

Complaint Investigation Report
Parents v. RSU #23

January 14, 2010

Complaint #10.043C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainants: Parents

Address

City, Zip

Respondent: Michael LaFortune, Superintendent

90 Beach St.

Saco, ME 04072

Special Services Director: Catherine Faust

Student: Student

DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on November 24, 2009. The Complaint Investigator was appointed on November 24, 2009 and issued a draft allegations report on November 30, 2009. The Complaint Investigator conducted a complaint investigation meeting on December 14, 2009, resulting in a set of stipulations, subsequently amended. On December 17, 2009, the Complaint Investigator received 37 pages of documents from the Complainants, and received a 6-page memorandum and 197 pages of documents from RSU #23 (the "District"), on December 18, 2009. Interviews were conducted with the following: Catherine Faust, director of special services; Patricia Sands, outside case manager; Andrea Conley, teacher; Katrina Edwards, consulting teacher; Pat Moulton, occupational therapist; Kelly Mourmouras, physical therapist; Carol Hall, educational technician; Paul Snyder, brother-in-law; Karen McPhee, Director of Center for Therapeutic Recreation; Gary Grover, in-home service provider, and the Student's mother.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Multiple Disabilities. This complaint was filed by (the "Parents"), the Student's

parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to fully and adequately implement the student's November 2008 IEP with respect to provision of full-time one-on-one support in violation of MUSER §IX.3.B(3);
2. Failure to provide in the November 4, 2009 IEP supplementary aids and services in the nature of full-time one-on-one support to enable the Student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d);
3. Failure to provide special education and related services in the nature of a therapeutic swim program with sufficient frequency to enable the student to advance appropriately toward attaining his annual goals and to participate in extracurricular and other nonacademic activities in violation of MUSER §IX.3.A(1)(d);
4. Failure to obtain the Parents' agreement to not convene an IEP team meeting for the purpose of making changes to the Student's IEP before amending the IEP in violation of MUSER §IX.3.C (4);
5. Failure to provide written notice of the proposed amendment to the Student's IEP in violation of MUSER App. 1, 34 CFR §300.503.

V. Stipulations

1. From the start of the school year in September 2009 until the issuance of the November 4, 2009 IEP, there were three blocks during each school day when the educational technician assigned to support the Student was also responsible for providing support to one or two other students.
2. The Student's IEP in effect from the start of the school year in September 2009 until the issuance of the November 4, 2009 IEP provided for 100% Ed Tech support one-on-one assistance 100% of the time for the Student.

VI. Summary of Findings

1. The Student lives in Saco with the Parents, and is presently attending xx grade at C.K. Burns School ("the school"). He began receiving early intervention services at the age of six weeks, and currently receives special education services under the category Multiple Disabilities.
2. On September 12, 2008, the Student, at the District's request, underwent a psychological evaluation performed by Laurel Tinkham, M.Ed., M.S., LCPC. Ms. Tinkham administered

the Wechsler Intelligence Scale for Children – 4th Edition, and recorded a full scale I.Q. score of 40 for the Student.

3. Ms. Tinkham also had the Student's classroom teacher, Andrea Conley, and the Student's mother complete the Achenbach Child Behavior Checklist. Ms. Conley reported that the Student was very dependent on adults and often did not respond or do anything unless someone was right there working with him. Ms. Conley indicated that the Student had a tendency to sit back and let others speak for him or prod him rather than initiating a response. The Student's mother reported that the Student was too dependent on adults both in and out of school, and indicated that she desired the Student to become as independent as possible. Among the recommendations from Ms. Tinkham was: "Programming to increase independency and decrease dependency on adults."

4. In preparation for the Student's 2008 annual IEP review, Ms. Conley administered an Assessment of Basic Language and Learning Skills. In her evaluation report, Ms. Conley noted that the Student "makes very few independent requests throughout the day. If he looks like he needs help, a staff member will prompt him to sign or use his talker to ask for help." Among Ms. Conley's recommendations was: "Continue setting up interactions with peers from his class: partner him up at recess, lunch, and other appropriate opportunities throughout the day."

5. The Student's IEP dated November 6, 2008 provided, among the supplementary aids, services, modifications and supports: "100% Ed Tech support one-on-one assistance 100% of the time;" and therapeutic swim program once per week for one hour.

6. The Written Notice for the IEP team meeting on November 5, 2008 stated that the therapeutic swim program was to help with the Student's motor skills and functional life skills.

7. Beginning at the start of the school year in September 2009, during the blocks when the Student was at Unified Arts (music and physical education), lunch and recess, the educational technician assigned to the Student was also responsible for another student whose IEP provided for educational technician support during those activities.

8. At the next IEP annual review, on November 3, 2009, the District proposed that the Student's therapeutic swim program be discontinued because it caused the Student to miss opportunities for the Student to socialize and to use his alternative augmentative communication device ("AAC"), and because the Student didn't require the program in order to benefit from his education. The Parents strongly disagreed, and the District determined to reduce the frequency of the swim program to two times per month. The District suggested that the Student attend the swim program after school, but the Parents stated that they did not have the funds for that.

9. At the November 3, 2009 IEP team meeting, the District also proposed that the Student would no longer have one-on-one support from his educational technician, although he would continue to be supported throughout the entire day. The District explained that there were

times when the Student would be working with one or two other students, and there would only be one educational technician to support the group. The District based its proposal on the Student's significant improvement in behavior and his increased ability to communicate using his AAC. The Parents strongly disagreed that the Student did not need one-on-one support at all times, and when the District proceeded to make the determination, the Parents stated that the meeting was over and left.

10. On November 9, 2009, the Parents met with Ms. Faust (the special education director for the District), at Ms. Faust's suggestion, to further discuss the support issue. A compromise proposal was discussed, involving bringing in an outside consultant, gathering more data, developing a plan for shifting from one-on-one support to more independence and, in the interim, retaining one-on-one support for the Student for all activities except Unified Arts, lunch and recess. By the close of the meeting, Ms. Faust believed that the Parents were in agreement with this proposal, but according to the Student's mother, the Student's mother had stated that she would have to think about it.

11. On November 12, 2009, in response to an e-mail sent by Ms. Faust to the Student's mother referencing implementation of elements of the proposal developed at the November 9, 2009 meeting, the Student's mother sent an e-mail to Ms. Faust stating that the Parents did not agree with the proposal.

12. On November 13, 2009, the District sent a Written Notice to the Parents describing the results of the IEP team meeting of November 3, 2009, including the determination that the Student would have educational technician support at all times but not on a one-on-one basis. Immediately preceding the list of determinations was the following statement: "Below are determinations from 11/2/09 meeting, however, please see attached addendum from 11/9/09 meeting with parents and SPED director." The attached addendum set forth as "Determinations" the proposed terms discussed at the November 9, 2009 meeting between Ms. Faust and the Parents, including retaining one-on-one support for the Student for all activities except Unified Arts, lunch and recess.

13. Shortly after the Written Notice was sent, the District issued an IEP dated November 4, 2009. Among the supplementary aids, services, modifications and supports in the IEP were: "Ed Tech support one-on-one assistance 100% of the time for academics" in both regular and special education settings; "Ed Tech support" at lunch, recess and Unified Arts; and therapeutic swim program twice per month.

14. During an interview conducted by the Complaint Investigator with Patricia Sands, Ms. Sands stated the following: She is employed by Pine Tree Society and has been the Student's case manager since September 2007. As case manager, she assisted the Parents with getting home services instituted after they moved to their present home, and has been an advocate for school services for the Student. In that capacity she has attended the Student's IEP team meetings. She has observed the Student in the school setting, including one opportunity just before the most recent meeting. In general, there has been significant improvement in the Student's behavior over the last year, and the Student doesn't get "stuck" (he shuts down and turns into himself) nearly as often as he once did.

She is concerned about the IEP team's determination to reduce the amount of time the Student has one-on-one support for reasons relating both to the Student's safety and communication. The Student is not fully independent using his AAC, and relies on lots of verbal prompts. He often doesn't respond when another student asks him a question, and has to be prompted to respond. The Parents want the Student to be able to socialize with his peers. She thinks the District believes the Student is more independent than he really is, and she also does not believe there is a problem with the Student being overly dependent on his educational technician.

During her most recent observation, there was another student whose educational technician kept leaving the classroom, and who required a lot of support. The Student's educational technician had to give that student support, and was finding it very difficult to go back and forth between the two students. When the educational technician attended to the other student, the Student just sat there.

She has had occasion to observe the Student in his swim program, and he loves that activity. She believes swimming improves the Student's muscle tone as he works on his swimming technique. This is a different set of muscles than the Student works on in physical therapy ("PT") or occupational therapy ("OT"). In the swim program, the Student works on breathing technique and his whole body is involved. The District's concern was that the Student would be missing Unified Arts class when he went swimming, more of a social opportunity than a learning opportunity. The Student's mother had suggested that the District could find another social opportunity during the week to replace the one he missed during the swim activity.

15. During an interview conducted by the Complaint Investigator with Andrea Conley, Ms. Conley stated the following: She has been the Student's special education classroom teacher for the three years that the Student has been attending the school. The Student begins each day by going to the regular education classroom, checking in and then participating in class time. The Student then goes to Unified Arts (except on the day he goes to the swim program), after which he comes to her classroom. During the next block, the Student does work in her class or else goes to PT, speech or OT. Next the Student has lunch followed by recess. Afterwards, the student has either social studies or science in the regular education classroom. The Student spends the remainder of the day in her classroom working on activities programmed by the speech therapist. Throughout the day, the Student works on goals involving the use of his AAC. The Student is supported by an educational technician at all times.

When the Student first came to the school, he was a completely different child from who he is today. He was very quiet and shy, and frequently became "stuck," remaining that way for up to 30 minutes. When school staff attempted to intervene, the Student could become aggressive. Some days he refused to get on the bus to come to school. The Student was not toilet trained. At recess, the Student stood next to his educational technician and would not play with any other children. In general, the Student was very attached to his educational technician. He had an AAC at that time that was not very accessible to him, and he was reluctant to use it. The Student's IEP goals were largely functional in nature.

Over the course of the last school year, the Student became more independent. He became toilet trained. There was more social interaction with other students. He allowed his sense of humor to show. Towards the end of the year, the Student got a new AAC that worked much better for his level of functioning, and he began using it voluntarily. The Student became “stuck” much less frequently. Academic goals were added to the Student’s IEP, and the Student learned to: recognize 40 sight words (from a baseline of 0 words); write his first name; write numbers from 1-15; identify the different coins; put events in order (with 60% accuracy); and identify which group of objects is “more” and “less.” He began to learn to answer “who, what, where, when” questions and is learning to type on a keyboard.

During the Student’s first year, she accompanied him to the swim program. At that time, there were no other students in her class that were at the Student’s level, and he was very much by himself. The Student wouldn’t participate in physical education (“PE”) or in recess. The staff thought that the swim program would be good for the Student physically and would also give him a chance to go out into the community. In addition to swimming, the program gave the Student an opportunity to work on skills involved in showering, dressing and undressing. At the November 3, 2009 IEP team meeting, however, the team recommended that the swim program be discontinued because the Student no longer is reluctant to participate in PE and recess – he runs and plays ball and does most of what the other children do. The Student also walks up and down four flights of stairs on a daily basis. He is much more apt to socialize with his peers, and there are other students in the class at his level. The Student has largely learned to dress, undress and shower. The Student is much more a part of the school community, and the team members were reluctant to pull him out of school in order for him to attend the swim program. She thinks that the swim program is great, but that the Student no longer needs it and it takes away from time spent working on his IEP goals.

With regard to the educational technician issue, there are two other special needs students from her class who are in the same regular education class as the Student. She believes that the Student’s mother observed this and assumed that the Student’s educational technician was responsible for those students as well. In fact, the educational technician is only responsible for the Student. One of the other students has an educational technician, not the same educational technician as the Student’s, for computer class and art only. The second other student’s IEP provides for an educational technician only at recess. That student is very high functioning and is probably the best behaved student in her class, but has had a couple of behavior incidents where that student was playing too roughly. That other student only needs an occasional reminder to not be so rough. At the beginning of the year, that other student went to recess with an educational technician. The District decided, however, that since there were two other educational technicians already at recess plus the Student’s educational technician, since that other student requires only minimal support, and since that other student frequently plays with the Student, it would not be necessary for an additional educational technician to be present at recess dedicated to supporting only that other student. There has so far never been a time during recess where that other student and the Student were in two different places so that the Student’s educational technician could not see them both.

The Student's IEP team wants to see the Student continue to become more independent. They want to look for times when the Student's educational technician can back off and not be with the Student one-on-one. In the special education classroom, they want the Student's educational technician to work with the Student along with one or two other students. In the regular education classroom, however, the Student would still require one-on-one support. The Student would not be put in a group with other students that had significant behavior problems. They would look for other students who could be role models for the Student, or who are working on similar issues as those the Student is working on. Part of the problem in the past was that there were no other students at the Student's level for him to work with. In the past, the Student needed almost constant cueing and prompting, but this is no longer the case. Now, he sees other students doing something and he wants to do what they are doing. The Student very rarely "zones out" anymore. The Student has also become more adept at using his AAC. She is able to ask him what is bothering him, and he uses the AAC to answer. The Student is an active participant in class. He can work on an assignment independently now. At present, the Student often works in her class along with another student and they both have an educational technician beside them. To her observation, it is clear that the two students don't need to have two educational technicians present, and both those students need to be working on their independence.

The Student acts very differently when the Student's mother is present in the classroom. The Student's mother will sit next to the Student and interact with him. Once, the Student's mother told the Student to go to the bathroom after he had come back from recess. The Student had already learned to incorporate going to the bathroom after recess into his routine. The Student became angry and got "stuck." That was the first time all year that the Student had become "stuck." The Student got "stuck" one other time when the Student's mother was present.

16. During an interview conducted by the Complaint Investigator with Karen McPhee, Ms. McPhee stated the following: She is the director for the Center for Therapeutic Recreation, where the Student attends his swim therapy program. She is certified as a special education teacher. For the first year the Student attended the program, she worked directly with him; since then, the Student has had another instructor (also certified as a special education teacher), but she has continued to observe the Student. The Student is in a group with one other special needs child. The program stresses safety, especially around the water, teaching things such as walking carefully and maintaining good behavior.

She has seen much improvement both in the Student's swimming skills and in his maturity generally. With some adult help, the Student is now able to come in, change his clothing, go to the pool and engage in the program. She has also seen the Student's social skills continue to develop, with an increase in his awareness of others and ability to wait his turn. Sometimes his instructor asks the Student to model an activity for the other student in his group because the Student is better at that activity than the other student.

She believes that routine - having a consistent schedule to follow (swim at the same time every week) - is very important with children such as the Student. She does not believe that the Student will get the same health benefits from attending the program twice a month as he

does attending once a week, although he will still get some benefit. She believes that the program not only helps the Student to swim better, but to sleep better and eat better as well. She doesn't know what the Student will be doing instead of swim therapy on those other days in the month, whether there will be any physical activity involved, but children do lose physical strength and skills if they are not regularly engaged. She also does not know what the Student works on in his PT and OT, whether he focuses only on functional skills or also on posture, stability and fine motor work. There are other children in the swim therapy program who attend in the afternoons after school, and the Student could do that also.

She is not concerned that the Student's instructor is also responsible for another special needs child. That instructor is able to offer encouragement, support and instruction to both children. There are also other adults in the area who could provide support if it was needed.

17. During an interview conducted by the Complaint Investigator with Gary Grover, Mr. Grover stated the following: He is the president and CEO of Back to Basics Behavioral Health Services, and has been providing in-home support to the Student under Maine Care section 24 for about two years. He works with the Student primarily on personal care and daily living skills, and on environmental safety. He often takes the Student out into the community. He has not observed the Student in the school setting, and is not familiar with the Student's school program.

The Student is basically non-verbal, and has a very limited use of sign language and very limited functional communication. He does not believe the Student will ever be capable of holding a conversation, or be able to properly respond to what others ask or say. There has been improvement as the Student has gotten older, but the Student is still largely unable to communicate his needs. The Student also has a long processing delay, even longer when the Student is in a setting that is noisy, crowded or unfamiliar. In those settings, the Student has a tendency to freeze up – he gets overwhelmed and doesn't respond. When he goes out into the community with the Student, the Student's understanding of what is happening around him is very limited, and the Student is unable to make good social choices. The Student is best able to communicate when in a setting with which he is familiar and where he feels comfortable.

With regard to the Student's school program, he believes that the Student most needs one-on-one adult support when the Student is in a mainstream setting like the lunchroom or at recess and is confronted with lots of choices. In those settings, if the aide assigned to the Student has to attend to another student for a time, he believes that the Student will be unable to know what to do and will freeze up. He has less concern with the Student sharing that support with one or two other students when the Student is in a self-contained classroom.

With regard to the Student's swim program, he believes that an adaptive physical education program is of more long-term value to the Student than any academic program. He also believes that a structured, community-inclusive experience is very beneficial to the Student. The many skills the Student practices in the swim program - checking in, changing clothes, safety practices, etc. – will be valuable to him when he is an adult. In addition, the Student loves swimming. He has been with the Student when the Student was getting ready to go swimming, and the student was happy and upbeat.

18. During an interview conducted by the Complaint Investigator with Pat Moulton, Ms. Moulton stated the following: She is an occupational therapist for the District and has worked with the Student since he came to the District. With the Student, she works primarily on fine motor skills and upper body strength. The latter involves using weights and work using the balance ball. The Student works on tying, using a zipper, buttoning and using school tools (e.g., pencil sharpener, tape dispenser, etc.). She also consults with the classroom teachers and provides them with carryover activities. She has observed the Student in both his regular education and special education classrooms. In general, the Student appears to be on task and following what is taking place in the class. She has not observed the Student withdraw when he is not directly engaged with his educational technician.

She believes that having a one-on-one educational technician throughout the day reduces the Student's chances of increasing his independence, and that the Student is capable of becoming more independent. Being more dependent on his educational technician makes the Student less likely to socialize with his peers. The Student has "come out of his shell" a little more this year. She can see his sense of humor. She has also seen improvement in the Student's fine motor skills.

With regard to the Student's swim program, improved muscle tone, coordination and strengthening are all important, but the Student works on those things in OT, PT, PE and in his special education program. The Student goes to PE class and participates to the extent he is physically able. She does not believe the Student needs the swim program at this point.

19. During an interview conducted by the Complaint Investigator with Kelly Mourmouras, Ms. Mourmouras stated the following: She is a physical therapist for the District and has worked with the Student since he came to the school. Her work with the Student focuses on increasing trunk strength, on posture, on running and kicking, and on stair management. She has seen a great improvement in the Student over the last year. The Student's educational technician carries over a lot of the work she does with the Student. She also consults with the PE teacher. She has observed the Student in PE and at recess, and he does very well. He does a lot of running (as best as he can) and ball playing.

The Student has grown and improved greatly since he started in the District. He used to refuse to go into the school building. Now he goes in eagerly with a smile. He has become more independent and interacts more with his peers. She believes the Student should be encouraged to become more independent.

She has spoken with Ms. Hall about the Student's swim program. She doesn't believe there are benefits that the Student gets from that program that he doesn't get from OT, PT, PE, recess and using the stairs. The Student works on body strengthening in OT, PT and PE, and the educational technician carries this over. The Student works with weighted balls to build upper body strength. She thinks that swimming is a great activity for the Student, and she would always encourage parents to keep their children active on weekends.

20. During an interview conducted by the Complaint Investigator with Carol Hall, Ms. Hall stated the following: She is an educational technician III for the District. She is certified as both a regular and special education teacher, and has been teaching since 1987. She has worked with the Student since he started in the District. When the Student first came, he needed 100% one-on-one, but he's come such a long way. The Student knows where everything is in the school building. He used to be stuck to her like glue, but he is now more independent, and he plays and socializes with other students. She believes that the Student likes the independence, likes not having her right beside him all the time. She agrees that the Student needs prompting, but does not agree that he shuts down whenever she turns her attention away from him.

At present, there is never a time when the Student doesn't have one-on-one support. She is with the Student at all times, except at lunch (when he is with a different educational technician) and sometimes at recess (she switches off every other week with a different educational technician). At recess, there are also other educational technicians who are on duty, and she and the others all have walkie-talkies in case of emergency. She does not believe that the Student requires her constant attention. At the beginning of the year, the District received a new student whom they weren't expecting, and so for a time they were short-staffed. During that period, there were times when she had to turn her attention briefly towards that new student. When this happened, the Student continued to work on his activity.

The Student is able to communicate some of his needs. He signals to her when he needs to go to the bathroom by tapping her on the shoulder and giving her a sign. If the Student has completed his work and wants to show it to a teacher, he can go to that teacher and tap her on the shoulder so he can show it to her. The Student is also using his AAC more than he did before. He uses it to more often to answer questions, but he sometimes uses it to initiate communication as well. The Student has become much more mature and confident, and she doesn't believe there would be a problem putting him in a group led by her or another educational technician with one or two other students.

She takes the Student to his swim program. Although there are other children there, the Student doesn't have his AAC with him and he doesn't interact very much with the others. The Student is in a group with another child, and the instructor gives directions to each of them and then they work independently. When the Student is at swim, he is missing out academically. The Student loves to go swimming, but she doesn't believe that it is a necessity. At school, the Student works on strength and mobility in PT and OT. He also goes up and down several flights of stairs each day. In PE, the Student used to just stand against the wall. Now, he will climb the rock wall, practice dribbling a basketball or run laps, and be happy while he is doing it. At recess, the Student runs and plays football or tag. When the Student first came to the school, during a fire drill he could only walk about ½ block; now he is able to complete the full loop around the school with the other students.

21. During an interview conducted by the Complaint Investigator with Katrina Edwards, Ms. Edwards stated the following: She is a special education consulting teacher for the District. She consults with the Student's team for one hour per month and meets with Ms. Conley on a weekly basis. She helps design some of the material the Student works on in the special

education setting. She has observed the Student in both the regular and special education setting.

The Student has made overwhelming progress in the last two years. The Student doesn't need the same degree of support now that he did two years ago. The Student's "getting stuck" behavior is now happening so rarely that this year she hasn't even been consulted about it. The Student can follow his schedule and knows his class routines. The Student can work in a group setting, and in fact enjoys it. Even one year ago, the Student preferred to be with adults, but now spends more time with his peers. The Student is beginning to look to other students for his cues, and this is a really important development. She believes that the Student's constant one-on-one support can hold back the continuation of this development.

The Student will always need a very involved program, but there are other ways to teach him besides the one-on-one model. The Student still needs cueing and prompting, but she doesn't believe that the Student requires constant attention at the one-on-one level. She has seen the Student working independently on a task with only minimal prompting. The Student will always have supervision, and there won't be a time when the Student is in distress and no adult would know about it. The staff members know what kinds of activities might stress the Student and they prepare for this. When they put the Student in a group, they carefully choose the other students in that group and make sure the Student fits in, so he can continue to make gains.

22. During an interview conducted by the Complaint Investigator with Catherine Faust, Ms. Faust stated the following: She has been the special education director for the District for 12 years. Throughout her career, her work has focused particularly on children with autism.

She has observed the Student in the classroom, and has seen him working independently. One time, Ms. Hall got up to talk to her for a moment, and she noted that the Student continued to work during their conversation. She has also observed the Student engaged in activities with other students. The Student is also making better use of his AAC. In general, the staff has reported that the Student has become much more independent.

Since September, there have been three blocks (Unified Arts, lunch and recess) when the Student's educational technician was responsible for other students. In Unified Arts and lunch there was another student whose IEP called for support during those activities. That student required such minimal support, and the Student's need for supervision had decreased to such an extent that the District decided that the Student's educational technician could provide support to the other student while still being primarily responsible for the Student. She is certain that the Student's needs continue to be met. After this complaint was filed, the IEP team for the other student met and determined, with the consent of that student's parents, to remove the provision for support from that other student's IEP. It is still possible that the Student's educational technician might assist the other student with, for example, opening a carton of milk. She does not believe that giving that kind of minimal attention to another student is inconsistent with the designation of "one-on-one support."

At recess, there is also another student whose IEP calls for support during recess. The Student and this other student play together at recess. In addition to the Student's educational technician, there are two other educational technicians present on the playground during recess, and all three have been told to keep an eye on this other student. The staff attempted to add another student to the Student's reading class, but when the Parents complained, they removed the other student.

When a student is designated for one-on-one support, it is always due to the student's behavior – the student requires someone right there with him at all times. The staff always tells those parents that the goal is to phase out that degree of supervision. The Student certainly needs someone there to provide assistance when he needs it, but that doesn't mean the educational technician can't address another student's needs in a minor fashion, so long as the Student is the educational technician's primary responsibility and the Student's needs are being met. She does not believe that in the absence of one-on-one support the Student will ever be in distress without anyone noticing; when the Student is distressed it is very visible as the Student generally puts his head down.

After the November 3, 2009 meeting, which ended with the Parents walking out before it had ended, she invited the Parents to come to her office and continue the conversation. They worked on a new set of determinations around the one-on-one issue for three hours, involving bringing in an outside consultant and leaving one-on-one in place except for Unified Arts, lunch and recess. The Student's father did most of the talking, but she recalls the Student's mother saying that she didn't really care about Unified Arts, lunch and recess. She believed that by the end of the meeting the Parents were in agreement with the new determinations, and she sent out the Written Notice with an addendum containing those new determinations and developed the IEP consistent with them.

With regard to the swim program, this year Ms. Conley approached her and said that the Student was doing so much better in her class that she would rather not see him losing one morning every week. When the Student first came to the District, he was having such a hard time, getting "stuck" so often, that the staff wanted to give him an activity that he enjoyed. The Student had been involved with a swim program in his previous district, so the District agreed to also provide him with a swim program. Now, with the Student being so successful in school, he doesn't need the swim program in that sense.

23. During an interview conducted by the Complaint Investigator with Paul Snyder, Mr. Snyder stated the following: He is the Student's brother-in-law, and has known him since he was two years old. He has a degree in education with a major in PE, and has often taught as a substitute in special education settings. The Student didn't walk until he was four or five, and anything he can do for exercise is beneficial. The Student can't run or do most sports activities. Learning to ride a bike has helped the Student.

The Student needs someone to engage with him, to keep communication going. He has seen improvement in the Student's ability to communicate, but left to himself, the Student will just sit and roll his toy cars back and forth. If someone isn't on top of the Student, the Student won't stay focused – he'll be lost in another world. During lunch, the Student will "check

out” and forget to eat, especially if he is in a noisy, busy setting like a school lunch room. The Student often understands what is going on, but 20 – 30% of the time he has no idea. The Student also has trouble with transition, and needs someone to tell him where to go and what to do next.

Emotionally, the Student can “turn on a dime” and become violent, shut down or engage in self-injurious behavior. He doesn’t allow his children to be alone with the Student.

24. During an interview conducted by the Complaint Investigator with the Student’s mother, the Student’s mother stated the following: When she goes into the Student’s class to observe, she doesn’t participate, but just sits back and watches. She has observed the Student this year at recess when the Student was with his educational technician and two other students from his class. She doesn’t know whether the other students were supposed to have support at that time. There were also other students and other adults on the playground. She also observed Ms. Hall in the classroom giving instruction to the Student and one other student. The other student was being disruptive and kept trying to get Ms. Hall’s attention. Whenever Ms. Hall turned to the other student, the Student just sat there. She complained to Ms. Hall about it, and Ms. Hall agreed it was a problem. The District stopped putting the Student in the small group. She is happy to have the Student in small group instruction, but she just doesn’t believe that Ms. Hall can be the group facilitator while at the same time being the Student’s one-on-one educational technician. Someone else has to fill one of those roles.

She agrees that compared to when the Student started at the school he is much more comfortable and much more interactive with the other students. The Student is not as glued to his educational technician, and she is very happy with that. The Student is getting “stuck” less. All of this is where the Student was by the time he left his previous school district. The Student has begun to raise his hand in class, although just barely. The Student still, however, isn’t good at communicating his needs. She agrees that the Student has become more independent and wants him to become even more so, but she doesn’t want to pull the one-on-one support until the Student has truly mastered the skills he needs.

She sees the District’s wanting to remove one-on-one support during Unified Arts, lunch and recess as only stage one – they will continue to try to give the Student less and less support. The Student still needs help knowing what to do. The District is saying they can reduce support this year because of who the other children in his class are who would be in his groups with him, but the Student is going to middle school in the fall. Also, another student could come into his class. The change in the IEP shouldn’t be based on who the other children are right now – either he needs the support or he doesn’t.

She saw the Student at lunch trying to eat lasagna by taking tiny little bites because he couldn’t figure out how to cut it to proper size. No one opened the Student’s milk carton, so she had to do it. The Student doesn’t ask for help when he needs it. He wasn’t able to get his food until the rest of his class came to the table, and by then there wasn’t enough time for him to finish his food. The Student needs full support at lunch until he can cut his own food, open his milk and ask for the help he needs.

She agrees that the Student is much more interactive with the other students at recess, but believes that this is because Ms. Hall prompts him to do it. If Ms. Hall was busy with other students, the Student would just stand there. If another child bolts and Ms. Hall has to go after him, the Student will be vulnerable. When she was observing at recess, one of the students ran off, and no one went after him.

She knows the Student is happier in PE than he was before, and that he really likes the PE teacher. The Student might be able to share his educational technician in that class. On the other hand, if the Student was in art (if his swim program was taken away), he wouldn't be able to follow the teacher's instructions without either one-on-one support or a modified program. She doesn't know what happens in music class, but if they're going to try to teach him about notes or other skills beyond his capabilities, he would need one-on-one support in order to stay on task and figure out what to do. She observed the Student in computer class and he needed constant help.

With regard to the swim program, from the time the Student was in 1st grade, his school put him in a swim program as part of his PT. When the family moved to the District, she told them about this and the physical therapist said she wouldn't do a swim program. Ms. Faust found a swim program for the Student, and she was very happy about that. Now the IEP team says they want to take it away because the Student misses one morning a week (really only two hours). She doesn't understand why they would take this away. The Student has found a sports activity in which he can be successful, and he is almost able to swim on his own. It's also a socialization opportunity and involves hygiene training. Going to the YMCA with the Student wouldn't be an adequate substitute because the pool water is too cold for the Student, and she would not be able to go into the men's locker room and help him dress. There also wouldn't be someone qualified to instruct a non-typical child like the Student. She agrees that the Student gets physical exercise in his school program, but it doesn't duplicate the experience of swimming – it doesn't work on flexibility, stretching and buoyancy. Swimming can be a life-long skill for the Student, as well as a safety skill since the Student loves the water so much.

With regard to the November 9, 2009 meeting with Ms. Faust, this was not an IEP team meeting, and she didn't understand when Ms. Faust invited her that IEP decisions would result from it. She would have had Ms. Sands present, and would have tape recorded it. She believed it was just an informal conversation. At the end of the meeting, she told Ms. Faust: "Let me think about this." The next thing she knew, it was part of the Student's IEP.

VII. Conclusions

Allegation #1: Failure to fully and adequately implement the student's November 2008 IEP with respect to provision of full-time one-on-one support in violation of MUSER §IX.3.B(3)

VIOLATION FOUND

The Student's November 6, 2008 IEP provided "100% Ed Tech support one-on-one assistance 100% of the time." The District concedes that there have been periods of time, since September 2009, when the educational technician responsible for providing the "one-on-one assistance" to the Student has also been given responsibility for providing support to another student at the same time. The District takes the position that so long as the support needed by the other student is minor, and so long as the Student's needs are being met, this arrangement is not inconsistent with the notion of "one-on-one."

The special education regulations do not define, nor even reference, "one-on-one" support. According to the Random House Dictionary (2009 ed.), however, "one-on-one" is defined as: "a meeting or confrontation between *two* persons" (emphasis added). Indeed, it is hard to justify an interpretation of this term that includes one adult being responsible for two students. Having issued an IEP containing that term, the District was obligated to honor it unless and until the IEP was amended. When it appeared to District personnel that the Student no longer needed the undivided attention of an educational technician, they could have convened an IEP team meeting to consider making that change. They could not, however, simply change the practice of the educational technicians without changing the provisions of the IEP.

This is not to say that an educational technician assigned to a student could not, on a given occasion, lend assistance to another student when doing so would not jeopardize the student to whom the educational technician was assigned. This is very different, however, from assigning that educational technician with the ongoing responsibility to support another designated student.

Allegation #2: Failure to provide in the November 4, 2009 IEP supplementary aids and services in the nature of full-time one-on-one support to enable the Student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d)

NO VIOLATION FOUND

The fact that the District was constrained to continue to provide exclusive support to the Student so long as the November 6, 2008 IEP was in effect does not mean the Student's IEP team, on November 3, 2009, could not determine that this degree of support was no longer required. There was ample evidence that the Student had progressed to the point that he no longer required the same degree of vigilance and assistance from his educational technician. Many staff members spoke of the Student's ability to work independently and of the great reduction in the number of instances of problematic behavior on the Student's part. It should be further noted that the director of the Student's swim program, which program the Parents hold in such high esteem, found no problem with the Student's swim instructor sharing her attention with another child. At the same time, the concept of reducing the Student's dependence on his educational technician was embraced by many, including the evaluating psychologist Ms. Tinkham and the Student's mother.

This is not to overlook the Student's ongoing need for support, and in particular his difficulty in asking for assistance. The program being put forth by the District, however, involving support throughout the day and including the Student's participation in small groups of other students whose behavior is not significantly challenging, appears to reasonably meet the Student's needs both in terms of assistance and of encouraging further independence.

Allegation #3: Failure to provide special education and related services in the nature of a therapeutic swim program with sufficient frequency to enable the student to advance appropriately toward attaining his annual goals and to participate in extracurricular and other nonacademic activities in violation of MUSER §IX.3.A(1)(d) **NO VIOLATION FOUND**

There appears to be no question that the swim program is beneficial to the Student and that the Student greatly enjoys the experience. This is not, however, the legal standard by which to determine whether it must be included in the Student's educational program. The standard by which a student's educational program is to be measured is that it must offer a program "reasonably calculated" to deliver "educational benefits." *Hendrick Hudson Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L.Ed. 2d 690 (1982). As explained by the Court in *C.G. and B.S. v. Five Town Community Sch. Dist.*, 513 F. 3d 279, 284 (1st Cir. 2008), this obliges a school district to "provide an adequate and appropriate education. The IDEA does not place school systems under a compulsion to afford a disabled child an ideal or an optimal education."

The Student plainly has needs involving his physical and motor development. The November 4, 2009 IEP contains a PT goal that begins: "[The Student] presents with decreased muscle strength, endurance, advanced gait skills, and delayed age-appropriate gross motor skills which affect his functional mobility within the educational environment." Those needs are adequately and appropriately addressed through the Student's PT program, as well as through the Student's active participation in PE and recess. The swim program would no doubt serve to further enhance the Student's progress but, again, the law does not guarantee delivery of the optimal program.

Allegation #4: Failure to obtain the Parents' agreement to not convene an IEP team meeting for the purpose of making changes to the Student's IEP before amending the IEP in violation of MUSER §IX.3.C (4) **VIOLATION FOUND**

MUSER §IX.3.C (4) describes the process for making changes to a student's IEP after the annual meeting is held without the convening of the IEP team. It requires that the district and the parents agree to amend the IEP, and involves the development of a written document containing those amendments. The regulation further requires that parents receive Written Notice of those changes.

Here, shortly after the parents walked out of the IEP team meeting due to their displeasure with the IEP team's determination concerning the level of support to be provided to the Student in the coming year, Ms. Faust invited the parents to meet with her to further discuss the issue. Ms. Faust and the Parents spent three hours working on an alternative set of determinations, which in final form would have restored the one-on-one support the Parents wanted for most of the Student's day, and set in motion a process for further assessing the Student's needs in this regard and developing a program for increasing the Student's independence. At the end of the meeting, Ms. Faust believed the Parents were in agreement with those determinations; the Student's mother, however, had not decided to accept them, and believed that she had communicated that uncertainty to Ms. Faust.

Regardless of what was communicated at the end of the meeting, the Student's mother, in an e-mail dated November 12, 2009, told Ms. Faust that the Parents were not in agreement with the proposed amendments. At that point, the District was constrained to follow the determinations made at the IEP team meeting (even though they were less favorable to the Parents' position), until either another IEP team meeting was held or some further discussions were held with the Parents resulting in new determinations with which the Parents did agree. Instead, the next day the District sent to the Parents the Written Notice containing an addendum setting forth the amendments with which the Parents were not in agreement, and several days later sent an IEP developed in accordance with the amended determinations rather than those reached at the IEP team meeting. These actions violated the requirement that changes to the IEP may occur only as a result of an IEP team meeting unless the parents agree to amend without a meeting. About one week after the Parents received the Written Notice, they filed this complaint.

It should be noted that the Parents were not clear regarding the nature of the meeting with Ms. Faust on November 9, 2009. More careful explanation of the process for amending the IEP without an IEP team meeting might have avoided the loss of trust experienced by the Parents when Ms. Faust took steps to implement the proposal she thought had been agreed to at the meeting.

Allegation #5: Failure to provide written notice of the proposed amendment to the Student's IEP in violation of MUSER App. 1, 34 CFR §300.503

NO VIOLATION FOUND

The Written Notice connected with the November 3, 2009 IEP team meeting and sent to the Parents on November 13, 2009, clearly referenced and had attached to it an "Addendum" setting forth what Ms. Faust believed was agreed to between the Parents and herself. While the Written Notice was defective in that Ms. Faust had reason to know at that point that the Parents were not in agreement, it nevertheless satisfied the regulatory requirement to put the Parents on notice of the proposed amendments.

VIII. Corrective Action Plan

The District shall revise the November 4, 2009 IEP so that it is consistent with the determinations made by the District after the IEP team failed to reach consensus at the November 3, 2009 meeting, as reported in the Written Notice of that meeting. The District will submit a copy of the revised IEP to the Due Process Office and the Parents.

The District shall also issue a memorandum to all special education staff regarding the necessity for parental agreement before amending an IEP without convening an IEP team meeting, and regarding the requirement that an educational technician assigned to a student whose IEP provides for “one-on-one support” may not also be assigned responsibility for support of another student. The District will submit a copy of the written memorandum, together with a list of the names and job titles of all those to whom the memorandum is issued, to the Due Process Office and the Parents.