Ms. Folk notified the Mother that MMCC in Saco and Auburn would not have openings for several months at least and suggested that she look at Waban [S. 22]. The Mother responded, stating that she was disappointed that MMCC was not available. [S.22]. She stated that she would visit Waban with reservation because there were "mixed reviews" about the program and that she had issues with their turnover rate [*Id.*]. Ms. Folk stated:
We can keep him at this current placement and send in Maureen if that is what you want to do. We agreed that he needed more and that is what I am trying to provide. The offer of FAPE is the same regardless of what

program he goes to: MM or Waban. Both programs would be providing the same ESY service, the same 30 hours, the same OT consultation and the same Speech Therapy.

62. Ms. Folk acknowledged to the Mother that the situation was frustrating and that she wished that she could provide a program at MMCC but was not able to. (S-22). The Mother then asked if MMCC had an opening after the Student started at Waban, if he could be switched. [S.22].
63. The Mother was unsure whether, at that time, the Student should be receiving 2:1 or 1:1 direct instruction given the changing circumstances on December 8 and 9, 2016, and without information from a classroom observation had been done. (Test. Mother 447:12).
64. On December 12, 2016, a PT assessment was administered by Pam Winsor at New Beginnings. [S-55].
65. In an email exchange on December 13 and 14, 2016, the Mother informed Ms. Folk that after visiting Waban, she did not believe it was appropriate for [REDACTED] because the children were all younger than him and the classroom seemed very chaotic. [S-24]. Ms. Folk responded that she understood and that other programs were being contacted. The Mother indicated that she had gone ahead and checked herself and found out none of them had availability. [S-24]. The Mother asked whether CDS could provide ABA therapy while waiting for MMCC to have an opening. However, there was no further response from Ms. Folk. [S-24].
66. On December 14, 2015, the Mother asked for and received the Written Notice from the IEP meeting on December 5, 2016. [Test. Mother, S-24, 25]. Ms. Folk indicated that she was reaching out to other programs that provide ASD programs including Odyssey, Woodfords, and North Star Learning Centers. [S-25]. However, the Mother reported to her that she also had contacted them and none were currently available. [S-24]

67. On December 15, 2016, the Mother emailed Ms. Folk with several questions about the IEP. [S-25]. Ms. Folk provided a lengthy email response the following day, and also invited the Mother to sit down and walk through the IEP. [S-25]. She offered to schedule a separate IEP meeting to revisit other aspects of ■■■■■'s IEP and to determine if Educational/Academic Testing was needed to gather more data and to discuss the Physical Evaluation when it was completed. [S-25]. The Mother agreed, and an informal meeting was scheduled for December 22, 2016. [S-25]. Ms. Folk explained "We will not plan on making changes to the IEP on that day but going through to see what more we need to do for ■■■■■ We can then have a formal IEP meeting if we need to make changes if we do further evaluations." [S-25].
68. On the same day, December 14, 2015, the Mother contacted Jan Breton, the Director of Special Education Services for the Maine Department of Education. [Test. Mother]. She explained to Ms. Breton her concerns about the Student's lack of services. Ms. Breton stated that she would call her back after she spoke with an advisor for early childhood special education. Ms. Breton never contacted the Mother [Test. Mother].
69. A meeting was held on December 22, 2016 to review aspects of the IEP. The Mother arranged to have Juli Sibley, the Head Start teacher, call in. Also in attendance were Ms. Folk, Ms. Neiverth, the Mother, and Pam Scribner, a program manager from CDS. [P-11, S-53]. Ms. Folk discussed that the purpose of the meeting was to go through the IEP and also to hear from the regular education teacher about ■■■■■'s experience at the Head Start program. [S-53].
70. At the December 22, 2106 meeting, Ms. Sibley was on the speaker telephone and described her experience with ■■■■■ Her concerns were about his lack of language skills to communicate his wants and needs. She reported that:
- He needed queuing for almost all of his needs.
 - He did not understand when he was behaving unsafely (jumping from high places).
 - He did not appear to understand social questions from other children.
 - He was not aware of the impact of his own behavior on others.
 - He engaged in self-play for the most part and did not initiate play with his peers.
 - He refused to engage in imaginative or pretend play.

- He was resistant when transitioning from one activity to another.
- He was being targeted by two or three other children with rough play and pushing.
- He could stay focused during circle time.
- He could remember the names of his peers who sit with him at lunch every day.
- With respect to academic measures, more testing was needed.

71. Based upon the reports from Ms. Sibley and the Mother, Ms. Folk believed that [REDACTED] needed 1:1 student-teacher ratio of support. [P-11 at 36:24]. She also stated that CDS staff would conduct academic testing and observations. She also stated that the IEP goals were not accurate and that once academic evaluations were completed, another meeting would be scheduled to amend the IEP. [P-11]. The Team also discussed amendment to the IEP that could be made, including the addition of a positive behavior intervention plan, a social skills goal relating to social language, assistive technology such as a supportive chair or a cube chair. Ms. Folk also stated that academic testing would take place as soon as possible. She stated that the IEP could be amended upon review of the academic testing. [P-11].
72. The Team members discussed the possibility of having [REDACTED] attend MMCC because of the ABA methodology they use. Ms. Folk stated that she could make another referral to MMCC. Ms. Neiverth offered to work with [REDACTED] until he was admitted to MMCC, however, Ms. Folk stated that she was not hiring educational technicians in that capacity. [P-11]. A disagreement occurred between Ms. Neiverth and Ms. Folk over whether CDS could contract with Ms. Neiverth to provide ABA therapy on an interim basis. [P-11] Ms. Neiverth disputed Ms. Folk explanation that CDS could not contract with her. Ms. Folk ended the meeting abruptly during this disagreement. [P-11].
73. Thereafter, the Mother returned to the meeting room to discuss the details of having [REDACTED] evaluated and Ms. Folk confirmed that a referral for testing would be submitted right away. [S-53].
74. No changes were made to the IEP at the meeting on December 22, 2016. However, a Written Notice was produced from this meeting. [S-53].

75. On the same day, after the meeting, the Mother contacted Ms. Folk and informed her that she was looking into the possibility of the Morrison Center as an interim placement, even though it did not provided ABA-based therapy. [S-27]. Ms. Folk agreed that it would be a good alternative until MMCC became available. [S-27]. Thereafter, the Mother objected to the Morrison Center because there were students with different types of special needs, not exclusively autism. [Test. Mother at 498:6-12].
76. In an email dated December 28, 2016, Ms. Folk confirmed that [REDACTED] was on the waiting list for MMCC. [S-29].
77. On December 30, 2016, MMCC received the referral paperwork for [REDACTED], which was dated December 16, 2016. [P-16].
78. The Mother emailed Ms. Folk directly after receiving an email from Ms. Bickford explaining that [REDACTED] was not on the waitlist and that in order for that to happen, [REDACTED]' IEP needed to reflect that he needed 1:1 SDI, not 2:1 and referred to the prior meetings indicating that Ms. Folk acknowledged that was what he needed. [S-30]. She asked Ms. Folk to amend the IEP to reflect this. [*Id.*].
79. Ms. Folk and Ms. Bickford continued to communicate on January 3, 2017 about the challenge of having [REDACTED] admitted to MMCC. Ms. Folk explained that:
- So [REDACTED]' mom is adamant that the IEP be amended to 1:1. I do not have the data yet to do that. We are doing academic/educational testing as mom signed the consent last week. I anticipate we will have enough data to do that in the near future. I apologize if I misunderstood when we emailed that he could go on the waiting list after our email. We did get the referral out but obviously everyone was on vacation until today. I would still like him on a waiting list with his current paperwork; knowing that more information/data is coming. I don't want to hold up the process, however we have made an offer of FAPE for a 2:1 at Waban which I believe mom is rejecting as she wants to go with you, but can't have 2 IEPs saying 2 different ratio's. Thoughts?

[Rebekah's response at 2:35 PM on 1/3/2017]:

That's a tricky situation. For [REDACTED] to go on our waiting list, I need to observe him and then complete the entire intake process with his mother. I'm reluctant to do that if we don't know if he'll end up needing 1:1 support. How about if I observe him and then we talk? An observation will give me a better sense of his level of need and whether or not it makes sense to move forward. As an aside, our plan is to accept 1:1 students and then move them to 2:1 if appropriate and when we have a suitable 2:1 match. We don't have enough of a pool of 2:1 students to accept at that level. I hope that makes sense. [S-33].³

80. On January 4, 2017, Ms. Bickford emailed Ms. Folk emailed each other about complications with [REDACTED]'s referral. The two discussed how, administratively, CDS and MMCC could increase the speed at which [REDACTED] could be admitted to MMCC. Both had their own internal processes to follow which was making it difficult to admit [REDACTED] right away. [S-33]. CDS had billing constraints given the student-teacher ratio and MMCC was constrained by the timing of when classroom observations could take place in relation to when a contract with CDS could be executed. [S-33].
81. Also on January 5, 2017, the Mother rejected the CDS referral to Waban. [S-32]. The Mother objected to Waban on several grounds. She did not consider it a "true ABA program," and the classroom was "not ideal." She was annoyed that the Director got her name wrong. She felt the school was too eager to fill a preschool spot. [S-24]. She later objected to a mix-up with a phone number, writing "I will never allow my son to attend a school where they cannot get simply my name and phone number correct." [S-31].
82. On January 11, 2017, Ms. Bickford emailed Ms. Folk stating that until she had a sense that CDS was going to be approved for 1:1 or CDS was willing to bill the services differently, she believed she needed to wait to do an observation. [S-33, S-36]. Ms. Folk could only verbally confirm that CDS had approved 1:1, however the paperwork had not been sent and therefore MMCC could not move forward until it had something in writing showing that CDS approved it. [S-36].

³ Pursuant to the Mother's subpoena, Ms. Folk submitted a different version of this email. [S-31]. CDS submitted S-33 as the full and original email between Ms. Folk and Ms. Bickford.

83. On January 11, 2017, Ms. Bickford reported to the Mother that the referral for admission to MMCC had been received on December 30, 2016, and that she had not reviewed until January 3, 2017. [P-16]. She stated to the Mother that [REDACTED] was not and never had been on the wait list, and outlined the admission process. [P-16].⁴
84. On January 11 and 13, 2017, Ms. Hannah Marston, M.S. Ed. and certified special educator, performed an evaluation and observation of [REDACTED] in the Head Start classroom. [S-34, S-46, S-47, S-48]. [REDACTED] was assessed using three standardized assessment tools: the ABAS-3, a measurement of a child's developmental areas; the Brigance Inventory of Early Development III (IED III); and the Vineland Adaptive Behavior Scales II. [S-46]. In the academic areas assessed, [REDACTED] scored in the average range on the Academic/Cognitive composite, and average on the Mathematics subscore. The Literacy subscore indicated a mild delay, however, [REDACTED] was interrupted during literacy testing by his little brother, whom the Mother had brought with her. [S-48; Test. Marston at 388:7-12]. The functional pre-academics subscore in the ABAS-3 also fell within the average range. [S-48; Test. Marston at 392:12-18]. His teacher stated that [REDACTED] "has made progress since he started." [S-48].
85. Ms. Marston's recommendations included "A low child to teacher ratio classroom that is taught by a special education teacher is recommended to support [REDACTED]'s social and peer skill development." [S-46; S-47]. In Ms. Marston's opinion, the correct service ratio for [REDACTED] would be 2:1. [377:13-378:5].
86. Ms. Marston testified that there were multiple effective approaches and methodologies for children with autism, and that it is important to take each child individually. In

⁴ There was some confusion at the hearing regarding whether MMCC formally declined the referral by returning the referral cover sheet. On January 3, 2017 the same date on which Ms. Folk learned that [REDACTED] was not on the MMCC waiting list, CDS received a cover sheet from Waban declining a referral based on the 2:1 classroom's having filled up in the interim. [Test. Folk at 214:16-215:21]. This was erroneously filed with the referral paperwork for MMCC, and as a result was produced together with that paperwork in response to a document subpoena. While MMCC did not return a cover sheet declining the referral, Ms. Bickford testified that she intended to decline any referral at 2:1, as she communicated in an email dated December 7, 2016. [Test. Bickford at 341:10-12].

addition to ABA methodology, she mentioned the SCERTS model, the AEPS curriculum, and DIR Floor time. [Test. Marston at 384:2-385:23].

87. Ms. Marston leads the team of itinerant special educators at CDS. In testimony, she described the role of the special educator who would have delivered the SDI on ██████'s IEP dated October 4, 2016. She testified that in the first month, the teacher would get a good sense of the child and classroom culture, take data, then develop a detailed plan of care that breaks down the annual goals on a child's IEP into smaller steps. [Test. Marston at 381:1-382:12].
88. On January 17, 2017, Ms. Scribner confirmed to the Mother that CDS was approved to have MMCC provide 1:1 until the 2:1 became available. [S-35]. She stated that MMCC was planning to contact the Mother to move forward with the observation and their intake process. [S-35].
89. On January 19, 2017, the Parents filed for a due process hearing. [S-1].
90. Mother has refused to consent to the implementation of ██████'s IEP at any special school other than MMCC. Her opinion is that MMCC is the best program in Maine, based on the recommendation of Ms. Neiverth. [Test. Mother at 488:25-489:2].
91. On January 30, 2017, CDS convened a resolution session and made an offer of resolution. As part of the offer, CDS would agree to amend the IEP to 1:1, as requested by the Mother (prior to the IEP's consideration of the educational evaluation that had been conducted on January 13, 2017), in order to facilitate referral to MMCC and ██████'s placement on the waiting list. [S-42]. The Parents did not sign an agreement to resolve the dispute that day.

92. On January 30, 2017, after the resolution session, Ms. Folk contacted Ms. Bickford to inform her that CDS could not go forward with a referral to MMCC at the 1:1 ratio at that time. [J-1]⁵.
93. On February 1, 2017, the Mother emailed Ms. Folk to accept the offer made at the resolution session. [S-38]. In her response, Ms. Folk advised the Mother of the three-day review period for resolution agreements citing MUSER. [S-38].
94. On February 2, 2017, the Mother sought to convene an emergency IEP meeting. [S-39]. Ms. Folk initially responded that CDS could not convene an IEP meeting until the expiration of the review period, but quickly wrote back correcting this misunderstanding, before receiving any response from the Mother. [S-39; S-40]. Ms. Folk was able to rearrange her schedule to accommodate an emergency IEP meeting. [S-41].
95. At the emergency IEP meeting on February 2, 2017, the Team agreed to amend ██████'s IEP to 1:1. Because no 1:1 placement was immediately available, CDS proposed alternative interim services, including services in the home, services at Head Start, and a 30-hour a week placement at a 3:1 service ratio at the Morrison Center. [S-45]. The family rejected all of these options.
96. At the emergency IEP meeting on February 2, 2017, the family declined to sign the resolution agreement the Mother had indicated she was going to accept the previous day. At the meeting, the Parents and Ms. Neiverth sought to add to the resolution agreement a conditional payment of \$80,000 in the event ██████ did not get into MMCC from the waiting list by the end of March 2017. [S-45]. This was request was rejected by CDS. [S-45].

⁵ This email was not produced by CDS as part of its correspondence in response to a document subpoena submitted by the Mother, but from Ms. Bickford at the hearing. It was admitted into evidence as Exhibit J-1.

97. The Mother removed [REDACTED] from the Head Start classroom on February 2, 2017. At the time, she told Juli Sibley she thought removing [REDACTED] from school would help her more quickly get what she was looking for. [Test. Sibley at 72:3-10].
98. CDS was never able to provide satisfactory documentation to MMCC approving payment to MMCC for services provided at the 1:1 level. Accordingly, [REDACTED] was not placed on the MMCC wait list until February of 2017, after the IEP was amended to call for a 1:1 service ratio. [S-43; Test. Bickford at 346:1-24].
99. [REDACTED] was at the top of the MMCC waiting list at the time of the due process hearing. [Test. Bickford]. The most recent student to get off the waiting list – i.e., the student directly ahead of [REDACTED] on the MMCC waiting list – was first referred to MMCC by CDS in September of 2016, and the intake process was completed in October of 2016, several months before December 2016. No child took a space ahead of [REDACTED] on the MMCC waiting list during December 2016 and January 2017, and his wait time for placement at MMCC is what it would have been had CDS written an IEP at a 1:1 ratio on December 5, 2016. [Test. Bickford at 348:7-15; Test. Folk at 316:8-317:2].
100. [REDACTED] continued to receive speech services through CDS starting November 22, 2016. On March 13, 2017, the Mother reported she was not happy with the provider – a licensed Speech Language Pathologist – and that [REDACTED] had stopped seeing her. [Test. Mother at 507:7-508:13].
101. Following her removal of [REDACTED] from the Head Start classroom, the Mother kept [REDACTED] home for a month and a half. Starting in mid-March 2017, the Mother sent [REDACTED] to [REDACTED] preschool in York, and Ms. Neiverth was working with him. The Mother testified that Ms. Neiverth is not charging to work with [REDACTED] [Test. Mother at 499:9-12]. There is no evidence in the record regarding the appropriateness of the educational services [REDACTED] is receiving at [REDACTED].

102. At various times, CDS has offered to implement [REDACTED]'s IEP through a placement at one of a number of appropriate programs at which CDS places children with autism, including Waban (December 9, 2106), Back to Basics (February 24, 2017), and the Morrison Center (February 2, 2017). [S-23; S-45; S-52].
103. Each of these providers employs qualified personnel with the required Maine certification. [Test. Folk at 306:20-307:16].
104. Each of these providers utilizes ABA-based methodologies. [Test. Folk at 317:19-318:4; Test. Haskell, at 596:3-21; Test. Grover at 517:1-14].
105. Since December 5, 2016, the Mother has refused to permit the implementation of [REDACTED]'s IEP by any provider other than MMCC. [Test. Mother 501:8-13; S-52].

IV. LEGAL FRAMEWORK

The IDEA guarantees to children with disabilities a free, appropriate public education, and provides parents of children with disabilities with certain procedural safeguards. In order to provide a FAPE, a school must create and then follow an "individualized education program" ("IEP") for each disabled child. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). "To ensure that this takes place, a school district must take steps to identify children who may qualify as disabled, evaluate each such child to determine his or her eligibility for statutory benefits, and develop a customized IEP designed to ensure that the child receives a level of educational benefits commensurate with a FAPE." *Ms. S. v. Regional Sch. Unit 72*, 829 F.3d 95, 113-114 (1st Cir. 2016)(citation and internal quotation marks omitted). "The IDEA also mandates that, to the maximum extent appropriate, a school district's special education accommodations should take place in the least restrictive environment available." *Id.* at 114 (citation and internal punctuation omitted).

The IEP is the centerpiece of the IDEA's education delivery system for disabled children." *Id.* (citation and internal punctuation omitted). The IEP is "a written statement for each

child with a disability that is developed, reviewed, and revised” in accordance with the IDEA and must include, among other things, the following: a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals; criteria for measuring progress toward those goals; and a statement of the specific services that the school will offer. 20 U.S.C. § 1414(d)(1)(A). “A customized IEP must include, at a bare minimum, the child's present level of educational attainment, the short- and long-term goals for his or her education, objective criteria with which to measure progress toward those goals, and the specific services to be offered.” *Ms. S.*, 829 F.3d at 114 (citation and internal quotation marks omitted). “An IEP therefore must target all of a child's special needs, including a child's social limitations.” *Id.* (citations and internal quotation marks omitted) (emphasis in original). “However, the IDEA does not promise perfect solutions, and the obligation to devise a custom-tailored IEP does not imply that a disabled child is entitled to the maximum educational benefit possible.” *Id.* (citations and internal punctuation omitted).

The IDEA imposes additional procedural and substantive requirements with regard to the IEP. *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987-88 (1st Cir. 1990). For example, parents have the right to be part of the IEP “team” along with the teachers and other educational professionals charged with formulating a child's particular IEP. 20 U.S.C. § 1414(d)(1)(B); *Lessard*, 518 F.3d at 23. The purpose behind such procedural safeguards is to “guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.” *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993) (citation and internal quotation marks omitted). Thus, in the event of a dispute between the school and the child's parents regarding the IEP, the parents have the right to demand a hearing by an impartial hearing officer. *See, e.g.,* 20 U.S.C. § 1415(f)(1)(A), (B)(ii). A party dissatisfied with a hearing officer's decision may seek judicial review of that decision by a state court or a federal district court, which must (i) receive the records of the administrative proceedings; (ii) hear additional evidence at the request of a party; and (iii) grant relief as it deems appropriate based upon the preponderance of the evidence. *See, e.g., id.* § 1415(i)(2)(A), (C).

When reviewing an IEP, a hearing officer examines both procedure and substance, asking two questions: “First, has the State complied with the procedures set forth in the Act?

And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (U.S. 2017).

The IDEA recognizes that coming up with an IEP will be a “fact-intensive” exercise that will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. Any review of an IEP “must appreciate” that the question is whether the IEP is reasonable, not whether it is ideal. *Andrew F. v. Douglas County Sch. Dist.*, *supra*.

Not only must an IEP be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, it must do so in the Least Restrictive Environment (LRE) in which FAPE can be provided. Under the IDEA, children with disabilities must be educated with children who are not disabled “to the maximum extent appropriate,” and removal from the regular educational environment should occur “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). As the First Circuit has noted, the Congressional preference for mainstreaming cannot be ignored, even if a student may achieve greater educational progress in a more restrictive setting. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) (citing *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (“In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.”))

An IEP is considered in its entirety, and parents may not “endlessly parse IEPs into highly particularized components and circumvent the general rule that parents cannot unilaterally dictate the content of their child’s IEP.” *Lessard v. Wilton Lyndeborough Coop. School Dist.* 518 F.3d 18, 30 (1st Cir. 2008). In determining whether an IEP is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances” it must be kept in mind that “An IEP is a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.” *Roland M.*, 910 F.2d at 992.

In drafting the IDEA, Congress envisioned a collaborative process. Where a delay in completing or implementing an IEP is the result of a parent's unreasonable conduct, the school district is not liable for the delay resulting from the parent's obstruction. *Lessard*, 518 F.3d at 26; C.G. ex rel. *A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 287-88. Similarly, while the IEP Team is responsible for developing the IEP, certain decisions are the exclusive prerogative of the IEU/SAU. One such area is in the selection of qualified personnel. See *Parent v. SAD 75*, Case No. 14-035H. ("The law is clear that a hearing officer does not have authority to order a school to remove or add particular personnel.") (citing *Slama v. Independent Schl. Dist. No. 2580*, 259 F. Supp. 2d 880 (D. Minn. 2003)); *Freeport Sch. Dist. #145*, 34 LRP 189 (Ill. SEA 2000); C.S.D. 18, 102 LRP 4378 (Me. SEA 1998) ("There is no basis in education law or regulations which allows parents to have employment jurisdiction over staff who serve their special education children.") Schools are also given broad discretion to choose among educational methodologies. See *Lessard*, 592 F.3d at 270 ("The underlying judgment of those framing the plan is given considerable weight"); *Rowley*, 458 U.S. at 208 ("Once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.")

While the IDEA concerns both procedure and substance, the heart of any inquiry under the IDEA is the provision of FAPE to an individual student with a disability. "The sufficiency of the IEP remains the paramount concern: 'the ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.'" *Town of Burlington v. Department of Educ. For Com. Of Mass ("Burlington II")*, 736 F.2d 773, 788 (1st Cir. 1984); see also *Roland M.*, 910 F.2d at 990. Where procedural violations or inadequacies are alleged, a court's review "must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective." *Roland M.*, 910 F.2d at 994. Thus, "before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Id.* See also *W.D. v. Watchung Hills Regional High School Bd. of Educ.*, 602 Fed. Appx. 563, 569 (3d Cir. 2015) (citing *D.S. v. Bayonne Bd. Of Educ.*, 602 F.3d 553, 565 (3d. Cir. 2010))("A procedural violation is actionable under the IDEA only if it

results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits.”); *Seth B. ex rel. Donald B. v. Orleans Parish School Bd.*, 810 F.3d 961, 981 (5th Cir. 2016) (citing *T.S. v. Independent School Dist. No. 54, Stroud, Oklahoma*, 265 F.3d 1090, 1095 (10th Cir. 2001)) (“It is well-settled that, without a claim that the FAPE was deficient, procedural defects are not actionable.”). This rule is made explicit in the text of the IDEA statute, which requires that “a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” 20 U.S.C. §1415(f)(3)(E)(i).

A procedural violation will rise to the level of a denial of FAPE only in limited circumstances. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” 20 U.S.C. §1415(f)(3)(E)(ii). Where implementation of an IEP is challenged, courts will look to whether the school district failed to implement substantial or significant provisions, such that the disabled child was denied a meaningful educational benefit. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir 2000).

Finally, in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005), *Regional School Unit No. 51 v. John Doe*, 60 IDELR 163 (D. ME. 2012); *DB ex rel. Elizabeth v. Esposito*, 675 F. 3d 26, 35 (1st Cir. 2012). As the complainant in this case, the Mother must prove that the evidence supports her position on the issues before the hearing officer.

V. DISCUSSION

1. Whether CDS failed to timely identify and conduct relevant evaluations of the Student in the spring, summer and fall of 2016.⁶

Parents' Position

The Parents argue that the IEP Team did not consider Dr. Dalzell's recommendations for a classroom observation: circle time; sensory overload; group activities; social interactions; behavior that impedes learning or that of others; positive behavioral interventions and supports; and concerns about ██████'s lack of back and forth conversations, peer interactions, imaginative play, and responding to his name or safety words.

In addition, the Parents argue that the IEP Team did not adequately consider Ms. Hewins' speech and language evaluation from September 7, 2016. The behaviors noted in her report, such as not waving hello and goodbye independently, introducing new conversation topics, or telling details of a story, are not reflected in the IEP. The Parents also assert that Ms. Hewins' speech goals were not discussed or reflected in the IEP.

The Parents also argue that CDS failed to administer the appropriate assessments and other evaluation measures needed to determine the extent of ██████'s educational needs, citing 34 C.F.R. 300.305(c). The Parents assert that CDS should have been alerted to testing ██████ in other areas for potential academic needs. They cite Ms. Hewins' evaluation, in which she reported that ██████ scored in the 10th percentile for receptive language, expressive language, and language structure. The Parents urge that the low scores should have triggered an evaluation to determine if ██████ had a specific learning disability (e.g., processing speed, working memory, short and long-term memory, recall, automaticity) that was impacting his ability to learn to read, write, communicate, or navigate math.

⁶ Two MUSER citations listed in the issues for hearing are not relevant to this proceeding, including MUSER §IV.1.E.1(b); IV.2.A.

CDS's Position

CDS argues that [REDACTED] was referred to CDS as a child with an existing speech evaluation who had been receiving speech services, and that he was promptly reevaluated in this area. It asserts that while the available information from July and August 2016 did not indicate a suspicion about autism, it promptly considered Dr. Dalzell's evaluation as soon as it was made available to them by the Parents. It argues that both the speech evaluation and Dr. Dalzell's evaluation were comprehensive and provided recommendations.

CDS asserts that the IEP Team considered input from these evaluations, the regular education teacher, and the Mother to determine [REDACTED]'s present levels of academic performance and needs. It points out that the entire Team agreed that at that point in time, [REDACTED]'s educational needs were in developmental/functional areas and there were no academic concerns. CDS suggests, therefore, that it complied with Maine Unified Special Education Regulations ("MUSER") in its evaluation process.

Discussion

All referrals to the IEP Team must be acted upon in a timely manner. MUSER IV.E(3) provides that a parent may request that the agency conduct an evaluation for eligibility determination. MUSER V.2(C)(4) requires an intermediate education unit ("IEU"), to ensure that the child is assessed in all areas of suspected disability. MUSER V.2(C)(6) requires that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the category in which the child has been classified. MSUER V.2(C)(7) requires the IEU ensures that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

The IEP Team shall also review existing evaluation data and determine the need for additional evaluations. MUSER IV.2.E. If additional evaluations are needed, the IEP Team must send a Consent to Evaluate form within 15 days of receipt of the referral. [Id.] The Parent may request that the agency conduct a full and individualized evaluation for possible eligibility

determination at any point during the implementation of general education interventions. MUSER IV.2.E(3).

During the initial evaluation process to determine eligibility for SDI and related services, the IEP Team shall conduct a full and individual initial evaluation in accordance with MUSER V.1 and 3 before the initial provision of SDI and related services. MUSER V.1.A. The initial evaluation must be conducted within 60 calendar days of receiving parental consent for the evaluation for children in the CDS system. MUSER V.1.A.(3)(a)(i). The IEP Team shall review existing evaluation data, including evaluations and information provided by the parents, and determine if any additional evaluations are needed to decide whether the child has a disability. Existing evaluations may be used to determine present levels of academic achievement and related developmental needs of the child, and subsequently what SDI is needed. MUSER V.3.A.(1)(a), (2)(a)-(d).

I find that CDS complied with MUSER in a timely manner in identifying [REDACTED] as a child with a disability in need of SDI and related services. CDS received the referral for possible special education and related services from the Mother in mid-July 2016, based upon his reported speech and language impairment. The Mother provided CDS with the psychological evaluation from Dr. Dalzell diagnosing [REDACTED] with Autism Spectrum Disorder (“ASD”) on September 20, 2016. An updated speech and language evaluation was also performed, which indicated that speech and language services were recommended. The IEP Team reviewed all of the information and input from the regular educator and the Mother on October 4, 2016. At that time, the IEP Team identified [REDACTED] with a qualifying disability of ASD and agreed that it had an adverse impact on his educational performance.

I find that the decision to conduct these evaluations was timely because they were completed within 60 days of the Mother’s written consent. The Mother consented to the speech and language evaluations on August 16, 2016; they were completed when the IEP Team met on October 4, 2016, 49 days later. Dr. Dalzell’s report was received on September 20, 2016 and was also reviewed on October 4, 2016.

Based upon the above, I find no procedural violation in the timeliness in performing an initial evaluation to determine whether [REDACTED] was eligible for SDI and related services. I also find that CDS conducted relevant evaluations of [REDACTED] based upon the information it had at the time of a suspected disability.

However, I find that the IEP Team did not initiate an evaluation with respect to [REDACTED]'s academic performance at the IEP meeting on October 4, 2016. The evaluations performed by Ms. Hewins and Dr. Dalzell were comprehensive and enlightening. Ms. Hewins' report, for example, indicated that [REDACTED] was experiencing potential processing speed issues. For example, Ms. Hewins noted that, "[w]hen told to 'point to the dog then point to the cat', he pointed to both at the same time. It wasn't clear if [REDACTED] was not understanding the direction words or if he was not attending fully to the speaker." She also stated, "There was often a lengthy pause between questions and [REDACTED]'s answer as it appears it took him time to process the questions/his response." While not definitive, the IEP Team had enough evidence of [REDACTED]'s potential cognitive issues to ask whether he was also being impacted not only by a speech and language impairment but other underlying intellectual problems, such as memory issues or slow processing speed. I find, therefore, that an appropriate evaluation in this area should have been recommended at the IEP meeting on October 4, 2016.

2. Whether the initial IEP developed on October 4, 2016, was reasonably calculated to provide educational benefit at the time it was developed, and therefore provided a FAPE.

Parents' Position

The Parents argue that the IEP, dated October 4, 2016, was inappropriate because it lacked measurable goals in the areas of behavior and language. They assert that the language used was vague and could not be interpreted consistently by educators reading them.

Specifically, the Parents cited Goals 1 and 4, which stated:

- Goal 1: By October 2016, [REDACTED] will interact with peers as play partners 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist observation and data collection.
- Goal 4: By October 17, [REDACTED] will use words to communicate his wants and needs with peers and adults, 4 out of 5 opportunities over 3 consecutive sessions as measured by therapist observation and data collection.

The Parents cite the different interpretations of these goals by Ms. Goulding and Ms. Metcalfe at the hearing, suggesting that inconsistent implementation of the IEP could result if the language is too vague.

The Parents also argue that speech and language goals recommended by Ms. Hewins in her evaluation, dated September 12, 2016, were not included in the IEP dated October 4, 2016.

They cite the following recommended goals:

- [REDACTED] will initiate play and have four to five verbal exchanges with a peer on a play topic over a seven-minute play sample in four to five opportunities independently.
- [REDACTED] will independently answer “WH” questions in eight out of 10 opportunities.
- [REDACTED] will maintain a conversation or tell a story up to four sentences and turns in four to five opportunities independently.
- [REDACTED] will use pronouns, “I,” “he,” “she,” and “they” in sentences independently in eight out of 10 opportunities.

The Parents argue that all four of the above goals should have been included in the IEP. The Parents assert that a generalized goal of [REDACTED] using his words was insufficient to capture his individualized needs with respect to speech and language delays.

The Parents argue that the IEP did not address [REDACTED]’s functional performance. They cite Ms. Metcalfe’s testimony that this portion of the IEP was blank despite evidence that [REDACTED] needed support to improve in this area, as stated in the IEP dated October 4, 2016. They claim that the goals in the developmental section should have been stated as functional goals, constituting a procedural inadequacy that resulted in the loss of educational benefit, and subsequently resulting in denial of a FAPE.

The Parents claim that the initial IEP should have included a listening skill as an academic goal, based upon Dr. Dalzell’s evaluation that indicated [REDACTED] was having difficulty in circle time.

The Parents also claim that [REDACTED] should have had a functional behavioral assessment and subsequently a behavior plan developed and included in his IEP; they cite Dr. Dalzell’s report

that [REDACTED] could easily experience sensory overload and should be provided with activities to decrease his stimulation and spend time in a setting with reduced distractions. [S-7, p.8]. The Parents cite Ms. Goulding's testimony, wherein she acknowledged that [REDACTED]'s behaviors during circle time impeded his learning and that of others (e.g., getting up, sitting down, rolling onto another child, not paying attention, looking around.). The Parents note that the IEP did not reflect Dr. Dalzell's opinion that [REDACTED] needed behavioral supports.

Based on the assertion that the IEP was procedurally flawed, the Parents claim that it caused denial of a FAPE to [REDACTED]

CDS's Position

CDS argues that the IEP meeting on October 4, 2016 was reasonably calculated to provide educational benefit to [REDACTED]. It urges that the IEP was designed based on what the IEP Team knew about [REDACTED]'s educational performance and needs at the time. Furthermore, it claims that the IEP provided the least restrictive environment for [REDACTED], given his educational needs.

CDS asserts that as of October 4, 2016, no academic concerns were identified for [REDACTED]; neither were concerns expressed regarding his safety or disruptive behaviors. The IEP Team therefore decided that, given the low student-teacher ratio in the mainstream classroom, [REDACTED] was able to participate in all activities with some support.

Discussion

I find that some portions of the IEP dated October 4, 2016 were not reasonably calculated to provide measurable benefit to [REDACTED]. At the time of the IEP meeting on that date, the IEP Team had input from the evaluations performed by Ms. Hewins and Dr. Dalzell. The Team also had input from Ms. Sibley and the Mother. At that point in time, the IEP Team drafted an IEP that provided SDI with supports and goals that were measurable. However, I find that there were gaps in the IEP.

Speech and Language Goals

The Parents raise an important issue regarding the inclusion of goals recommended by the speech pathologist's evaluation. The IEP only included one generalized speech goal, which stated: "[REDACTED] will use words to communicate his wants and needs with peers and adults 4 out of 5 opportunities over 3 consecutive sessions as measured by the therapist observation and data collection." The goals recommended by Ms. Hewins were more specific. They were stated as follows:

- [REDACTED] will initiate play and have 4-5 verbal exchanges with a peer on a play topic over a 7 minute play sample in 4/5 opportunities independently;
- [REDACTED] will independently answer WH questions in 8/10 opportunities;
- [REDACTED] will maintain a conversation or tell a story up to 4 sentences/turns/in 4/5 opportunities;
- [REDACTED] will use pronouns "I"/"he"/"she"/"they" in sentences independently in 8/10 opportunities.

The above recommended goals specifically addressed the delays that [REDACTED] was experiencing in expressive and receptive language abilities and challenges with pragmatic language, as found by Ms. Hewins. For the IEP to simply state that [REDACTED] "will use his words to communicate his wants and needs" is only a general goal that does not reasonably address the more complicated delays in speech and language development. Ms. Hewins was clear in her evaluation that [REDACTED] needed help in specific areas of his speech, which should be reflected in his IEP. Therefore, I find that that IEP was not sufficiently individualized with respect to speech and language goals, and was therefore not reasonably calculated on that basis.

Behavior Goals and Positive Behavior Plan

I find that the IEP was not reasonably calculated to address [REDACTED]'s social pragmatic skills, an area of concern discussed in both Dr. Dalzell's and Ms. Hewins' evaluations. Developmental Performance for children aged 3 to 5 includes social skills development. Clearly, the three goals included in the IEP discuss participation in small and large group activities. However, these goals are general in nature and do not address [REDACTED]'s more specific problem areas described in the evaluations. Dr. Dalzell was clear in his recommendations that [REDACTED] would benefit from directed teaching and coaching in social skills, including anticipatory guidance for social interactions. She also emphasized the benefit of developing a positive behavior plan to gauge specific social practice goals. The IDEA and MUSER are clear that positive behavioral

interventions should address developing or problematic behaviors. MUSER IX.3.C(2)(a), 20 USC 1414(d)(3)(B)(i). I find that the IEP is lacking these social behavior pragmatic goals and services, and therefore find that the IEP was not reasonably calculated in this area.

Academic Goals

I find that it was unnecessary to include an academic goal for listening in the IEP dated October 4, 2016. It is evident that two of the measurable goals under the Developmental Performance included listening: “[█] will watch, *listen* and participate during small group activities...” and “[█] will watch, *listen* and participate during large group activities...” [emphasis added]. While these two goals do not reside under Academic Performance, the implementation of the IEP includes this skill. Therefore, I do not find the placement of a goal for listening skills in this section of the IEP to be problematic.

Functional Performance

I find that the placement of goals in the developmental section of the IEP related to █’s functional performance is not fatal to the IEP. In fact, in an IEP, developmental performance is confined to addressing developmental delays of children 3 to 5 years old, while for children ages 5 to 20, developmental performance reflects significant cognitive disabilities. Ms. Metcalfe testified that those goals could have been placed in either the functional or developmental section of the IEP. She stated that █’s deficits as a four-year old could have been either developmental or functional.

Summary of Initial IEP

Based upon the above, I find that the IEP was not reasonably calculated to provide a FAPE to █ at the time it was created in the areas of speech and language goals, as well as social skills goals and services.

3. Whether the delay and failure to implement portions of the October 4, 2016 IEP, and further revisions of it, resulted in a denial of FAPE?

Parents' Position

The Parents argues that SDI and speech/language services were not implemented according to the IEP dated October 4, 2016. They state that while speech/language was implemented by November 22, 2016, it was not at the rate agreed upon in the IEP. In addition, the Parents claim that SDI was never implemented.

CDS's Position

CDS acknowledges that it failed to implement portions of the IEP dated October 4, 2016. It calculates that between October 4, 2016 and November 22, 2016 it failed to provide speech and language services for [REDACTED]. It also calculates between October 4, 2016 and December 5, 2016, it failed to provide SDI for [REDACTED] because it did not have an itinerant special educator on staff. It reasons that CDS and the Mother agreed on December 5, 2016 to amend the IEP to call for a more restrictive placement at a special school and that it made little sense to provide [REDACTED] with a new teacher for what was anticipated to be a short period before [REDACTED]'s placement at a new school.

Discussion

I find that the IEP dated October 4, 2016 was not implemented as written. CDS acknowledges that speech/language services were not implemented until November 22, 2016. A review of the IEP indicates that [REDACTED] was to receive 60 minutes per week of direct speech therapy and 90 minutes per quarter of consultation from the speech language therapist to the regular education teacher.

I also find that no SDI was ever provided to [REDACTED]. While there was a change at the IEP meeting on December 5, 2016 to have [REDACTED] in a specialized program, this did not give CDS allowance to end its responsibility to provide SDI and related services until an offer of interim SDI and services was made. In this case, I find that a valid offer of FAPE was made on December 9, 2016, when CDS offered a placement at Waban. (See below).

4. Whether the IEP developed on December 5, 2016, was reasonably calculated to achieve educational benefit based upon the information available the time and therefore provided a FAPE.

Parents' Position

The Parents argue that the IEP amended on December 5, 2016 did not reflect the agreements made at the IEP meeting on that date. Specifically, they assert that despite Ms. Folk's agreement to refer ██████ to MMCC, there was no language in the IEP to reflect this, other than mentioning that a referral would be made to a "separate school." They also argue that the IEP did not reflect the recommendations of Dr. Dalzell and Dr. Scarponi to provide ██████ with an ABA therapy program. They state that despite the agreement that ██████ needed specialized programming at a 2:1 student-teacher ratio, no other substantive changes to his goals were made to reflect his higher level of need.

CDS's Position

CDS argues that the IEP was amended on December 5, 2016, based upon new information provided by the Mother, Ms. Sibley, and ██████'s medical providers, as well as an occupational therapy assessment. Based upon the review of the new information, the IEP was amended to include new goals for functional and developmental needs relating to social skills and participation in group activities. Occupational therapy consultation was also added. While ABA therapy was discussed in the IEP meeting, CDS argues that it was not required to specify the type of methods used to deliver special education and related services in the IEP. Citing Ms. M. v. Falmouth, 847 F.3d 19, 27-28. CDS asserts that by including language in the IEP that calls for 30 hours per week of SDI under the direction of a teacher of students with disabilities in a separate school, they met the description of what qualifies for appropriate and specially-designed instruction. CDS does not believe that all students with ASD require generalized ABA therapy, but that instruction must be more individually tailored to the needs of the student. Citing the testimony of Ms. Marston, Ms. Bickford, Ms. Haskell, and Mr. Grover, CDS argues that multiple methodologies can be effective for students with autism.

CDS further argues that services offered at Waban, Back to Basics, or the Morrison Center would offer appropriate education provided by qualified personnel with the required state certification.

Finally, CDS argues that the selection of a particular provider is within its exclusive purview and parents are not permitted to choose from qualified providers or methodology. It states that as long as it offers the appropriate student-teacher ratio and SDI programming, CDS can make the offer of a FAPE to the Parents and that it is up to them to decide to accept it or not. CDS asserts that services █████ would have received at Waban, Back to Basic, or the Morrison Center would have been provided by qualified personnel with the required state certification.

Discussion

The IDEA does not require IEPs to include specific instructional methodology. 20 U.S.C. 1414(d)(1)(A)(ii)(I) (“nothing in this section shall be construed to require that additional information be included in a child’s IEP beyond what is explicitly required in this section.”) See also *Ms. M. v. Falmouth*, 847 F.3d 19, 27-28 (1st Cir. 2017). MUSER expressly categorizes “Specially Designed Instruction” as a distinct type of special education service, noting that it refers to “instruction provided to children . . . by an appropriately qualified special education professional or an appropriately authorized and supervised educational technician consistent with a child's IEP.” Me. Code R. 05-071, Ch. 101 § X.2(A)(2). At the same time, the IDEA does not require schools to include specific instructional methods in an IEP. See 20 U.S.C. 1414(d)(1)(A)(ii)(I) (stating that the IDEA shall not be construed to require “that additional information be included in a child's IEP beyond what is explicitly required in this section”). While it is the U.S. Department of Education's “longstanding position” to allow IEP teams to address specific instructional methods in IEPs, there is no requirement that they do so. See 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006) (“There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with [the IDEA], we cannot interpret . . . the Act to require that all elements of a program provided to a child be included in an IEP.”)

Parents, no matter how well motivated, do not have a right under the IDEA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child. *Brougham v. Town of Yarmouth* 823 F. Supp. 9, 16 (D. Me. 1993), citing *Rowley*.

The Supreme Court has ruled that the IDEA confers primary responsibility upon the school district to choose among competing methodologies. *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F. 3d 18, 27 (1st Cir. 2008), quoting *Rowley*, 458 U.S. at 207. On the other hand, selection of methodology can be a critical issue in IDEA cases that focus on the development and implementation of IEPs. If a school district fails to utilize an effective methodology for instructing a student, then its choice can be overturned as a violation of a FAPE. See, e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1999), citing *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989).

In 2006, when it issued a revised set of regulations, the Department of Education reiterated its position that “if an IEP Team determines that specific instructional methods are necessary for the child to receive a FAPE, the instructional methods may be addressed in the IEP.” 71 Fed. Reg. 46,665 (2006). In 2015, with respect to ABA therapy, the Department of Education’s Office of Special Education Programs reminded educational agencies that ABA therapy “is just one methodology” that may be appropriate for a child on the autism spectrum and that Part C and Part B of the IDEA require IEP teams to determine a child’s services based on the child's unique needs. *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015).

I find that the change of placement from the least restrictive environment to a more restrictive special purpose school with a 2:1 student-teacher service ratio was appropriate. The IEP Team, which included Ms. Folk and the Mother, along with the Mother’s advocate, agreed that, based upon reporting from the Mother and recommendations from Dr. Dalzell and Dr. Scarponi, [REDACTED] needed a more restrictive environment with a higher level of direct instruction. The Mother and Ms. Nieverth discussed the possibility of having [REDACTED] attend MMCC to receive SDI and whether ABA was a necessary methodology through which to receive his programming. Ms. Folk agreed to make a referral to MMCC because she thought it would be a good fit. She did

not state at the IEP meeting that it was the only fit or that other programs providing ABA-based therapy would not be appropriate.

The resulting amended IEP did not specifically name MMCC or ABA methodology. However, it was amended to include 2:1 specially designed instruction. Ms. Folk was credible in her testimony that while the information from the Mother about the difficulties [REDACTED] was experiencing at Head Start was very concerning and warranted an increase in student-teacher ratio, she did not believe, at that time, that a 1:1 ratio was supported by the available evidence. However, she stated that she was willing to refer [REDACTED] to a program that included ABA methodology, while not excluding other possible options. Therefore, the IEP was not restricted to one methodology or one placement through which the Student could receive instruction and services. While Ms. Folk understood that the Mother desired to have [REDACTED] attend MMCC, and she was willing to make a referral there, she could not guarantee that MMCC would be available.

Based upon these circumstances, I find that while the goals reflected in the IEP were still not specifically addressed regarding speech language therapy and pragmatic social skills, it was appropriate with respect to placement at a special purpose school with a 2:1 service ratio, given the specific circumstances occurring with [REDACTED] at the Head Start program.

5. Whether CDS failed to revise the Student's IEP based upon agreements made at the December 5, 2016 IEP meeting.

Parents' Position

The Parents argue that on December 5, 2016, CDS agreed to refer [REDACTED] to MMCC and discussed the benefit of using ABA methodology. They claim that CDS failed to revise the IEP to specifically name MMCC and did not include ABA therapy in the IEP. They assert that no other schools or programs were discussed on December 5, 2016, and that the Parents were clear in their minds that MMCC was the placement. They cite the Written Notice, which named MMCC, without reference to other programs. Therefore, the Parents argue that the failure to include these specific agreements makes the IEP inappropriate.

CDS's Position

CDS argues that while MMCC was the Parents first choice of placement to provide [REDACTED] with his SDI programming, Ms. Folk was notified after the IEP meeting on December 5, 2016, that it was not immediately available. She then searched for other programs that provided ABA-based services that could accept [REDACTED], including those that were discussed at the meeting on November 17, 2016 (e.g., Waban and Back to Basics). Therefore, the IEP reflected this by not specifically naming MMCC because it was not able to immediately accommodate the Parents' first choice.

Discussion

As stated above, the IEP meeting on December 5, 2016 was held based upon the Mother's concern that [REDACTED] was not getting the SDI agreed upon in the IEP dated October 4, 2016, and her belief that he was not progressing at Head Start. She had provided CDS with recommendations from Dr. Dalzell and Dr. Scarponi. Dr. Dalzell believed that [REDACTED] would benefit from "more intensive therapy such as ABA therapy." Dr. Scarponi's note authorized ABA for medical insurance purposes. While there was no in-depth rationale included in their letters, Ms. Folk agreed to refer [REDACTED] to MMCC and amend his IEP to reflect 2:1 SDI and to change his placement.

While the amended IEP did not specifically name MMCC, the agreement at the meeting was to refer [REDACTED] to MMCC, however, Ms. Folk did not have the authority to guarantee his placement there. The amended IEP reflected a change of placement by stating that he would benefit from receiving SDI at a "separate school." I find that this description of the agreement conforms to the IDEA requirements. CDS sufficiently described the changes agreed upon at the IEP meeting while leaving open the possibility that if MMCC could not accept [REDACTED], other appropriate placements could be pursued.

In addition, CDS was not required to identify which type of methodology it was going to use in the IEP. I find that there was no specific agreement to include ABA therapy in the IEP. The IEP was left open to be flexible enough to provide options for how it was going to

implement the IEP. Therefore, while the Mother preferred ABA therapy, the IEP was not flawed because it did not specifically include or refer to ABA methodology.

6. Whether CDS' offer to implement the December 5, 2016 IEP through a placement at the Waban Fraser-Ford Center was a valid offer of FAPE that was refused by the Parents.

Parents' Position

The Parents argue that at the time of the offer to provide programming at Waban, CDS had not evaluated [REDACTED] in all areas of suspected disability or performed a classroom observation. They imply that there was no way to know whether programming at Waban would be appropriate or provide [REDACTED] with a FAPE.

CDS's Position

CDS argues that as of December 5, 2016, the IEP called for 30 hours per week of SDI, provided in a special school. It asserts that Waban is a certified program in the State of Maine that provides SDI by qualified personnel and that it was able to implement all aspects of [REDACTED]'s IEP.

Discussion

When CDS was notified on December 6, 2016, that MMCC would not be able to admit [REDACTED] immediately, Ms. Folk took steps to secure another placement that would be able to provide [REDACTED] with SDI in a more restrictive setting. She had been in contact with Waban and contacted them again after MMCC informed her of its unavailability. At that point, the IEP Team agreed that [REDACTED] needed a lower student-teacher ratio in order for him to access his SDI.

Waban Projects, Inc. is a non-profit corporation organized to develop and operate program that promote the general welfare and education of children and adults with developmental and other disabilities. It includes the Waban Fraser-Ford Child Development Center, which provides special purpose therapeutic preschool programs in an inclusive environment for children with autism and other developmental/intellectual disabilities. CDS

refers children to Waban for SDI and other services. It is staffed by qualified personnel with Maine certifications and is able to implement [REDACTED]'s IEP.

Waban was available to admit [REDACTED] on December 9, 2016, and CDS offered to provide [REDACTED]'s programming at Waban at that time. However, the Mother chose not to accept the offer. I find that the offer of providing a FAPE at Waban while waiting for an opening at MMCC was a valid offer. The Mother's refusal of the offer based upon her dislike of some aspects of the program does not disqualify Waban as a valid offer. Furthermore, there is no evidence in the record indicating Waban was not an appropriate placement.

The Parents' argument that Waban may not have been an appropriate placement because he had not yet been evaluated for all suspected disabilities lacks merit. At the time, the IEP had already qualified him for SDI under the category of autism. While [REDACTED] may have had additional or overlapping disabilities, such as a learning disability, this would not have disqualified Waban if it provided the SDI and services that were already delineated in his IEP. If future evaluations would have indicated additional or different services were needed, the IEP Team would need to revise the IEP. However, as of December, 2016, Waban was able to provide the SDI and services in [REDACTED]'s IEP.

7. Whether the IEP developed on February 2, 2017, was reasonably calculated to achieve educational benefit based on the information available at the time and therefore provided a FAPE.

Parents' Position

The Parents argue that the IEP Team's agreement to include MMCC was not included in the IEP dated February 2, 2017. They also argue that the academic evaluation was not discussed at the emergency IEP meeting on February 2, 2017, and therefore no recommendations flowing from it were included in the IEP. Finally, the Parents argue that the goals as stated in the IEP remained unchanged and that there was no mention of ABA services. They assert, therefore, that the IEP was not reasonably calculated to provide a FAPE to [REDACTED]

CDS's Position

CDS argues that the IEP Team agreed to a 1:1 student-teacher ratio on February 2, 2017, which was reflected in the amended IEP. It argues that the team agreed to schedule another IEP meeting to review the academic evaluation done by Ms. Marston. The meeting on February 2, 2017 was scheduled on short notice based upon the Mother's urgent concerns for [REDACTED]. However, after the meeting, she pulled [REDACTED] from Head Start, and the IEP meeting to review the academic evaluation was never held. CDS argues that perhaps the Mother believed that once the IEP Team agreed to the 1:1 ratio, [REDACTED] would be moved up on the waitlist at MMCC.

Discussion

On February 2, 2017, [REDACTED] was still enrolled at Head Start and the Mother had refused CDS' offer to provide 2:1 SDI at Waban, which would have started in mid-December 2016. The Mother had filed the Due Process Hearing Request on January 19, 2017, and a resolution meeting had occurred on January 30, 2017 in which CDS offered 1:1 SDI in order to facilitate a referral and placement on MMCC's waitlist. The Mother declined the offer that day, but contacted CDS on February 1, 2017, stating that she would, in fact, accept the offer. On February 2, 2017, an emergency IEP was convened at the request of the Mother, at which time the same offer was made. If the Mother had not unilaterally pulled [REDACTED] from Head Start after the meeting on February 2, 2017, the full IEP Team would have met and made changes to the IEP, if necessary, based upon a review of the academic evaluation.

I find that the placement in a special purpose school was reasonably calculated to provide the SDI for [REDACTED] given the information that the IEP Team had at the time. The IEP Team agreed that [REDACTED] needed SDI in a more restrictive environment. It agreed with the Mother that while it was waiting to review the academic evaluation performed by Ms. Marston, a 1:1 student-teacher ratio was reasonable. The IEP Team also agreed with the Mother that MMCC was an appropriate placement in which [REDACTED] could receive his programming. It agreed to include MMCC as his placement in the IEP despite the fact that he was not going to be able to attend until late March 2017.

However, the IEP was still deficit with respect to the lack of individualized goals in pragmatic social skills goals and services, as well as individualized speech and language goals as recommended by Ms. Hewins.

Based upon the above, I find that the IEP dated February 2, 2017, was not reasonably calculated to provide a FAPE in the areas of pragmatic social skills goals and speech and language goals.

8. Whether CDS' offer to provide interim services until the February 2, 2017 IEP could be implemented at MMCC was a valid offer of FAPE that was refused by the Parents.

Parents' Position

The Parents argue that the interim services offered until the IEP dated February 2, 2017, could be implemented were inappropriate. They specifically assert that because the Morrison Center could only provide 3:1 student-teacher ratio, and combined children with various disabilities in the same learning environment, the setting was unable to meet the specific needs of children.

CDS's Position

CDS argues that in offering multiple alternative options for the provision of SDI for [REDACTED], it was in compliance with MUSER IX(3)(B)(3). It argues that the Morrison Center, in particular, could provide 30 hours per week of SDI in a less restrictive 3:1 student-to-teacher setting. As such, this was not an unreasonable offer until MMCC became available.

Discussion

Where an IEP Team is unable to implement an IEP as written, the IEP Team shall determine any amendments to the IEP necessary to reflect the inability to begin services as originally anticipated. MUSER IX(3)(B)(3). In this case, MMCC was the agreed-upon placement, however it was not going to be available until March 2017. Therefore, the IEP Team had to make temporary adjustments until MMCC became available. CDS proposed alternative interim services, including services in the home, services at Head Start, and a 30-hour a week

placement at a 3:1 student-teacher ratio at the Morrison Center, all refused by the Parents. I find that these offers of interim services were not unreasonable, given all the options that had been refused by the Parents up until that point.

It is apparent that the Mother's desire to have [REDACTED] attend MMCC, which she believed was the only place for him to receive an appropriate education, outweighed any offers of a FAPE to be provided elsewhere. She believed that his programming could only be administered using ABA methodology as it is used at MMCC. Her refusals of offers of all other options at programs that provide programming for children with ASD, without evidence that these programs were inappropriate, point to her singular desire to have [REDACTED] attend MMCC.

While it is understandable that the Mother was fighting for what she believed was the best program for her son, the law does not require that the best option be provided. Programming must be reasonably calculated to provide a FAPE. In this case, CDS provided many reasonable options, including placements at Waban and Back to Basics. There is no evidence that [REDACTED]'s IEP could not have been implemented at these programs. They are designed to provide SDI using methodologies known to be successful, as described by Ms. Haskell and Mr. Grover.

There is no evidence that the interim programming offered to the Parents was not reasonable. CDS's attempts to offer programming during the period that MMCC was unavailable were reasonably calculated to enable [REDACTED] to make appropriate progress in light of his circumstance. He could stay at Head Start or receive services at home. He could also have been provided his programming at Waban or Back to Basics, programs certified to provide day treatment programming for children with intellectual disabilities, include ASD. While the student-teacher ratio would have been 3:1 at Back to Basics, I find that this would not have been unreasonable given the SDI would have been provided by trained professionals for an interim period of time. Therefore, I find that the options offered to provide programming to the Student during the interim period were not unreasonable or a violation of the IDEA.

9. Whether CDS's offer to implement the February 2, 2017 IEP through a placement at the Waban Fraser-Ford Center or Back to Basics Behavior Health Services was a valid offer of FAPE that was refused by the Parents.

Parents' Position

The Parents argue that neither Waban nor Back to Basics were appropriate offers of a FAPE. They assert that because the academic evaluation had not been reviewed, there was no way of knowing whether a placement at other than MMCC was appropriate. They noted that Back to Basics did not have a BCBA on staff and that staff did not apparently know what ABA therapy is when the Mother asked them on her tour of the program. The Parents believe, therefore, that because it cannot offer a true ABA program, it was inappropriate for ██████ to attend. Even if Back to Basics was going to hire a BCBA to train its staff, the Parents did not believe that the program would be appropriate, and that it might perhaps be dangerous, citing Ms. Bickford's testimony about the dilemma of using an untrained person to provide ABA therapy.

CDS's Position

CDS argues that both Waban and Back to Basics offered programs that could implement ██████'s IEP. It claims that both have certified and qualified special education teachers and educational technicians. In addition to speech services and OT consultation, BCBA's would have been provided if the Parents accepted CDS' offer to implement ██████'s IEP at either of them.

Discussion

As stated above, both Waban and Back to Basics provide programming for children on the autism spectrum by trained professionals. Ms. Haskell and Mr. Grover both credibly testified that their programs have highly trained staff that is familiar with various methodologies used to implement IEPs, including ABA-based methodologies. While the Parents may disagree, CDS has the sole discretion to determine the appropriate methodologies used to implement a student's program.

Therefore, I find that CDS made valid offers of a FAPE by offering placements at either Waban or Back to Basics.

10. Whether CDS failed to adequately consider the Parents' concerns during the IEP process from July 15, 2016.

Parents' Position

The Parents argue that throughout the relevant time period, CDS has failed to take the Parents' concerns seriously. They refer to several instances in this regard. They believe that CDS:

- Did not consider the letters they submitted from Drs. Dalzell and Scarponi because the IEP was not changed to reflect their concerns;
- Did not amend the IEP when the Mother, as well as the regular education teacher, reported unsafe behaviors in the regular classroom;
- Ended the IEP meeting to end discussion about unethical practices at Waban;
- Did not consider the Mother's views about the classroom at Waban;
- Denied a request for a working session on December 22, 2016 to discuss safety concerns at Head Start;
- Failed to amend the IEP to a 1:1 student-teacher ratio upon the Mother's request after Ms. Folk had promised she would do so;
- Failed to comply with a FERPA request made by the Parents;
- Refused to discuss safety issues because the Parents had filed for a due process hearing;
- Did not include ABA methodology in the IEP;
- Threatened to end an IEP meeting when issues regarding owed services were brought up at the IEP meeting on February 2, 2017;
- Failed to consider specific learning disabilities.

CDS's Position

CDS argues that it has considered the Parents concerns since [REDACTED] was referred for services. It states that it has helped the Parents secure SDI speech and OT therapy, and a placement that provides [REDACTED] with SDI using ABA-based methodology. It states that it offered to have [REDACTED] placed at Waban when MMCC was unavailable in December 2016. As such, it offered a FAPE from that point going forward.

Discussion

The IDEA requires that Parents must be integral participants on the IEP Team. 20 U.S.C. § 1414(d)(1)(B); *Lessard*, 518 F.3d at 23. The record reflects that CDS worked diligently with the Mother to get the programming that she believed was best for [REDACTED]

A review of the record shows that Ms. Folk responded to the Parents' requests for informal and formal IEP meetings in a timely manner. It is clear that after October 4, 2016, the Mother became more concerned about the Head Start setting and the apparent lack of services [REDACTED] was receiving. Ms. Folk became involved in [REDACTED]'s case at some point before December 5, 2016, and essentially became the Mother's point of contact thereafter. As discussed above, while CDS failed to implement [REDACTED]'s IEP up until November 22, 2016 due to a lack of an itinerant special educator and speech therapist, the record reflects that CDS was responsive to the Mother's concerns when they were raised.

CDS was responsive when the Mother reported at the IEP meeting on December 5, 2016, that she believed Head Start was no longer appropriate for [REDACTED]. IEP Team meetings were held to review the changing circumstances, such as the increased classroom size and [REDACTED]'s apparently changing behaviors. The IEP was amended to reflect that [REDACTED] needed to have a lower student-teacher ratio at a separate school. While MMCC, the Mother's preferred placement, was not available, the referrals to alternative placements, such as Waban, were clearly responsive to [REDACTED]'s needs. In addition, Ms. Folk made sure that an academic evaluation would be conducted to determine [REDACTED]'s current levels of academic performance. At her suggestion, the IEP Team met again on December 22, 2016 to discuss the IEP and any of the Mother's other concerns. Ms. Folk agreed to refer [REDACTED] to MMCC and scheduled an academic evaluation to be performed. While the Mother rejected all options other than MMCC, Ms. Folk continued to work with the Mother to find programming.

Ms. Folk continued to work with MMCC to get [REDACTED] on the wait list by considering changing the student-teacher ratio from 2:1 to 1:1. Through no fault of her own, she was unable to get paperwork approved fast enough to allow MMCC to begin the admissions process. Meanwhile, offers of a FAPE at other programs were still being offered in January 2017.

There was one procedural defect in Ms. Folk's handling of the Parents' concerns. She withdrew the MMCC referral on January 30, 2017, when the Parents filed their Hearing Request. It is not clear why she did this, but I do not find that it was done with bad intent. I find that the Ms. Folk made the procedural mistake by thinking that offers of a FAPE had to be withdrawn once a due process hearing request was filed. When she was informed this was not the case, she contacted MMCC and again proceeded with the referral process. MMCC agreed to place [REDACTED] on the wait list and he was slated to be admitted in March 2017. I find that the procedural mistake was not fatal to CDS's agreed-upon attempts to place [REDACTED] at MMCC.

I find that based upon the entirety of the record, CDS was responsive to the Parents' concerns from the time that [REDACTED] was referred in July 2016.

11. Whether CDS failed to consider evaluations from outside providers presented to the IEP Team by the Parents since July 5, 2016.

Parents' Position

The Parents argue that portions of evaluations from providers were not reflected in [REDACTED]'s IEP. They assert that the IEP did not reflect Ms. Hewins' concerns that [REDACTED] could not perform age-appropriate tasks such as waving hello or goodbye independently, introducing new conversation topics, or telling details of a story. They argue that no goals were added to the IEP that reflected concerns about [REDACTED]'s low scores in receptive speech, expressive language, or language structure. The Parents also note that while Ms. Hewins recommended four language goals, only one was included in the IEP. They cite the testimony of Ms. Goulding, the CDS Administrator, who did not know why the three other goals were not included in the IEP, other than presuming that the one general goal was responsive to all the concerns raised by Ms. Hewins.

The Parents also argue that the IEP Team did not consider Dr. Dalzell's recommendation to perform a classroom observation. They fault Ms. Folk for not being responsive to this when she became the case manager in November 2016.

CDS' Position

CDS argues that it reviewed and took into account all of the evaluations presented to it by the Mother. It states that it took the recommendations of Dr. Dalzell to provide a more restrictive setting. It included OT consultation based upon the OT evaluation performed by Ms. Farwell. It also considered the letters from Drs. Dalzell and Scarponi submitted in the fall of 2016, when the IEP was amended to include SDI at a special school.

Discussion

The major responsibilities of an IEP Team are: 1) To review, as part of an initial evaluation (if appropriate) and as part of any reevaluation of a child, existing evaluation data (including evaluations and information provided by the parents of the child and current classroom-based assessments and observations, including those from teachers and supportive services providers) and to identify, with input from the child's parents, what additional data, if any, are needed to determine whether a child is a child with a disability as defined in MUSER VII; (2) To determine the present levels of performance and educational needs of the child in all affected academic and non-academic areas. MUSER VI.2(J)(1)(2).

I find that CDS considered all evaluations provided to it by the Parents since July 5, 2016. Initially, CDS reviewed the speech and language evaluation performed in the fall of 2015 at Frisbie Memorial Hospital. Since it was several months later, the Mother agreed to have CDS conduct another evaluation, performed on September 12, 2016. On that same day, the Mother contacted CDS and reported that Dr. Dalzell had performed a psychological evaluation of [REDACTED]. According to intake documentation provided by CDS, the Mother submitted that evaluation to CDS on September 20, 2016. This was the first time that CDS had been aware of an ASD diagnosis.

The IEP Team met on October 4, 2016, and reviewed Dr. Dalzell's evaluations, along with a speech and language evaluation performed by Ms. Hewins. Based upon these evaluations, the observation reports from Ms. Sibley, and the Mother's understanding of [REDACTED]'s disability, the IEP Team determined that [REDACTED] qualified for SDI and services under the category of autism, and

that it was having an adverse effect on his educational performance. The record does not reflect any additional outside evaluations provided to CDS by the Parents since their referral of [REDACTED] to CDS.

The IEP dated October 4, 2016, included goals related to [REDACTED]'s speech and language deficits and social skills. These were based upon evaluations from Dr. Dalzell and Ms. Hewins. While the Mother argues that the IEP does not include the specific recommendations included in their evaluations, the IEP Team agreed that three hours per week of SDI from an itinerant special education, 90 minutes per quarter of consultation from the special educator to the regular education teachers, 60 minutes per week of direct speech therapy, and 90 minutes per quarter of consultation from the speech language therapist to the regular education teacher would be sufficient to allow [REDACTED] to successfully participate in the classroom with group and peer activities. The goals in the IEP dated October 4, 2016, reflect recommendations from Dr. Dalzell and Ms. Hewins regarding social skills (increasing peer interaction and participation in small and large group activities) and speech and language development.

There is no evidence in the record that this programming was not reasonably calculated to provide a FAPE at that point in time.

The record reflects that on December 5, 2016, Ms. Folk not only took into consideration the Mother's concerns for [REDACTED]'s lack of progress, but also letters from Dr. Dalzell and Dr. Scarponi indicating that [REDACTED] would benefit from therapy using ABA methodology. In addition, extended school year ("ESY") services, which were recommended by Dr. Dalzell, were added to the IEP. Based upon these consideration, CDS agreed to refer [REDACTED] to a special school.

Therefore, I find that CDS properly considered outside information when considering appropriate programming for [REDACTED]

12. Whether CDS failed to conduct appropriate IEP Team meetings on November 17, 2016, December 5, 2016, and December 22, 2016.

November 17, 2016

Parents' Position

The Parents do not argue that the CDS failed to conduct appropriate IEP Team meeting on November 17, 2016.

CDS's Position

CDS argues that the meeting on November 17, 2016 was an informal one requested to discuss the apparent failure to implement the IEP. It was meant to be an update on how things were going at Head Start. It argues that the elements to consider it an IEP meeting are absent, including an Advance Written Notice, a Written Notice, and the lack of IEP Team members. What was determined at the meeting was to schedule an IEP meeting in order for the Team to change the IEP based upon the new information being reported by the Mother and outside providers.

Discussion

I find that the meeting held on November 17, 2016, was not an IEP meeting. The Mother contacted CDS to discuss the reasons why ■■■ had not started to receive the programming that was included in his IEP. There was no Advance Written Notice or Written Notice of the meeting. It was held on an emergency basis and no waiver of attendance for the missing IEP members was signed. The meeting was informational only. Based upon the discussion with Ms. Folk, a determination was made that an IEP Team meeting would be scheduled for December 5, 2016, in order to amend the IEP to provide for more intensive services in light of the circumstances ■■■ was experiencing at the Head Start program, and to discuss alternative program options. Furthermore, the Parents do not claim the meeting was an IEP meeting in their written brief.

Therefore, I find that no procedural violation occurred with respect to the informal meeting held on November 17, 2016.

December 5, 2016 Meeting

Parents' Position

The Parents argue that the IEP Team was not complete on December 5, 2016. They argue that Ms. Sibley, the regular education teacher was not present at the meeting. The Parents state that it was unclear why she was not in attendance and that it was concerning that only Ms. Folk was present for the IEP Team.

CDS's Position

CDS argues that the meeting on December 22, 2016 was an informational meeting, not an IEP meeting.

Discussion

MUSER VI.2.B.2(E) provides that required members of an IEP team are not required to attend an IEP Team Meeting, in whole or in part, if the parent of a child with a disability and the School Administrative Unit agree in writing that the attendance of such member is not necessary because the member's area of curriculum or related services is not being modified or discussed in the meeting.

The meeting held on December 5, 2016, was intended to be an IEP meeting. An Advance Written Notice was issued that included all the required IEP Team members. However, at the meeting, only Ms. Folk was in attendance from CDS. The required regular education teacher, Ms. Sibley, was not present. No written waiver for her nonattendance was signed. Ms. Folk, a certified special education teacher and CDS administrator, along with the Mother, was sufficient to complete a proper IEP team if the Mother agreed to continue the meeting. It was apparent the Mother choose to continue the meeting, but there is no evidence that she signed a waiver excusing the regular education teacher.

I find that there was a procedural violation in conducting the IEP meeting on December 5, 2016, by not having the Mother sign a waiver to excuse the regular education teacher. In order for a procedural violation to rise to the level that causes a deprivation of a FAPE, it must impede

a student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of education benefit for the student.

The IEP Team made significant decisions on December 5, 2016, including amending the IEP to provide for 2:1 SDI in a separate school placement. The Mother, who had been advocating for a more intensive program, agreed to the amendment. Therefore, I find that the procedural violation neither impeded [REDACTED]'s right to a FAPE nor the Parents' participation in the IEP Team process. There is no evidence that the violation caused a deprivation of educational benefit.

December 22, 2017

Parents' Position

The Parents argue that the meeting on December 22, 2017 was an IEP meeting and that decisions made in that meeting must be implemented. The Parents state that all participants on the team were present and that a Written Notice was issued that described the decisions that were made.

CDS's Position

CDS argues that the meeting on December 22, 2016 was an informal meeting to explain the sections of the IEP to the Mother. It claims that it was not scheduled to make amendments to the IEP. It reasons that it would have been inappropriate to do so prior to reviewing the result of Ms. Marston's educational evaluation to be completed in January 2017. It argues that the Parents cannot claim afterwards that the meeting essentially became an IEP meeting during the meeting, and insist that potential changes to the IEP that were discussed had become binding agreements.

Discussion

I find that the meeting held on December 22, 2016, was not an IEP meeting. The Mother and Ms. Folk arranged to have an emergency meeting on that date to discuss the IEP. While emails seem to indicate that an IEP Team meeting needed to be scheduled, Ms. Folk also stated that no changes to the IEP would be made on that day and that the meeting was scheduled in order for Ms. Folk and the Mother to discuss aspects of the IEP. Ms. Folk was clear in her emails

that an IEP meeting would be arranged thereafter, but that she could go over the IEP in that meeting on December 22, 2016.

The meeting on December 22, 2016, had all the IEP Team members in attendance. Ms. Sibley, invited by the Mother to join the meeting, attended by telephone. Ms. Pam Scribner, the CDS Program Manager, Ms. Folk, the Mother, and Ms. Nieverth were also present. After hearing from Ms. Sibley, it was clear to Ms. Folk that [REDACTED] needed a 1:1 student-teacher ratio for his SDI and that an educational evaluation needed to be performed by Ms. Marston. I find that Ms. Folk, at that point, wanted the Mother to sign a waiver of the seven-day notice Advance Written Notice so she could consider the meeting an IEP meeting. While it is unclear whether the Mother signed a waiver, a Written Notice of the meeting was generated, which indicated that no amendments made to the IEP at that time.

I find that there is insufficient evidence to provide that the meeting on December 22, 2016 was an official IEP meeting.

13. If any of the actions on the part of CDS in paragraphs 1 through 12 failed to provide the Student with a FAPE, what remedy is appropriate?

Parents' Position

The Parents argue that the failure to provide a FAPE since October 4, 2016, requires CDS to provide compensatory education. They urge that the compensatory education must be provided at MMCC for one year. The Parents also state that they are entitled to reimbursement for tuition at Smartipants, including the costs of transportation, where they unilaterally placed the Student after the IEP meeting on February 2, 2017. The Parents also request attorney fees if they are the prevailing party.

CDS's Position

CDS admits that the IEP dated October 4, 2016 was not timely implemented between November 3, 2016 and December 5, 2016. It calculates that [REDACTED] is owed 12 hours of SDI and one hour of speech therapy. It argues that no other FAPE violation occurred with respect to any

of the offers CDS made to the Parents concerning placement. It cites the many offers made and refused by the Parents, despite its belief that they were all appropriate and able to implement ■■■'s IEP. It also urges that CDS had no obligation to insert specific methodology into the IEP. It states that ultimately that the Parents prevented the IEP from being implemented by refusing any and all offers of a FAPE.

Discussion

I find that CDS failed to provide ■■■ with SDI from November 3, 2016, through December 9, 2016. During this period of time, CDS acknowledges that it was unable to locate an itinerant special education teacher to provide the SDI programming in ■■■'s IEP. On December 9, 2016, CDS offered a placement at Waban, an accredited program able to provide ■■■ with SDI at a 2:1 service level, as well as the other services in his IEP. The Mother rejected the offer because she was concerned about staffing levels and the younger ages of the children. While not ideal, the program was able to offer SDI in the more restrictive setting, as stated in the IEP dated December 5, 2016.

I also find that that CDS failed to provide speech therapy as written in the IEP from November 3, 2016 until November 22, 2016.

In failing to conduct an academic evaluation upon review of Ms. Hewins' and Dr. Dalzell's evaluations, both indicating other possible cognitive problems, the issue is whether it would have made a difference in how the IEP Team would have crafted his IEP on October 4, 2016. Ms. Marston conducted the academic evaluation and observation on January 13, 2017. In summary, she found that ■■■ scored in the average range on the academic/cognitive composite and average on the mathematics subscore. However, she found that his literacy subscore was in the mild delay range, as was his pre-academic subscore on the ABAS-3. Based upon his scores, Ms. Marston recommended that ■■■ have a low student-teacher ratio in the classroom taught by a special education teacher and that the correct student-teacher ratio would be 2:1. While this evaluation is a snapshot of ■■■'s cognitive and functional level on January 13, 2016, in all likelihood it would have been similar on October 4, 2016, if the evaluation had been performed sometime in the fall of 2016.

The IEP Team considered the student-teacher ratio at Head Start at that time. The Team understood that it needed to keep an eye on class size, since [REDACTED] had to be redirected and refocused. However, the Team initially did not want to change his placement to a more restrictive setting if he could continue to participate with his peers in the regular education setting. The Team members agreed that it would need to monitor class size, i.e. student-teacher ratio. Furthermore, there were no concerns raised regarding his cognitive or academic progress, which was consistent with what Ms. Marston found almost four months later.

Therefore, I find that the failure to conduct an academic evaluation upon the review of the speech and language evaluation did not deprive the Student with a FAPE.

14. Ancillary Issues

Exhibits P-8 and P-20

The Parents raised an issue in their brief that requires a response. At the due process hearing, it became evident that CDS had not produced a document pursuant to the Parents' subpoena that became an issue. P-8 and P-20, emails between CDS and MMCC, were part of the same email. One was not complete. Both exhibits are part of the record. The Parents allege that CDS and/or its attorney intentionally tampered with the document to hide certain comments made in them. While the hearing officer does not have jurisdiction to determine any potential criminal intent to tamper with evidence, I find that, taken as a whole, P-8 and P-20 contain all the information in the email and are now part of the record .

Testimony of Ms. Folk regarding Referral to MMCC

The Parents contend that Ms. Folk perjured herself by testifying that she did not withdraw the referral made to MMCC, but that MMCC denied the referral. The Parents cite the testimony of Ms. Bickford, wherein she cites the email from Ms. Folk, dated January 30, 2017, informing her that CDS was essentially withdrawing its referral of [REDACTED] from MMCC. [J-1]. This email was not included in the subpoenaed documents. The substance of this communication was in direct conflict with Ms. Folk's testimony that [REDACTED]'s referral had been denied a second time by MMCC and that Ms. Folk did not retract the referral. [Test Folk 167-169, 173, 179]. The hearing

officer's authority is limited only to determining whether there has been a violation of the IDEA related to the provision of a FAPE to students, not to whether a witness is guilty of perjury. However, credibility determinations are often made based upon witness testimony and demeanor. In this case, I find that Ms. Folk's testimony of her understanding of why [REDACTED] was no longer referred to MMCC as of January 30, 2017, was not credible. Based upon the wording of the email dated January 30, 2017, it is evident that Ms. Folk herself withdrew the referral from MMCC after the resolution meeting on January 30, 2017. However, this fact does not change any findings or conclusions made in this decision, since [REDACTED] was again referred to MMCC after the resolution session and was back on the wait list (as of the date of the hearing), in the same position he would have been if his application had been processed in December 2016.

The Parents also attempt to argue that Ms. Folk retracted her statement in an email to Ms. Bickford, saying that MMCC was the only ABA program in southern Maine. [P-11]. While Ms. Folk may have believed that MMCC was the best program for ABA therapy, she did not limit herself to an understanding that it was the only ABA-based option available. I do not find any credibility issues with Ms. Folk's testimony in this regard.

Testimony about the Accuracy of the IEP

The Parents take issue with Ms. Folk's language used in the meeting on December 22, 2016, where she describes [REDACTED]'s IEP as not being "accurate" and that the goals were going to be updated. [P-11]. The Parents cite her testimony, when she stated that she never said that the IEP wasn't appropriate. [Test. Folk 99:5]. I do not find a credibility issue here merely because Ms. Folk believed some of the goals were inaccurate. Inaccuracy of goals, depending the severity of them, may or may not rise to the level of making the entire IEP inappropriate. There may be some portions that need updating by the IEP Team. I do not find any credibility issues with this testimony.

Subpoena Issues

The Parents claim that CDS failed to comply with their subpoena request. The hearing officer does not have jurisdiction to rule on subpoena issues. The Parents must take this matter to a court of competent jurisdiction for findings on these issues.

Bribery and Withholding of Evidence at IEP meeting

The Parents claim that they were being “blackmailed” when CDS offered 1:1 services at MMCC at the Resolution Meeting on January 30, 2017. The hearing officer does not have jurisdiction to rule on any alleged criminal allegations.

VI. REMEDY

Based upon the above, I order the following remedy:

1. CDS must provide [REDACTED] with compensatory specially-designed instruction for 15 hours, and one hour of compensatory speech and language therapy;
2. CDS must amend the IEP to include goals as stated in the Speech and Language evaluation, dated September 12, 2016, and provide SDI and related services based upon those goals, for a period of five months, at a frequency to be determined by the IEP Team;
3. The IEP Team must meet to discuss, determine, and amend the IEP to include appropriate, individualized pragmatic social skills goals and related services, including a positive behavior plan, as recommended by Dr. Dalzell, in order to address [REDACTED]'s social skills development in the IEP. This meeting must occur within 14 schools days of the receipt of this decision.
4. Based upon the IEP determination in number 3, above, CDS must provide [REDACTED] with compensatory SDI and related services to address [REDACTED]'s pragmatic social skills development, for a period of five months from the date of the IEP meeting, at a frequency to be determined by the IEP Team.
5. The compensatory education described above shall begin within 21 days of the receipt of this decision.

It is so ORDERED.



A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Hearing Officer

May 30, 2017