

Complaint Investigation Report
Parent v. Lewiston October 5,
2009

Complaint # 10.002C
Complaint Investigator: David C. Webb
Date of Appointment: July 10, 2009

I. Identifying Information

Complainants Parent
Address
City, Zip

Respondent: Leon Levesque, Superintendent
36 Oak St.
Lewiston, ME 04240

Mel Curtis, Director of Special Education

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

On July 9, 2009, the Maine Department of Education received this complaint. The complaint investigator was appointed on July 10, 2009.

The complaint investigator received 195 pages of documents from the respondents and two pages of documents from the parents. Interviews were conducted with the following people: Parent; Emily Hebb, Case Manager Tri County Mental Health Services; Burl Hall, MST Clinician, Tri County Mental Health Services; Debbie Hannigan Anctil, M.S., School Psychological Services Provider; Susan Powers, Psy.D. School Psychological Services Provider; Linda Barrington, Special Education Coordinator, Lewiston Public Schools; Megan Praschak, Special Education Teacher, Lewiston Middle School; Cassandra Young, Regular Education Math Teacher, Lewiston Middle School; Sandra Cyr, Regular Education Teacher, Lewiston Middle School; Scott Walker, Assistant Principal, Lewiston Middle School; and Jennifer Mogul, MD, Child/Adolescent Psychiatrist, Tri-County Mental Health Services.

III. Preliminary Statement

The Student is xx years old and currently attends the Regional Educational Treatment Center-Success of Student (RETC/SOS) Day Treatment program in Auburn as a xx grader pursuant to a determination made at an IEP team meeting convened on March 23, 2009. He has a diagnosis for attention deficit and anxiety disorder and receives special education services under the exceptionality of Emotional Disturbance.

This complaint was filed by the Student's parent ("Parent") alleging that Lewiston Public Schools ("District") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on July 16, alleging 11 separate violations of the MUSER. A Complaint Investigation Meeting was held at the Lewiston Superintendent's office on July 22, 2009. In addition to the Complaint Investigator, persons present at this meeting were: Parent; Katrina Ringrose, Advocate; Mel Curtis and Linda Barrington, Lewiston Public Schools.

At this meeting, in addition to confirming the document and witness lists to be considered as part of this investigation, the parties agreed to the following stipulations: 1) The parent's allegations refer only to special education services provided to the Student between the time period of February 2008 to the present, and 2) The District may provide or schedule an evaluation of the Student, with the parent's consent. The parties agreed that the District's willingness to provide said evaluation or evaluations shall not be an admission or denial of any of the allegations contained within this Complaint Investigation. A Complaint Investigation Meeting Report was prepared and sent to the parties on July 22, 2009. The date of the initial draft of this report was extended to September 4 due to the Complaint Investigator's inability to arrange interviews with several key witnesses involved in this case.

IV. Allegations

1. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;
2. Failure to ensure that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;
3. Failure to ensure that a continuum of alternative placements is available to meet the Student's educational needs in violation of MUSER §X.2.B;
4. Failure to conduct a manifestation determination in violation of MUSER § XVII.1.E;
5. Failure to conduct a functional behavioral assessment or to develop a behavioral intervention plan in violation of MUSER §XVII.1.F;
6. Failure to consider the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a);
7. Failure to consider existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c);
8. Failure to implement the Student's IEP within 30 days or to convene an IEP meeting to identify alternative service options in violation of MUSER §IX.3.B.(3);
9. Failure to provide the parents with proper prior written notice of the district's proposals regarding the student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503);

10. Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I); and
11. Failure to identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d).

V. Summary of Findings

1. The Student is xx years old and currently attends the Regional Educational Treatment Center-Success of Student (RETC/SOS) Day Treatment program in Auburn as a xx grader pursuant to a determination made at an IEP team meeting convened on March 23, 2009. He has a diagnosis for attention deficit and anxiety disorder and receives special education services under the exceptionality of Emotional Disturbance.
2. On February 6, 2008, a “Pupil Evaluation Referral Form” was prepared by Loretta Hamann, the Student’s regular education math teacher. In this form, Ms. Hamann states that the reason for the referral is: “Failing grades, frequent disruptions due to issues with self-control, distractibility and impulsive behaviors.” She stated on this form that the Student is “non-compliant to staff requests, is verbally aggressive to peers/adults, redirect does not change behavior and frequent use of inappropriate language, i.e. swearing, sexual.” She noted as other relevant factors an “excessive number of white slips, removal from cafeteria, suspensions, disregard of authority, school work not done, behaviors not modified by reward or punishment.”
3. A Written Notice was prepared in connection with an IEP Team meeting on February 11, 2008 for an initial referral to Special Education Services. The Written Notice stated in relevant part that the Student’s referral to special education was accepted and further noted the Student’s lack of progress due to “poor attendance, failing grades, frequent disruptions due to issues with self-control, easily distracted and impulsive behaviors, non-compliant to staff requests, verbally aggressive to peers and adults, using inappropriate language and poor work completion.” Pursuant to the February 11, 2008 Written Notice and IEP, the Student was to be referred to be evaluated in the following areas: achievement testing, intellectual testing, classroom observation, learning development, a psychological evaluation and additional testing. The February 11, 2008 Written Notice further provided that the IEP team proposed to continue weekly progress reports, using the behavior plan, escort by staff to/from classes and using positive incentives.¹

¹ Despite the reference to a behavior plan, there was no written behavior plan attached to the February 11, 2008 Written Notice or IEP. The first written Behavior Intervention Plan was attached to the April 17,

4. In a Psychological Consultation Report, Debbie Hannigan Anctil, M.S., a psychological evaluator for the District, reported that the Student was referred for evaluation “due to concerns expressed by his teachers regarding his failing grades, frequent disruptions due to issues with self control, distractibility and impulsive behaviors” with a questionable “emotional disturbance.”² Following examinations held on March 18 and 19, 2008, the following was noted:
 - a) For the most part, [the Student] can remain behaviorally appropriate in class, yet there have been several instances of his disrupting the class;
 - b) [the Student] has been placed on a specific behavior plan which has shown some success...however he continues to present with inappropriate behaviors which interfere with his learning;
 - c) [The Student’s] disciplinary record reflects 41 behavioral incidents beginning in early September and continuing steadily through each month, including defiant, rude and oppositional behavior, vulgar language, bullying and harassing behavior, instigating fights and skipping detentions;
 - d) Although personality testing could not be fully completed, there is evidence to suggest that the Student presents with an increased level of emotional distress and maladaptive coping strategies which appear evident in his learning environment;
 - e) [The Student] presents as an emotionally fragile young man who may be at risk for developing further emotional concerns if he continues without intervention.

5. In Ms. Anctil’s March, 2008 report she noted that further evaluative data was needed in order to determine appropriate programming. She suggested the Student should be provided with:
 - a) A therapeutic process with a mental health professional to help identify the etiology of his distress and to better help him manage;
 - b) Frequent, short breaks in order to sustain compliance;
 - c) A motivation/incentive program to increase his attendance to learning situations;
 - d) The use of a daily agenda book and participation with a homework helpers program; and

2008 IEP. Although this BIP is not dated, Anita Gagne, the Administrative Assistant for the Special Education Office stated that the written BIP became part of the Student’s IEP in April, 2008.

² Psychological Evaluator Debbie Hannigan Anctil, M.S. reported incomplete findings due to the Student’s refusal to participate in the evaluation process.

- e) Opportunities to participate in adult facilitated, adolescent-oriented clubs, teams or activities which focus on his areas of strength and promote positive peer interactions.
6. In an interview with the complaint investigator, Debbie Hannigan Anctil stated that she was concerned about the Student receiving over 40 infractions during his xx grade school year and that she recommended therapy and other interventions in her March, 2008 report in order to address some of the underlying roots of his disability. She stated that her report recommended a behavior plan that would help the Student to “regroup” when his behaviors were starting to escalate. She was aware of the behavior plan in place for the Student at that time, and did not believe that the positive incentives were inappropriate, based on her understanding of his challenges.
 7. According to a Student Discipline Log prepared by the District, the Student received 51 discipline infractions during the 2007-2008 school year. Of these infractions, the Student was given out-of-school suspensions for a total of 58 days. A total of 35 out-of-school suspensions were given from the time that the February 6, 2008, Pupil Evaluation Referral Form was prepared to the end of the 2007-2008 school year. During the 2008-2009 school year, there were seven discipline incidents between September 2 and September 23, 2008, and two incidents for the remainder of the year: a dismissal on February 25, 2009 for refusing to go to class and a five day bus suspension for using vulgar language on May 18, 2009.
 8. An Emotional Disturbance Evaluation Report prepared on April 17, 2008 by Sandra Cyr, Special Education Teacher, and regular education teachers Patricia Langelier and Susan Grondon of the Lewiston School District, concluded that that the Student exhibited the characteristics of emotional disturbance and indicated that he required specially designed instruction to benefit from school. This report documented, *inter alia*, that the Student exhibits “inappropriate types of behaviors or feelings under normal circumstances,” and that the Student’s behaviors have adversely affected the Student’s educational performance and “have been observed for six months or are likely to continue for six months,” and that the behaviors have been “displayed to a marked degree, and to the extent that is apparent in school, well beyond the range of average for that age or grade.”
 9. A Written Notice (“WN”) was prepared in connection with an IEP Team meeting on April 17, 2008 to review evaluation results for the Student’s referral to special education. The WN provided in relevant part as follows:

- a) The IEP team members reported that part of the Student's behavior plan to go over daily a check list of how his behaviors were during the day with a reward if there were not incidents that day;
- b) The IEP team said that the interventions that were in place have not worked;
- c) [The Student] will have a behavior plan that will help increase his socially appropriate behaviors and comments;

The Parent signed this form for consent of the Student's receipt of special education and related services on April 24, 2008.

- 10.** The IEP developed on April 17, 2008 noted the following with regard to the Student's present level of academic and functional performance:
- a) School records support that the Student has been suspended both in school and out this year (50 absences) as well as received detentions and/or verbal warnings for over 44 behavioral incidents since September;
 - b) The Student is failing 4 of 5 [sic] core classes for the year; and
 - c) The Student's emotional deficits and lack of coping strategies in social and interpersonal situations in school is impacting his ability to be involved and make progress with the general curriculum.
- 11.** The IEP developed on April 17, 2008 included the following components:
- a) Specialized instruction for 12 hours per week;
 - b) Supplementary aids and services to include: classroom accommodations and special education staff to be available in history and science and for all transitions between his classes to implement the Student's behavior plan.
- 12.** The IEP developed on April 17, 2008 included a Behavior Intervention Plan (BIP) which targeted the Student's comments to others which were "rude, disparaging or threatening in nature." The BIP provided that the following would be implemented to assist the Student with these behaviors:
- a) Supervision for all transitions and core subject classes as necessary to coach him on acceptable behaviors and to intervene if comments are made;
 - b) Instruction from special education staff as to school appropriate behavior and pro-social behaviors; and
 - c) [Student] will eat in the office until he can display correct replacement behaviors

The BIP further provided that if the Student used the correct replacement behaviors for five consecutive days "he may travel to and from his first class unescorted" and "one class period will be added to this for each consecutive five days of correct replacement behavior...when [the

Student] displays correct replacement behavior in the cafeteria he may remain there for lunch.”

13. According to a psychological consultation report dated September 17, 2008 by George Sheckart, Ph.D, the Student was admitted to St. Mary’s Regional Medical Center in Lewiston on September 14, 2008 following a significant episode of oppositionality and reported aggressive behavior at school. Dr. Sheckart noted in his report that the Student’s behavior prompted a pending charge of disorderly conduct. Following an evaluation and testing of the Student, Dr. Sheckart noted that the Student “shows an inability to obtain information from visual inputs effectively and efficiently. He tends to be significantly more concrete and has fewer skills for problem solving and determining strategies for the implementation of problem resolutions.” Dr. Sheckart recommended the following:
 - a) Treatment for attentional issues and direct instruction and organizational strategy;
 - b) Behavioral strategies that emphasize appropriate interventions and responses to social situations;
 - c) [interventions to help the Student understand] his own emotionality, feelings and how to express those;
 - d) Opportunities to experience the world as much as possible and to look to opportunities where he can have more exposure to tasks, pre-teaching activities, limited time limits for performance as well as good clear examples or models to work from.

14. A Written Notice was prepared in connection with an IEP Team meeting on September 17, 2008 to “discuss programming” for the Student. The Written Notice stated in relevant part as follows:
 - a) The Student’s IEP is appropriate and he is placed appropriately at this time;
 - b) The IEP team was concerned about [the Student’s] pattern of deterioration since school has started this year, but [they were] not sure what they can do to help [him]...he has the ability to do the work and works well when he attends classes, but is refusing to go to them;
 - c) The Parent was noted as saying: ‘[the Student’s] medication was misdiagnosed and he has recently been placed on new medication...due to his behaviors (ADHD and anxiety) and depression.’

The IEP team agreed to amend the Student’s IEP to add counseling for 60 minutes a week as a related service, with the remainder of his IEP to remain the same. The team rejected changing the Student’s program since the Student was changing his medication, and the team “felt he

needed time to adjust to the new medication.” The team also agreed to withhold further testing until the Student was discharged from St. Mary’s Regional Medical Center.

15. An IEP developed on September 17, 2008 amended the IEP developed at the April 17, 2008 and added counseling for 60 minutes a week as a related service. The remainder of the Student’s IEP remained the same.
16. A Written Notice was prepared in connection with an IEP Team meeting on September 29, 2008 to review the Student’s program. The Written Notice stated in relevant part:
 - a) Teachers are all reporting that [the Student] is compliant when in class, but his refusal to attend classes is keeping him from being successful;
 - b) Mr. Walker said that he cannot have [the Student] come to school and not attend his classes, because it disrupts the learning of [the Student] and others;
 - c) The IEP team suggested that a psychological evaluation and additional tests be completed by the school, and that the Student’s IEP will be amended to have tutoring two hours a day until testing can be completed, in light of the Student’s refusal to attend class;
 - d) The IEP team considered reducing his current schedule to a half day or keeping his full day schedule, but rejected these options because [the Student] is refusing to attend any of his classes at the present time. Parent is not sure this is the best option for him...Parent is concerned about [the Student’s] education and how she is not able to get him to come to school and participate in his classes.

Although the IEP team reviewed Dr. Sheckart’s evaluation, there is no mention within the Written Notice that the team considered Dr. Sheckart’s recommendations. The Written Notice also states that “The IEP team proposed to design a program that [the Student] will participate in.” Other than the referral to tutoring and the evaluations, however, there is no other indication of the design of such a program.

17. The IEP developed on September 29, 2008 stated that the Student “requires one-on-one time to participate in the general education curriculum while further evaluations are being completed.” The IEP set tutoring services with the special educator/Educational Technician at the “Special Ed Setting” for two hours per day after school. While the September 29, 2008 IEP continued the provision of supplementary services in support of the Behavior Intervention Plan as identified in the April 17 and September 17, 2008 IEPs, it discontinued reference to the counseling services contained in the earlier IEPs. There is no indication

within the IEP or the written notice of the IEP team meeting about a discussion or determination of the discontinuation of these services.

18. A psychological evaluation and report dated November 17, 2008 was generated by Susan Powers, Psy.D, pursuant to a request of the IEP team to evaluate the Student's social/emotional status and the education program that could address his needs.³ In her report, she noted as follows:

[The Student's] school functioning is primarily impacted by his oppositional behavior; however he is also diagnosed with an attention deficit and an anxiety disorder for which he is medicated. Additionally, he presents with borderline intellectual ability and delayed adaptive behavior consistent with his low cognitive ability...it appears that these factors co-exist to detrimentally impact his willingness/ability to participate even with significant Special Education services.[sic] *A day treatment setting is likely to be the most appropriate way for [the Student's] refusal to be addressed, perhaps beginning with a diagnostic period and a shortened day.* He is likely to require intervention around all areas of concern, but most importantly his refusal to participate in his education. Supportive counseling, medication management, a therapeutic milieu and home school communication are components that will need to be considered. (emphasis added)

19. In an interview with the complaint investigator, Dr. Powers stated that the Student had a very challenging profile, and that "no one was able to do much" to intervene due to his complete refusal and unwillingness to take part in any academic or counseling activities. She noted that due to the Student's refusal to cooperate, she was unable to complete her own evaluations on him. She stated that although she did recommend that he be placed in a day treatment setting in her November 17 2008, report, she agreed that it made sense for the Student to take part in the Multi Systemic Therapy (MST) program before starting day treatment to provide an opportunity to "allow him to agree" to participate in day treatment. Dr. Powers recalls the Parent noting that the Student would probably not agree to day treatment. Although not stated in her written report, Dr. Powers stated to the complaint investigator that in order for day treatment programs to be successful, there needs to be "some willingness" on the part of a student to attend such programs.

³ Psychological Evaluator Susan Powers, Psy.D, reported incomplete findings due to the Student's refusal to participate in the evaluation process.

20. Dr. Powers stated that the IEP team believed that the Student did have some underlying anxiety issues, and felt that the referral to tutoring and counseling with Ryan Hayes, the school-based counselor, would address some of the Student's underlying anxiety and behavior issues. Dr. Powers stated that although not stated clearly in the written record, it was "clearly articulated" in the IEP team meetings to use Ryan Hayes to "respond to the Student's oppositionality and to develop positive approaches" to use with the Student. She stated that she was not sure if the Student's tutor was given any new strategies to work on with the Student. Dr. Powers stated that in her view there was some question about whether the Student's difficulties were school-based vs. "just mental health" issues. Dr. Powers stated that she felt the Parent did not do a very good job on "follow through" with the District's efforts and finding a workable educational program for the Student.
21. A Written Notice was prepared in connection with an IEP Team meeting on December 1, 2008 to review the Student's evaluation. The notice stated in relevant part as follows:
- a) The Student only works on math, nothing else...[he] comes to tutoring with his mother, but will not do any work.
 - b) Ryan Hayes, the Student's counselor, said that the Student is refusing to see him.
 - c) The Student was referred to MST which is an intensive counseling program.
- The WN stated that the IEP team reviewed Dr. Powers' November 17, 2008 report, but rejected the day treatment program recommended in her report due to "[the Student's] refusal to participate in anything that staff is willing to try with him." There is no mention within the notice that Dr. Powers recommended day treatment as a way to address the Student's refusal to participate. Rather, the IEP team suggested that the Student continue tutoring for another 45 days reduced to 1 hour a day, from 2:30-3:30 pm. Although this notice documented the Student's refusal to attend counseling, the notice stated that "It is hoped that [the Student's] intensive counseling will enable him to develop coping strategies in order to participate in an educational program." The notice further stated that the Student's mother is concerned that he does not want to participate in tutoring.
22. Only two pages of the December 1, 2008 IEP were submitted to the Complaint Investigator, the first page and the "Special Education and Related Services" pages of the December 1, 2008 IEP.⁴ The Special Education and Related Services page purported to reduce the Student's

⁴ According to Megan Praschak, the Student's Case Manager, this IEP only contained two pages as it was an amended IEP from the September 29, 2008 IEP, and the two pages provided were the only two pages amended from the earlier IEP.

tutoring to 1 hour a day. There is no reference to the counseling services contained in the April 17th and September 17th, 2008 IEPs.

23. In an IEP Teacher input report dated January 27, 2009, the Student's tutor, Sandra Cyr reported that the Student "will not engage in school work. Having known [the Student] for just over one school year, it is my observation that his ability to participate in the learning process has steadily declined." Ms. Cyr finally recommends a more restrictive program with intensive social services and counseling.
24. The Student's second quarter report card indicated failing grades in all classes for both first and second quarters, with a comment from his math teacher Jennifer Laroche-Albert that his "earned grade is a zero; Has not completed any work this quarter!"
25. A Written Notice was prepared in connection with an IEP Team meeting on February 6, 2009 to discuss the Student's "progress with tutoring and to look at other options." The notice stated that the IEP team had previously determined to reduce the Student's tutoring sessions to one hour per day "due to his non-participation." The Student's tutor, Ms. Cyr, said that the Student "comes to school every day with his mother but he is not willing to try to do anything." The notice further stated that "the IEP team is puzzled as to how they can get [the Student] re-engaged with school." The IEP team recommended that the Student "continue tutoring [one hour per day] until after February break, when he would then start on a reduced school day with periods 7, 8 and homeroom."
26. An IEP developed on February 6, 2009, added specially designed instruction for "5 X 8:00 [hours]" per week as supportive service, supplementary aids and services to include on a daily basis: "classroom accommodation; behaviors defined; limits/expectations; positive and consistent reinforcement; involve parent." There is no identification of tutoring or counseling services, nor is there any indication within the IEP or the written notice of the IEP discussing the discontinuation of these services.
27. On March 20, 2009, Dr. Jennifer Mogul, a child psychologist with Tri-County Mental Health services wrote a letter in support of a day treatment setting for the Student. In her letter, Dr. Mogul stated: "...this is clearly not just a school attendance or school refusal issue. I believe he will need a higher level of special educational support with a mental health component to be able to function successfully again at school."
28. In an interview with the complaint investigator, Dr. Jennifer Mogul, a child psychologist with Tri-County Mental Health services, stated that in

her opinion the Student was “well within” what day treatment is meant to handle, and that “tutoring was a short-term solution only.” She said that the school should have more promptly followed Dr. Powers’ recommendation after it was made in November, 2008.

29. A Written Notice was prepared in connection with an IEP Team meeting on March 23, 2009 for an annual review and a manifestation determination⁵. The notice stated in relevant part as follows:
 - a) The IEP team said there is a program in place here at LMS for [the Student] but he refuses to go on a daily basis;
 - b) The IEP team noted a day treatment program would be beneficial for him, but there is an intake process and he must be willing to participate in the program. The team determined that the Student would be referred to day treatment (RETC/SOS, Spurwink and ALTC), and until accepted will continue with his current program at LMS attending for periods 7, 8 and homeroom.
30. An IEP developed on March 23, 2009, added specially designed instruction Day Treatment for “5 X 6:00” per week and “reduced day services for 5 X 2:00” per week. As supportive service, supplementary aids and services the IEP added: “Classroom accommodation, behaviors, natural consequences, model appropriate behaviors, positive and consistent reinforcement, keep parent involved, define limits and expectations, cueing system, behavior sheet track compliances, and incentive plan to reward compliant behavior.”
31. By letters dated April 28, 2009, the District formally referred the Student to the RETC/SOS day treatment program and the Spurwink Services day treatment program.
32. In an interview with the complaint investigator, Meghan Paschak, a Special Education Teacher and the Student’s Case Manager at Lewiston Middle School, stated that the Student was only physically in class for three to four days during the first week of the 2008-2009 school year. She stated that after the first week the Student refused to come to class and would spend his time in the Assistant Principal’s office. Ms. Paschak stated that the Student was not aggressive, but “passively defiant”, noting that he wouldn’t talk, and would only “shrug his shoulders”.
33. Ms. Paschak stated that the Student was “on grade level” with his academic performance, and that the District was looking at different

⁵ Meghan Paschak, a Special Education Teacher and the Student’s Case Manager stated that the manifestation determination reference on the March 23, 2009 IEP was initially referenced due to what the IEP Team believed were suspensions. She noted that in fact the Student had not been suspended but his absence had been excused by Mr. Walker, so no manifestation determination was done for the Student.

options to address his non-compliance while trying to “not send him away” to a more restrictive day treatment program. Ms. Paschak stated that the IEP team referred the Student to counseling through the school counselor Ryan Hayes in the fall of 2008; however the Student refused to communicate with Mr. Hayes.

34. In an interview with the complaint investigator, Cassandra Young, the Student’s tutor and an xx grade regular education math teacher, stated that the Student was only physically in class for three to four days during the first week of the 2008-2009 school year, and then afterwards would come to school but refused to come to class.
35. Ms. Young stated that she agreed to serve as the Student’s tutor in all subjects, but that due to the Student’s continued refusal to participate, she only did one actual day of tutoring with the Student. She stated that the Student would come to tutoring sessions with his mother after school, and he would simply refuse to participate in any academic or other activities or instruction with him. She said that he was not angry or verbally defiant, but simply refused to participate. When she attempted to strike up a conversation with him, she said that he only enjoyed watching television and playing video games. She learned that one of his favorite television shows was “Sponge Bob”, and during one of their earlier tutoring sessions, she developed a learning incentive program that involved some trivia questions involving characters from the Sponge Bob show. She said that he was initially interested in this, but lost interest after the first day. She stated that it was “frustrating” to deal with the Student’s lack of interest, and that she had “run out of options” to reach the Student through tutoring.
36. Ms. Young also stated that the Student’s mother, who attended the tutoring sessions, did not intervene with respect to the Student’s lack of participation with his instruction. She also said that she did not intervene or speak to the Student when he misbehaved, including one incident where the Student wheeled chairs across the room and Ms. Young asked him to stop.
37. In an interview with the complaint investigator, Linda Barrington, Special Education Coordinator for the District, stated that the IEP team did not refer the student to counseling at the April 17, 2008 IEP team meeting because the Parent represented that the Student would be getting counseling through Tri-County Mental Health. Ms. Barrington also said that she was aware of an evaluation report prepared by George Shekart, Ph.D. in conjunction with the Student’s admission to St. Mary’s Regional Medical Center. She stated that the IEP team did not place too much weight on Dr. Shekart’s report for planning purposes since it was done during a time that the Student was in crisis, which she

said was “not the best time to evaluate” a student. Ms. Barrington also stated that the decision to refer the Student to tutoring did reflect some of Dr. Sheckhart’s recommendations insofar as the Student’s educational programming was adjusted to a more basic level, with opportunities for some specific adjustments that were designed to better connect with the Student.

38. Linda Barrington stated that the Student wasn’t referred to day treatment immediately after Dr. Powers’ recommendation in November 2008 since the Student would first need to agree to go through the intake process, and then he would need to willingly participate in the day treatment program. She said that at that time, the Student was going through the MST program at Tri County Mental Health, which was an intensive home-focused program that was designed to help the Student agree to participate in programs like day treatment that could help him.
39. In an interview with the complaint investigator, Emily Hebb, Children’s Case Manager at Tri County Mental Health (TCMH), stated that she first got involved with the Student in November of 2008. She said that the Student was placed in the MST program at TCMH. Ms. Hebb described MST as an intensive, in-home program to help parents to regain control, structure and discipline of their behaviorally-challenged children. Ms. Hebb also stated that the MST program can “make the difference to get kids to agree to programming” at school, and that she remembers attending an IEP team meeting in December, 2008 where the team agreed that in an effort to obtain the Student’s compliance to day treatment, they would refer him to the MST program.
40. Ms. Hebb stated that the MST program commenced on or about December of 2008, and that Burl Hall was selected as the Multi-Systemic Therapist to work with the Student and the Parent. Ms. Hebb stated that after commencing the MST program, she concluded that the Student’s at-home behaviors were not as severe as the Parent had initially stated leading her to believe that the parent had perhaps exaggerated his behavior problems. Nonetheless, Ms. Hebb did state that they were able to work with the Parent and Student, and observed that his at-home behaviors were improving.
41. Ms. Hebb stated that the student was referred to day treatment at Spurwink and RETC, and that she attended the Student’s interview with the staff at both facilities. She said that she was surprised that neither she nor the Parent had received any word about the Student’s acceptance as late as May 13, 2009. She stated that she learned that the District had made a referral to the ALTC Day Treatment program, but the District had not informed the Parent of this referral, nor had the District given the Parent any paperwork or other information relating to this referral or

application process. Ms. Hebb stated that the Student was admitted into both programs in June of 2009 even though he refused to answer any questions or make eye contact with any of the interviewers. She also said that he did not verbally refuse or have any hostile behaviors during the interviews. She stated that the Parent chose the RETC Day Treatment Program, and the Student is scheduled to commence this program in September, 2009.

42. In an interview with the complaint investigator, Burl Hall, Multi-Systemic Therapist at Tri County Mental Health (TCMH), stated that he worked with the Student from December of 2008 to March of 2009. He stated that MST is an intensive program where he worked with the Student and his Parent two to three times per week, in addition to working with school personnel and attending IEP team meetings. Mr. Hall stated that this was “one of the strangest cases” he’s had, but that he believed that the roots of the Student’s problems were related to a cognitive deficit and a possible learning disability. He believed that rather than “risk failure” at any given task assigned to him, the Student would choose to not perform tasks at all. He believed that the District should have provided a different learning environment earlier in the process, such as Day Treatment or other types of special education services that would have more appropriately addressed the roots of his disability and difficulties.
43. Mr. Hall stated that when he worked with the Student at his home, he would have “no problem.” Even though the Student didn’t interact with him, he did not feel that this was a “parenting issue” and observed the Student as “pretty cooperative” with his mother, and having positive interactions with friends. Mr. Hall likewise did not believe that the Student’s older brother was a factor in the Student’s behavior, as the brother was out of the house most of the time with his girlfriend.
44. In an interview with the complaint investigator, the Parent stated that the Student’s difficulties commenced in the xx grade. She attributed some of his issues to being in a larger school with more teachers and the process of “going from class to class.” She also stated that “the school didn’t do anything.” She stated that she would attend the tutoring sessions with the Student after school and that the Student would simply “go to Mr. Walker’s office and sit there” while Ms. Cyr attempted to tutor him. She stated that the Student did “a little on the computer”, but he quickly got bored. She felt that the Ms. Cyr “could have tried harder.” The Parent stated that the Student’s “arrest” in September of 2008 for disorderly conduct was “just for refusing to go to class”, and not for any aggressive or violent behavior. The Parent also said that she admitted the Student to St. Mary’s Regional Medical Center to address his medication issues, rather than due to any particular behavior issues.

45. The Parent also stated that she attempted to get the Student signed up for the MST program at Tri-County Mental Health (TCMH) in the spring of 2008, but she was unable to do so because of some complications relating to the Student's eligibility for Maine Care. She stated that she might have agreed to hold off on starting the day treatment program as recommended by Dr. Powers until the Student had an opportunity to take part in the MST program through TCMH. The Parent stated that after the MST program ended in March of 2009, the IEP team referred the Student to Day Treatment at the School, however the Student refused to participate in the program offered at school. She said that he was finally accepted into the Day Treatment program at RETC where he will begin this September.
46. In an interview with the complaint investigator, Scott Walker, Assistant Principal at Lewiston Middle School, said that he and the IEP team "tried everything in the world to get [the Student] to go to class." He stated that he understood that the Student had a "school-based" anxiety, and that his referral to tutoring was designed in part to help him "not be embarrassed" in front of his peers. Mr. Walker said that in September of 2008 he had the school resource officer arrest the Student for failing to leave his office, partly in an effort to "scare him with the legal system." Mr. Walker reported that the charges against the Student were dropped, and that following this incident the Parent had the Student admitted to St. Mary's Regional Medical Center in Lewiston. Mr. Walker stated that after the Student returned from St. Mary's, he continued to refuse to participate in his educational program.
47. In an interview with the complaint investigator, Sandra Cyr, the Student's xx grade special education teacher/case manager and xx grade tutor, stated that she recalls numerous behavior issues beginning in his xx grade year. She stated that his xx grade teachers documenting the behavior infractions, and making referrals to the Special Education staff. She said that most of the Student's behavior problems occurred before and after school, and between classes. She said that during his xx grade year, he was better and more engaged once he was in class. She said however that she became concerned that he was missing his access to education because of the number of detentions and suspensions he received due to his behavior issues.
48. Ms. Cyr further stated that she was asked to serve as his tutor in the xx grade. She said that except for a period of one or two days at the beginning of the year, the tutoring was ineffective, and that the Student made no real progress during his tutoring sessions. She said that the Student would simply sit in the room used for tutoring (guidance office or Assistant Principal's office) and would refuse to do anything. She

said that the Student would frequently pull his hood over his head, and place his head on the desk and sleep during the tutoring sessions. She said that the Student's mother was usually present during the tutoring sessions, and that she would attempt to get him to do some work, without success. Ms. Cyr said that during the time she served as the Student's tutor, she did not experience a great deal of outwardly inappropriate behavior, but rather refusal behaviors. She said that although she didn't attend IEP Team meetings, she discussed ways to deal with some of the Student's behaviors with other teachers and staff working with the Student. She does not remember getting any specific direction with regard to how to deal with the Student's behavior issues. She also stated that she "wasn't seeing" issues of anxiety or depression with the Student, but rather that he simply didn't want to be in school and that he would rather be "out in the street."

VI. Conclusions

Allegation #1: Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C; **Allegation #6:** Failure to consider the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a); and **Allegation #7:** Failure to consider existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c). **Violation Found.**

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to develop or revise an Individualized Education Program as described in IX to provide each identified child with a disability a free appropriate public education. MUSER §IX.3.C provides in relevant part:

C. Development of IEP.

(1) In general.--In developing each child's IEP, the IEP Team, subject to subparagraph (3), must consider:

- (c) The results of the initial evaluation or most recent evaluation of the child; and
- (d) The academic, developmental, and functional needs of the child.

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

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

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

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

MUSER §IX.3.C(2)(a) provides that an IEP team for a child whose behavior interferes with his learning must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” MUSER §II.21 defines “positive reinforcement interventions and supports” as “the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors.” The definition further notes that these techniques may be based upon results of a functional behavioral assessment.

The Student’s behavior and discipline challenges are at the heart of this case. The Student received 51 discipline infractions during the 2007-2008 school year with out-of-school suspensions totaling 58 days. The February 11, 2008 Written Notice highlighted his behavior and discipline issues as a reason for referral to receive special education services, noting the Student’s impulsive behaviors, non-compliance to staff requests, verbal aggression to peers and adults, and use of inappropriate language. Debbie Hannigan Anctil, M.S., a psychological evaluator for the District noted “[The Student’s] poor disciplinary record beginning in early September and continuing steadily through each month, including defiant, rude and oppositional behavior, vulgar language, bullying and harassing behavior, instigating fights and skipping detentions.”

The District developed a Behavioral Intervention Plan (the “Plan”) for the Student in the IEP dated April 17, 2008.⁶ The Plan identified behaviors to be reduced or eliminated as “comments to others which are rude, disparaging or threatening in nature.” The Plan provided that the following would be implemented to assist the Student with these behaviors:

- Supervision for all transitions and core subject classes as necessary to coach him on acceptable behaviors and to intervene if comments are made;

⁶ Despite the reference to a behavior plan, there was no written behavior plan attached to the February 11, 2008 Written Notice or IEP. The first written Behavior Intervention Plan was attached to the April 17, 2008 IEP. Although this BIP is not dated, Anita Gagne, the Administrative Assistant for the Special Education Office stated that the written BIP it became part of the Student’s April, 17 2008 IEP.

- Instruction from special education staff as to school appropriate behavior and pro-social behaviors; and
- the Student will eat in the office until he can display correct replacement behaviors, and if the Student used the correct replacement behaviors for five consecutive days “he may travel to and from his first class unescorted” and “one class period will be added to this [sic] for each consecutive five days of correct replacement behavior...when [the Student] displays correct replacement behavior in the cafeteria he may remain there for lunch.”

The Student continued to have very challenging and outwardly disruptive behaviors when school started in September. However, his behavior changed by the end of September from the “verbally combative, attention seeking” behaviors noted on the April 17, 2008 Written Notice, to behaviors that were defined as “passive non-compliance”.⁷ After September 23, 2008, there were only two discipline incidents during the 2008-2009 school year: a dismissal on February 25 for refusing to go to class, and a five day bus suspension for using vulgar language on May 18, 2009. The April, 2008 BIP appeared to be completely ineffective with regard to the Student’s refusal and non-compliant behaviors.

The Written Notice prepared in connection with the September 17, 2008 IEP Team meeting noted that the IEP team was “concerned about [the Student’s] pattern of deterioration since school has started this year, but [they were] not sure what they can do to help [him]...he has the ability to do the work and works well when he attends classes, but is refusing to go to them.” The IEP team agreed to amend the Student’s IEP to add counseling for 60 minutes a week as supportive service, with the remainder of his IEP to remain the same. The team rejected changing the Student’s program since the Student was changing his medication, and the team “felt he needed time to adjust to the new medication.” The team also agreed to withhold further testing until the Student was discharged from St. Mary’s Regional Medical Center.

According to a psychological consultation report dated September 17, 2008 by George Shekart, Ph.D, the Student was admitted to St. Mary’s Regional Medical Center (SMRMC) in Lewiston on September 14, 2008 following a significant episode of oppositionality and reported aggressive behavior. The Student’s admission to SMRMC followed the Student’s arrest by the school resource officer on charges of disorderly

⁷Cassandra Young, the Student’s tutor, stated that in the fall of 2008 the Student would simply “go to Mr. Walker’s office and sit there” and that he would simply refuse to participate in any academic or other activities or instruction. She said that “he was not angry or verbally defiant, but simply refused to participate.” The September 29, 2008 Written Notice stated “Teachers are all reporting that [the Student] is compliant when in class, but his refusal to attend classes is keeping him from being successful” Mr. Walker, the Assistant Principal at Lewiston Middle School, said that on or about September 8, 2008 he had the school resource officer arrest the Student for failing to leave his office. Following this incident the Parent had the Student admitted to St. Mary’s Regional Medical Center in Lewiston. Mr. Walker stated that after the Student returned from St. Mary’s, he continued to refuse to participate in his educational program.

conduct for failing to leave the Assistant Principal's office.⁸ Although the charges against the Student were dropped, the Parent had the Student admitted to St. Mary's Regional Medical Center in Lewiston.⁹

The September 29, 2008 IEP amended the Student's program to discontinue specialized instruction in favor of tutoring for two hours a day until testing could be completed. The Written Notice stated that this action was taken in light of the Student's refusal to attend class, and also noted that psychological evaluations and additional testing would be completed by the school. The Written Notice also states that "The IEP team proposed to design a program that [the Student] will participate in." Other than the referral to tutoring, and a reference to further evaluations, there is no other indication of the design of such a program, nor were there revisions to the Behavior Intervention Plan.¹⁰

There is no indication within the September 29, 2008 IEP, however, that the Student's referral to tutoring was based on a consideration of the Student's unique needs or evaluations or his academic, developmental, and functional needs. The September 29, 2008 IEP merely stated that the Student "requires one-on-one time to participate in the general education curriculum while further evaluations are being completed." IEPs must anticipate a child's goals and needs and an IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. MUSER §IX.3.C. *see* Tennessee State Educational Agency 106 LRP 7800 (1998), *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F. 2d 1031, 1041.

In County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1467-68 (9th Cir. 1996), the Ninth Circuit Court held:

The placement must also include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Rowley, 458 U.S. at 189...[G]oals are not limited to academic benefits, but also include behavioral and emotional growth...Educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. (emphasis added)

⁸ Mr. Walker said that in September of 2008 he had the school resource officer arrest the Student for, partly in an effort to "scare him with the legal system." The Parent stated that the Student's "arrest" in September of 2008 for disorderly conduct was "just for refusing to go to class", and not for any aggressive or violent behavior

⁹ The Parent also said that she admitted the Student to St. Mary's Regional Medical Center to address his medication issues, rather than just due to any particular behavior issues

¹⁰ Although not documented in the IEP or the Written Notice, Ms. Barrington stated that the decision to refer the Student to tutoring did reflect some of Dr. Shekheart's recommendations insofar as the Student's educational programming was adjusted to a more basic level to better connect with the Student.

Within a short time after the September 29, 2008 IEP meeting, the lack of any meaningful consideration as to this placement resulted in both predictable and unfortunate results for this Student. Cassandra Young, the Student's tutor during the 2008-2009 school year, stated that the Student would come to tutoring sessions with his mother after school, and he would simply refuse to participate in any academic or other activities or instruction with him. Ultimately, she stated that she had "run out of options" to reach the Student through tutoring.

Sandra Cyr, the Student's xx grade special education teacher/case manager and xx grade tutor, stated that except for a period of one or two days at the beginning of the year, the tutoring was ineffective, and that the Student made no real progress during his tutoring sessions. She said that the Student would simply sit in the room used for tutoring (guidance office or Assistant Principal's office) and would refuse to do anything. She said that the Student would frequently "pull his hood over his head, and place his head on the desk and sleep" during the tutoring sessions.

Burl Hall, Multi-Systemic Therapist at Tri County Mental Health (TCMH) who worked extensively with the Student between December 2008 and March 2009, also believed the Student had a school-based anxiety, and he believed that rather than "risk failure" at any given task assigned to him, the Student would simply choose to not perform tasks at all. He believed that the District should have provided a different learning environment earlier in the academic year. Again, there is no indication that the IEP Team considered any modifications or revisions to the Student's IEP or BIP to develop strategies to provide FAPE or to increase the Student's attendance.

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to develop and *revise* an Individualized Education Program. (emphasis added).

Despite the evidence that the Student's IEP was not working, the District failed to adequately revise his IEP. In addition to failing to modify the tutoring plan, the IEP team failed to revise the April 17, 2008 Behavior Intervention Plan. Since the Student's BIP is part of the IEP, it also must be custom tailored to address the Student's specific unique needs in a way that is reasonably calculated to enable him to receive educational benefits. Rowley, 458 U.S. 176, 206-207. The Student's behavior plan, which solely targeted his negative and hostile behaviors, did not address the Student's passive non-compliant behavior, which became his predominant behavior pattern during the 2008-2009 school year.

Even after it was noted at the February 6, 2008 IEP Team meeting that the MST program was failed to address his non-compliant behaviors,¹¹ the IEP team recommended that the Student continue tutoring rather than refer the Student immediately to day treatment.¹²

¹¹ Ms. Cyr, the Student's tutor, noted at the February 6, 2008 IEP Team meeting that the Student "comes to school every day with his mother but he is not willing to try to do anything."

¹² The IEP team recommended that the Student "continue tutoring [one hour per day] until after February break, when he would then start on a reduced school day with periods 7, 8 and homeroom." Ultimately, at

A school district is obligated, within a reasonable period of time, to review and develop a programming alternative once it becomes clear the student's IEP is not working. M.C. ex rel. JC v. Central Regional School District, 81 F.3d 389, 396-97 (3d Cir.), cert. denied, 519 U.S. 866, 136 L. Ed. 2d 116, 117 S. Ct. 176 (1996).

In Lamoine School Committee v. Ms. Z., 353 F. Supp. 2d 18, 105 LRP 1467, 42 IDELR 172, (U.S. District Court, Maine 2005) a case on all fours with the present case, a 16 year old student's emotional difficulties often prevented him from attending school altogether. Though the district was aware of the student's tardiness and attendance issues, it did not make an attempt to remedy or improve the issue. The court noted that while the district could not be expected to rouse the student from bed or escort him to school on time, it also could not have provided him with FAPE in his absence, and specifically held:

Lamoine knew or should have known N.S. was having attendance and tardiness problems from at least early September 2002; by December 2002, N.S. had effectively stopped attending school. Nevertheless, on January 17, 2003, when the issue came up, Lamoine could not even quantify the amount of time N.S. had missed from school: "There are no clear indications of how many days [N.S.] has missed, but he pretty much hasn't been in school since before the Christmas Vacation." This Court concurs with the Hearing Officer's determination that Lamoine failed to provide IEPs reasonably calculated to provide academic benefit for the 2002-2003 school year, because the IEPs failed to anticipate attendance and lateness problems, failed to account for his presence or absence from school and class.

Lamoine, Id at 32.

In addition to its failure to adequately revise the Student's IEP, the District failed to consider the recommendations contained within the Student's evaluations. MUSER §IX.3.C (1)(c) provides that in developing each child's IEP, the IEP Team must consider the results of the initial evaluation or *most recent evaluation* of the child. (emphasis added)

In School Union #51 26 IDELR 1193, 26 LRP 4557, (Maine, 1997), a case addressing the PET responsibilities under MSER § 8.3, the Hearing Officer found that a school district denied a 15-year-old ninth grader a FAPE when it failed to review an evaluation of the student. In the School Union #51 case, the Hearing Officer held:

It is the responsibility of the PET to review all the existing evaluations in developing the program for a student... It appears from the record that the

the March 23, 2009 IEP team meeting, the team determined that the Student would be referred to day treatment (RETC/SOS, Spurwink and ALTC), and until accepted will continue with his current program at Lewiston Middle School.

Speech/Language evaluation of September 1996 was never reviewed by the PET. This evaluation contains some excellent concrete academic recommendations that were never discussed and thus are not in the I.E.P. where they belong.

In his September 17, 2008 report, Dr. Sheckart stated that the Student “tends to be significantly more concrete and has fewer skills for problem solving and determining strategies for the implementation of problem resolutions.” Dr. Sheckart recommended “treatment for attentional issues and direct instruction and organizational strategy; and “behavioral strategies that emphasize appropriate interventions and responses to social situations.”

There is no mention within the Written Notice of the September 29, 2008 IEP Team meeting that Dr. Sheckart’s September 17, 2008 recommendations were considered. Linda Barrington, Special Education Coordinator for the District, stated that the IEP team did not “place too much weight” on Dr. Sheckart’s report for planning purposes since it was done during a time that the Student was in crisis which was “not the best time to evaluate” a student. Dr. Sheckart’s report, however, is consistent with Debbie Hannigan Anctil’s March, 2008 report, which was performed during a time that there was no indication of the Student being “in crisis.” Specifically, Dr. Sheckart recommended behavioral strategies to deal with “attentional issues” and ways to “emphasize appropriate responses to social situations.” Ms. Anctil also addressed attention and compliance issues and suggested the Student be provided with “a motivation/incentive program to increase his attendance to learning situations” and “Frequent, short breaks in order to sustain compliance.”

Even when the District was presented with a recommendation to refer the Student to day treatment, it failed to do so on a timely basis. In her November 2008 report, Dr. Susan Powers recommended a day treatment setting for the student as “the most appropriate way” for his refusal to be addressed. She also recommended supportive counseling, medication management, therapy and better home-school communication. The Written Notice for the December 1, 2008 IEP Team meeting stated that the IEP team reviewed Dr. Powers’ November 17, 2008 report,¹³ but rejected the day treatment program recommended in her report due to “[the Student’s] refusal to participate in anything that staff is willing to try with him.”¹⁴ Instead of implementing Dr. Powers recommendations, however, the IEP team suggested that the Student continue tutoring for

¹³ The Written Notice prepared in connection with the December 1, 2008 IEP team meeting states in relevant part: “Dr. Powers reviewed her testing results [which showed that the Student’s] functioning is primarily impacted by his oppositional behavior.”

¹⁴ There is no mention within the notice that Dr. Powers recommended day treatment as a way to address the Student’s refusal to participate. Dr. Powers’ report does not condition the day treatment referral on consent, nor does she recommended the MST program as a way to address the Student’s refusal to participate day treatment. Although not mentioned in her report, Dr. Powers stated to the Complaint Investigator that she agreed that it made sense for the Student to take part in the MST program before starting day treatment to provide an opportunity to “allow him to agree” to participate in day treatment, noting that in order for day treatment programs to be successful, there needs to be “some willingness” on the part of a student to attend such programs.

another 45 days (reduced to 1 hour a day) and noted “it is hoped that [the Student’s] intensive counseling will enable [the Student] to develop coping strategies in order to participate in an educational program.” The District was obligated to provide programming that offered “effective results” and “demonstrable improvement” for the Student, regardless of what other programs or supports were being offered to the Student.¹⁵ See, *Roland M. v. Concord Sch. Comm.*, Id., at 989. Furthermore, it was unacceptable for the District to maintain the Student’s unproductive tutoring program simply because the Student refused to participate in other academic programs.

Allegation #2: Failure to ensure that the Student’s educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I; **Allegation #3:** Failure to ensure that a continuum of alternative placements is available to meet the Student’s educational needs in violation of MUSER §X.2.B. **Violation found.**

MUSER §VI.2.I provides that the SAU has ultimate responsibility to ensure that the child’s placement is in the least restrictive educational placement. MUSER §X.2.B. further defines the criteria for the determination of the Least Restrictive Environment and provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall 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 USC 1412(a)(5) and 34 CFR 300.114]

MUSER §X.2.B. further provides:

Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. The continuum required must include the alternative placements in the definition of special education under 34 CFR 300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with the regular class placement. [34 CFR 300.115] Comparable facilities – facilities in which special education services are provided to children with disabilities shall be comparable to those in which regular education is provided to children and located in chronologically age appropriate settings.

¹⁵ The intensive counseling referred to in the December 1, 2008 IEP was the MST program, described by Emily Hebb of TCMH as “an intensive, in-home program to help parents to regain control, structure and discipline of their behaviorally-challenged children”

The Least Restrictive Environment (LRE) requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." See 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004).

The First Circuit Court of Appeals has declared that determinations about least restrictive programming are unavoidably part of the determination of an "appropriate" program for a student. See *Lenn v. Portland School Committee*, 998 F. 2d 1083, 1090 n.7 (1st Cir. 1993) (questions about least restrictive programming are "an integral aspect of an IEP package (and) cannot be ignored when judging the program's overall adequacy and appropriateness.").

In the present case, the Student's disciplinary record for the 2007-2008 school year reflected 51 behavioral incidents, and a total of 58 days of out of school suspensions given to this Student for behavior related infractions. At the April 17, 2008 IEP team meeting a program was developed that offered specialized instruction for 12 hours per week, and supplementary aids that included classroom accommodations and special education staff to implement a Behavior Intervention Plan and to be available for all transitions between his special education and regular education classes. When the Student's behavior deteriorated following his return to school in September, the IEP team amended the Student's IEP to add counseling for 60 minutes a week as supportive service, with the remainder of his IEP to remain the same.

At the IEP team meeting on September 29, 2008, due to the Student's refusal to attend any of his classes, it was determined that the Student "requires one-on-one time to participate in the general education curriculum while further evaluations are being completed." The IEP set tutoring services with the special educator/educational technician at the "Special Ed Setting" for two hours per day after school. While continuing the provision of supplementary services as identified in the April 17 and September 17, 2008 IEPs.

Up to the time of the second IEP Team meeting in September of 2008, it appears from the record that the Student was in the Least Restrictive Environment as the IEP team attempted to keep the student in his regular education program as long as possible, while offering a range of alternative placements and supportive services including specialized instruction, classroom accommodations and supplementary aids that included counseling and special education staff and a Behavior Intervention Plan.

After it became apparent in October and November that the tutoring program was not working, the District failed to ensure both the least restrictive and that a continuum of alternate placements was available for the Student.¹⁶ Dr. Jennifer Mogul, a child psychologist with Tri-County Mental Health services, stated that in her opinion the

¹⁶ Arguably, if the District had properly conducted a manifestation determination on a timely basis, with a more in depth functional behavior assessment, the Student would have been more promptly placed in a day treatment or other appropriate setting.

Student was “well within” what day treatment is meant to handle and that “tutoring was a short-term solution only.” Burl Hall, Multi-Systemic Therapist at Tri County Mental Health (TCMH), who worked as the primary MST provider with the Student and his Parent between December 2008 and March 2009, stated that he believed that the District should have provided a different learning environment earlier in the process, such as Day Treatment or other types of special education services that would have more appropriately addressed the roots of his disability and difficulties.

By failing to provide these tools, the Student was denied FAPE and forced to endure a more restrictive tutoring program which took place with the Student and his mother alone in the guidance or Assistant Principal’s office.¹⁷

Even taking the District’s rationale that it wanted to see if the Multi-Systemic Therapy program was effective before referring the student to day treatment, it’s failure to make this referral after the MST program was deemed ineffective in February in 2009 only perpetuated the already inappropriate and restrictive placement for the Student. Although the IEP Team finally determined that the Student would attend day treatment on March 23, 2009, the District did not formally refer the Student to the RETC/SOS day treatment program or the Spurrink Services day treatment program until April 28, 2009. By the time the interview and application process after that referral the Student wasn’t accepted until June of 2009. The Student had effectively remained in the restrictive and ineffective tutoring placement for his entire xx grade school year.

Allegation #4: Failure to conduct a manifestation determination in violation of MUSER § XVII.1.E and **Allegation #5:** Failure to conduct a functional behavioral assessment or to develop a behavioral intervention plan in violation of MUSER XVII.1.F. **Violation found.**

With regard to discipline issues and their relationship to a Student’s disability, MUSER § XVII.1.E directs districts to “conduct a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” In such an event, the regulations then set forth a series of specific steps the IEP Team must take to ascertain the relationship between the student’s conduct and the disability, as well as whether the conduct is related to a district’s failure to implement an IEP.¹⁸

¹⁷ Cassandra Young, one of the Student’s xx grade tutors, stated that the Student would come to tutoring sessions with his mother after school, and he would refuse to participate in any academic or other activities or instruction with him. Sandra Cyr, the Student’s other tutor, said that the Student would simply sit in the room used for tutoring (guidance office or Assistant Principal’s office) and would refuse to do anything. She said that the Student would frequently “pull his hood over his head, and place his head on the desk and sleep” during the tutoring sessions.

¹⁸ **Manifestation Determination.**

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

As set forth in the above section, the trigger requiring a manifestation determination only applies if the code of conduct violation results in a “change of placement.” 34 CFR §300.536 defines “change of placement due to disciplinary removals” as follows:

A removal of a child with a disability from the child’s current educational placement is a change of placement if:

1. The removal is for more than 10 school days in a row; or
2. The child has been subjected to a series of removals that constitute a pattern because:
 - a. The series of removals total more than 10 school days in a school year;
 - b. The child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals;
 - c. Of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another; and

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

(2) The conduct must be determined to be a manifestation of the child’s disability if the SAU, the parent, and relevant members of the child’s IEP Team determine that a condition in either paragraph (E)(1)(a) or (1)(b) of this section was met.

(3) If the SAU, the parent, and relevant members of the child’s IEP Team determine the condition described in paragraph (E)(1)(b) of this section was met, the SAU must take immediate steps to remedy those deficiencies.

F. Determination that Behavior Was a Manifestation.

If the SAU, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team must—

(1) Either—

(a) Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (G) of this section, return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan.

Whether a pattern of removals constitutes a change of placement is determined on a case-by-case basis by the SAU and, if challenged, is subject to review through due process and judicial proceedings.

Although none of the Student's suspensions in the instant case were for greater than 10 school days in a row, the Student's series of removals, totaling 58 days in his xx grade year, constituted a "pattern", both with respect to the frequency and types of infractions that lead to the disciplinary actions. The discipline log prepared by the District confirms that these removals were in close proximity to each another and for behavior substantially similar to the Student's behavior in previous incidents. Incidents ranged from "refusing to walk with the rest of the class, inappropriate comments" to "refusing to listen to staff, refuses to do what the Assistant Principal tells him, and refusing to go to ISS and special ed testing."

Of course, the Student was not receiving special education services until the Parent signed her consent for the Student to receive services on April 24, 2008. From the time that the consent was signed to the remainder of the school year, the Student only received out-of-school suspensions totaling five days. Accordingly, during the time that most of the suspensions took place during the 2007-2008 school year, the Student was not "A child who has not been determined to be eligible for special education and related services" as required under MUSER § XVII.1.E.

MUSER § XVII.5, however, addresses discipline issues for students *not determined eligible for special education services*, (emphasis added) and provides, in relevant part:

A. A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part *if the public agency had knowledge* (as determined in accordance with paragraph (B) of this section) *that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred*. (emphasis added).

MUSER § XVII.5.B. articulates the standard for a district's Basis of Knowledge as follows:

A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) *The teacher of the child, or other personnel of the SAU, expressed specific concerns about a pattern of behavior demonstrated by the*

child directly to the director of special education of the agency or to other supervisory personnel of the agency.(emphasis added)

Sandra Cyr, the Student's xx grade special education teacher/case manager and xx grade tutor, stated that she recalls numerous behavior issues beginning in his xx grade year. She stated that his xx grade teachers documented the behavior infractions, and made referrals to the Special Education staff.¹⁹ Specifically, the record shows that on February 6, 2008, a "Pupil Evaluation Referral Form²⁰" was prepared by Loretta Hamann, the Student's regular education math teacher. In this form, Ms. Hamann states that the reason for the referral is: "Failing grades, frequent disruptions due to issues with self-control, distractibility and impulsive behaviors." She stated on this form that the Student is "non-compliant to staff requests, is verbally aggressive to peers/adults, redirect does not change behavior and frequent use of inappropriate language, i.e. swearing, sexual." She noted as other relevant factors an "excessive number of white slips, removal from cafeteria, suspensions, disregard of authority, school work not done, behaviors not modified by reward or punishment."

The Pupil Evaluation Referral Form, prepared by the Student's math teacher, satisfies the notice requirement of MUSER § XVII.5, that a "teacher of the child provide notice to the director of special education of the agency or to other supervisory personnel of the agency." By the time The Student completed his xx grade year, he received a total of 35 out-of-school suspensions after the Pupil Evaluation Referral Form was written on February 6, 2008. Based on the frequency and similarity of the behaviors that led to these disciplinary measures, it is clear that a "pattern" was established as contemplated by 34 CFR §300.536.²¹

Despite this pattern of behaviors and conduct violations, no manifestation determination was performed. In fact the Student's pattern of conduct violations continued after he started school again in the fall of 2008. He received a 2.5 day suspension on September 3, 2008 for "failure to take off underwear that was over clothing [or to] talk to A.P. or Principal." He received a one day suspension on September 8, 2008 for refusing to go to class, and he received a 10-day suspension on September 23, 2008 for "refusing to go anywhere in school but the A.P. (Assistant Principal's) office."

¹⁹ An Emotional Disturbance Evaluation Report was prepared on April 17, 2008 by Sandra Cyr, Special Education Teacher, and regular education teachers Patricia Langelier and Susan Grondon of the Lewiston School District, which concluded that that the Student exhibited the characteristics of emotional disturbance and indicated that he required specialized instruction to benefit from school. This report documented that the Student exhibits "inappropriate types of behaviors or feelings under normal circumstances," and that the Student's behaviors have adversely affected the Student's educational performance and "have been observed for six months or are likely to continue for six months," and that the behaviors have been "displayed to a marked degree, and to the extent that is apparent in school, well beyond the range of average for that age or grade." (emphasis added)

²⁰ The Pupil Evaluation Referral Form designed for Student referral to IEP team for consideration of special education services.

²¹ According to the Student Discipline Log prepared by the District.

At the time of these disciplinary measures in September, 2008 the Student was receiving special education services. Although none of the Student's suspensions in the instant case were for greater than 10 school days in a row, the manifestation determination requirement was again triggered as the Student had been subjected to a series of removals that constitute a pattern as defined by MUSER § XVII.1.E. and 34 CFR §300.536. Despite the pattern of behavior issues, the District again failed to conduct a manifestation determination.

As noted, when a manifestation determination is triggered, the regulations set forth a series of very specific steps to address the root causes and treatments for the underlying behaviors. Notably, if the District, the parent, and relevant members of the IEP Team must review all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by the parents to determine if the conduct was a manifestation of the child's disability, or if the conduct was the direct result of the SAU's failure to implement the IEP. If the manifestation team determines that the behavior is related to the disability, IEP Team must conduct a functional behavioral assessment and implement or modify any behavioral intervention plans, as necessary, to address the student's behavior. Additionally, MUSER § XVII.1.E requires the return the child to the placement from which the child was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan.

MUSER §II.12 defines a functional behavioral assessment as a school-based process to determine why a child engages in challenging behaviors and how the behaviors relates to the child's environment. This includes direct and indirect assessments and data analysis designed to: identify the problem behavior in concrete terms; identify contextual factors that contribute to the behavior; and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior. Obviously, this is an assessment of first resort when dealing with a student who exhibits challenging behaviors.

Regrettably, it was just this type of focused approach on the Student's behavior that might have made a critical difference to his special education programming or supportive services during his xx grade year. The manifestation determination would have caused the IEP team to more carefully consider other relevant information, such as teacher observations, discipline reports or Dr. Sheckart's recommendations in his September 14, 2009 report. It could have provided a more targeted functional behavior assessment, and would have given attention to updating the April 17, 2008 Behavior Intervention Plan to address some of the refusal behaviors in addition to those negative and hostile behaviors targeted by the original plan. The immediacy of the manifestation process would have provided a greater likelihood that some of these alternative placements and services would have been offered more rapidly.

Instead, the IEP developed on September 29, 2008 referred the Student to tutoring, where he essentially remained for his entire xx grade year, and which by all accounts provided little or no educational benefit to the Student.

Allegation # 8: Failure to implement the Student’s IEP within 30 days or to convene an IEP meeting to identify alternative service options in violation of MUSER §IX.3.B.(3).

Violation Found

MUSER §IX.3.B.(3) provides as follows:

Implementation of the Individualized Education Program

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability in need of special education and supportive services. All identified children with disabilities shall have a current Individualized Education Program in effect at the start of each school year.

If a school unit is unable to hire or contract with the professional staff necessary to implement a child’s Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options. This IEP Meeting shall occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP. The IEP Team shall determine the compensatory services, if any, necessary to compensate for the lack of services and to ensure the provision of a free appropriate public education

The March 23, 2009 IEP determined that the Student would be referred to day treatment and specifically provided that the Student would be referred to “specially designed instruction Day Treatment for “5 X 6:00” per week. (RETC/SOS, Spurwink and ALTC). The IEP further provided that until accepted to day treatment, the Student would continue with his current program at Lewiston Middle School attending for periods 7, 8 and homeroom. Although the record shows that an Educational Data Sheet and parent questionnaire for admission to Spurwink was completed on March 23 and 24, 2009, respectively, it appears that the District did not formally refer the Student to the RETC/SOS day treatment program or the Spurwink Services day treatment program until April 28, 2009. The Student was admitted into the RETC/SOS and Spurwink programs in June of 2009 and the Student is scheduled to commence the RETC/SOS program in September, 2009.

As of the March 23, 2009 IEP Team meeting, it was apparent that the Student’s current program of tutoring and partial day at Lewiston Middle School²² was completely ineffective. The day treatment referral, formally made by Dr. Powers in November, 2008, was long overdue. Based with this information, it is somewhat surprising that the District waited 26 days before making a formal referral to the two day treatment facilities approved by the IEP Team and the Parent. The delayed referral made it virtually impossible that the District would be able to implement the Student’s IEP within the 30

²² attending for periods 7, 8 and homeroom

days required under MUSER §IX.3.B.(3). Understandably, there is an application process, with interviews and paperwork that need to be prepared. Although reasonable to anticipate this delay, the District made no provisions to provide alternative services to this Student or to reconvene the IEP Team, but rather continued to implement the Student's partial day program, that he refused to participate in.

Allegation #9: Failure to provide the parents with proper prior written notice of the district's proposals regarding the student's educational program in violation of MUSER §VI.2.I and MUSER App. I (34 CFR §300.503). **No violation found.**

MUSER §VI.2.I states that if the team cannot reach consensus, a district must provide the parents with prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation. The Written Notice provisions of 34 CFR §300.503 also require districts to give parents notice, according to specifically defined terms, at least 7 days prior to the date the district proposes to change or initiate programs for students.²³

Despite the District's shortcomings on the issue of the Student's special education programming, there is no evidence to suggest that the District failed to adequately give notice to the Parent according to either MUSER §VI.2.I or MUSER App. I (34 CFR §300.503). The record reveals that the District provided Written Notice to the Parent

²³ The Written Notice provisions of 34 CFR §300.503 require districts to give parents notice at least 7 days prior to the date the school administrative unit:

1. Proposes to initiate or to change the identification, evaluation, or educational placement of your child, or the provision of early intervention services for your child age birth to 2 years, or a free appropriate public education (FAPE) to your child age 3 through 20 years; or
2. Refuses to initiate or to change the identification, evaluation, or educational placement of your child, or the provision of early intervention services for your child age birth through 2 years, or a FAPE to your child age 3 through 20 years.

The written notice must:

1. Describe the action regarding the referral, evaluation, identification, programming or placement that your SAU proposes or refuses to take;
2. Explain why your SAU is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record, or report your SAU used in deciding to propose or refuse the action;
4. Include a statement that you have protections under the procedural safeguards provisions in Part B of the IDEA;
5. Tell you how you can obtain a description of the procedural safeguards if the action that your SAU is proposing or refusing is not an initial referral for evaluation;
6. Include resources for you to contact for help in understanding your rights under Part B of the IDEA, such as and the Due Process Office of the Maine Department of Education (207-624-6644), the Maine Parent Federation (1-800-870-7746), and Southern Maine Parent Awareness (1-800-564-9696)
7. Describe any other choices that your child's individualized education program (IEP) Team, which includes the parent, considered and the reasons why those choices were rejected;
8. Provide a description of other reasons why your SAU proposed or refused the action.

prior to any evaluations or changes to the Student's educational placement and programming.

Allegation #10: Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I). **No Violation found.**

MUSER §IX.3.C provides that an IEP Team must consider both the concerns of the parents when developing each child's IEP. There is no evidence to suggest that the District failed to adequately consider the concerns of the parents in the IEP decision making process. The Parent appears to have attended each of the IEP Team meetings from February, 2008 to the present, and her concerns and points were routinely noted in each of the Written Notices corresponding to the IEP team meetings. It appears that the Parent was given full opportunity to express her position and opinions, and that the District staff gave consideration to those positions and opinions.²⁴

Allegation # 11: Failure to identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d); **Violation found.**

²⁴ MUSER §VI.2(I) confirms that the IEP Team must consider the parents' concerns but the District has ultimate responsibility, with due process rights afforded to parents, to ensure that a child is receiving appropriate special education services and supports. MUSER §VI.2(I) provides in relevant part as follows: The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding:

- (1) The child's needs and appropriate goals;
- (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and
- (3) the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

The IEP Team should work toward consensus, but the SAU has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive educational placement. It is not appropriate to make evaluation, eligibility, IEP or placement decisions based upon a majority "vote." If the team cannot reach consensus, the SAU must provide the parents with prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation.

Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resorting to a due process hearing. However a mediation or other informal procedure may not be used to deny or delay a parent's right to a due process hearing or to deny any other rights afforded under these rules.

MUSER §IX.3.A.(1)(d) provides in relevant part as follows:

- (1) In general. The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes:
 - (d) A statement of the special education (*Section X of this rule*) and related services (*Section XI of this rule*) and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with (a) and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and non-disabled children in the activities described in this subparagraph;

A procedural violation was found in the IEP developed September 29, 2008 in that it failed to continue reference to the weekly counseling support services that were added to the Student’s September 17, 2008 IEP. While the September 29, 2008 IEP continued the provision of supplementary services in support of the Behavior Intervention Plan as identified in the April 17 and September 17, 2008 IEPs, it discontinued reference to the counseling services contained in the earlier IEPs. The record reflects, however, that the Student continued to have counseling services made available to him through the December 1, 2008 IEP Team meeting.²⁵ The December 1, 2008 IEP contains no reference to counseling services, and the Written Notice likewise does not discuss the discontinuation of the Student’s counseling services. It appears, however, that the District discontinued counseling in light of the commencement of the MST program in December. None of the subsequent IEPs or Written Notices discuss the provision of school based counseling.

²⁵ Ryan Hayes, the Student’s counselor, attended the December 1, 2008 IEP Team meeting and stated that the Student “was refusing to see him.”

Additionally, due to a typographical error, the Student's IEP developed on February 6, 2009 stated that he was to receive eight hours of daily specialized instruction per week as supportive service, instead of the 80 minutes determined by the IEP Team.²⁶ The Written Notice stated that that the Student would "continue tutoring [one hour per day] until after February break" however there is no identification of tutoring or counseling services Supplementary aids and services to include on a daily basis: "classroom accommodation behaviors defined limits/expectations positive and consistent reinforcement involve parent", nor is there any indication within the IEP or the written notice of the IEP discussing the discontinuation of these services.

VII. Corrective Action Plan (CAP)

1. The District shall arrange for a manifestation determination and functional behavior assessment on the Student and the following comprehensive testing and evaluation:
 - a) Psychological testing, including behavior assessments, classroom observation, and an assessment of the Student's need for counseling and other supportive services to address his behavior issues;
 - b) An Independent Educational Evaluation as well as an assessment of academic, intellectual & learning development, with a specific assessment of any deficiencies or decreases in the Student's current level as a result of lack of programming or behavior planning for the Student;
2. The IEP Team shall convene upon the District's receipt of the aforementioned assessments in order to:
 - a) Review the recommendations of the evaluators, determine all necessary educational supportive services that the Student requires, and amend the IEP accordingly.
 - b) Determine what compensatory education and services must be provided to the Student for equity in light of the District's failure to provide any meaningful educational programming to the Student for his entire xx grade year, taking into consideration the need for extended school year programming. The IEP shall be amended to reflect any such modifications of programming or services.
3. The following compliance documentation shall be sent to the Due Process Office, the parent and the complaint investigator:
 - a copy of the IEP;
 - copies of all evaluation reports; and
 - a copy of the Written Notice (WN).
4. Copies of the revised IEP will be submitted to the Due Process office and the complaint investigator.

²⁶ Megan Prashak, the Student's case manager, prepared a written notice that she sent to the complaint investigator and the Parent noting this error.

5. The District shall schedule training for all appropriate staff members in order to review state and federal regulations with respect to IEP Team responsibilities and documentation of educational and supportive services offered to identified Students.