

Complaint Investigation Report
Parent v. Surry
November 19, 2010

Complaint #11.004C/11.012C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parent
Address
City, Zip

Respondent: Mark Hurvitt, Superintendent
Union #93
Box 630
Blue Hill, ME 04614

Special Education Director: Steve Peer

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received the complaint designated as 11.004C on July 22, 2010. The Complaint Investigator was appointed on July 23, 2010, and issued a draft allegations report on July 27, 2010. The Complaint Investigator conducted a complaint investigation meeting on August 9, 2010, resulting in a set of stipulations. The Department of Education received the complaint designated as 11.012C on August 10, 2010, and consolidated the two complaints. The Complaint Investigator was appointed to the consolidated complaints on August 13, 2010, and issued a second draft allegations report on August 17, 2010. The Complaint Investigator conducted a second complaint investigation meeting on September 24, 2010 (rescheduled from the original date of August 27, 2010 at the Complainant's request), resulting in a second set of stipulations. On October 8, 2010, the Complaint Investigator received a 4-page memorandum and 426 pages of documents from the Complainant, and received a 33-page memorandum and 730 pages of documents from the Surry School Department (the "District") on October 12, 2010. Interviews were conducted with the following: Dr. Royal Gruenich, neuropsychologist; Dr. Susan Bruce, deaf/blind expert; Dr. Mary Talbot-Fox, psychologist; Dr. Elizabeth Cuddy, psychologist; Steve Peer, special education director for the District; Dr. Murray Shulman, former special education director for the District; Patti Rapaport, special education director for Bangor School Department; Barbara Wais, speech language pathologist for Bangor School Department; Mary Marshall, special education teacher for Bangor School Department; and the Student's mother.

III. Preliminary Statement

The Student is xx years old and is considered to be in the xx grade. She is eligible for special services under the exceptionality of multiple disabilities, including blindness, partial hearing loss, autism, mental retardation and speech and language impairment. This complaint was filed by the Student's mother (the "Parent"), alleging violations of the Maine Unified Special Education Regulations, Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide a free appropriate public education by providing the Student with an abbreviated school day in violation of MUSER §II.11 and 34 CFR §300.101(a).
2. Failure to provide extended school year services during 2009 and 2010 in violation of MUSER §X.2.A(7);
3. Failure to fully and adequately implement the Student's IEP with respect to provision of occupational therapy, physical education and augmentative communication technology and services in violation of MUSER §IX.3.B(3);
4. Failure to provide education in the least restrictive environment in violation of MUSER §X.2.B;
5. Failure to develop the IEP in conformity with the determinations of the IEP team regarding augmentative communication devices and services in violation of MUSER §VI.2.J(4);
6. Failure to develop the IEP in conformity with the determinations of the IEP team regarding consulting services from a deaf/blind educator in violation of MUSER §VI.2.J(4);
7. Failure to develop a behavior intervention plan for the Student, using positive behavioral interventions and supports to address the child's behavior issues, in violation of MUSER §IX.3.C(2)(a);
8. Failure to fully and adequately implement the Student's IEP with respect to provision of tutoring services in violation of MUSER §IX.3.B(3);
9. Failure to conduct occupational therapy, deaf-blind developmental, physical therapy, and adaptive physical education evaluations as ordered by the Student's IEP team in violation of MUSER §V.1.B(1).

V. Stipulations

1. The Student did not receive extended school year services during the summer of 2010.
2. The Student's IEP during the 2009-2010 school year did not contain a behavior intervention plan.
3. The Student's IEP Team determined in 2009 that occupational therapy and deaf-blind/developmental evaluations were to be conducted.

VI. Summary of Findings

1. The Student is xx years old and lives in Surry with the Parent and three siblings. She began receiving special education services under the category Multiple Disabilities in xx grade.
2. The Student attended Surry schools from her first kindergarten year, school year 1999-2000, through 2004-2005. Her Pupil Evaluation Team then placed her in the Perkins School for the Blind (“Perkins”) for school year 2005-2006. After a few months, Perkins staff and the Parent decided that the Student should leave that school. The Student returned to Perkins several months later, but the Parent again withdrew her from the school. The Student returned to Surry Elementary School briefly, attended an ESY program at that school, and again attended briefly in September 2006 before the Parent decided to remove her from that school.
3. The Student’s 2008-2009 IEP provided that the Student would attend a day treatment program at Kid’s Peace in Ellsworth, Maine. The Parent, who sought a placement for the Student at a life skills program in the public school which the Student would attend if not disabled, challenged that determination through a due process hearing, and then appealed the Hearing Officer’s decision affirming the IEP team’s determination to the U.S. District Court, where it is presently pending.
4. The Student remained out of school from September 2006 until May 2009, when the Parent, the District and the Bangor School Department agreed that the Student would attend a program at the Bangor Regional Program for Multi-handicapped Students (“BRMH”).
5. On May 15, 2009, the Student’s IEP Team met to prepare an IEP for the forthcoming school year and to discuss the 2009 extended school year (“ESY”) program. The Written Notice of that meeting contains the following statements:
 - a. In accordance with the Parent’s wishes, the IEP would record the service level frequencies for all related service providers as “to be determined”;
 - b. Dr. Susan Bruce, a deaf-blind expert, would do an in-service training for staff in November 2009 and would provide consultation services thereafter, with the frequency to depend on the time and expertise of the teacher of the blind with whom the Student would be working;
 - c. In accordance with the Parent’s wishes, the IEP would not include a behavior intervention plan, with a plan to be developed after the school year started and staff members were able to see what the Student’s current behavior needs were;
 - d. The IEP team would make determinations about updated evaluations at the next team meeting;
 - e. The Student would have full access to the Bangor High School Regional life skills ESY program, although the Parent stated that the Student’s attendance at that program would be gradual, with the Parent and the Student’s United Cerebral Palsy worker deciding on a day-by-day basis whether and for how long the Student would attend.
6. The Parent did not request that the Written Notice of the May 15, 2009 meeting be amended.
7. The Student’s June 2009 IEP provides as follows:

- a. With regard to consideration of the Student's behavior, the District "has offered to implement the behavior intervention plan in the 2008-2009 IEP, but [the Parent] would prefer to wait to adopt a plan until after [the Student] has stabilized in her new program";
- b. Occupational Therapy is identified as a related service, with the frequency to be determined;
- c. Tutorial Services is identified as a special education service, with no further description provided;
- d. Adaptive Physical Education is identified as a related service with the frequency to be determined;
- e. Deaf Blind Consultation is identified as a related service with the frequency to be determined;
- f. Augmentative Communication Consultation is identified as a related service, to be provided by a speech pathologist, with the frequency to be determined;
- g. An Augmentative Communication System is identified as a supplementary aid, service, modification and/or support, to be provided by a special education teacher up to 6 hours per day;
- h. ESY is identified as a related service with the frequency to be "up to 6 hours per day, 4 days per week, for 6 weeks by mutual agreement;"
- i. Gradual Re-introduction to School is identified as a supplementary aid, service, modification and/or support, with the frequency to be "as needed";
- j. Specially Designed Instruction is identified as a special education service, Speech and Language Services are identified both as a special education service and a related service, Physical Therapy, Social Work Services, Psychological/Neuropsychological Consult, Orientation and Mobility and Transportation are all identified as related services, Educational Technician and Music Therapy are identified as supplementary aids, services, modifications and/or supports.

8. The June 2009 IEP further provides, in regard to Least Restrictive Environment: "[The Student] has multiple disabilities. Due to her significant needs, she requires specialized instruction and distraction free environment. [The Student]'s educational program requires an educational technician at all times for support, as well as a wide array of specialized services and consultation, as set forth in the IEP. [The Student]'s needs require placement in a structured special education program. Staff needs to be well trained and work together on all her skills throughout the day. Because [the Student] has been out of school for close to three years, and is very sensitive to new environments and new people, she will require a very careful transition into her school program. She requires access to peers, but a quiet comfortable space with headphones available for her."

9. On October 5, 2009, the Student's IEP team again met. The Written Notice of that meeting states that the team "agreed on the components of the 2009-10 IEP," and contains the determinations that the Student would receive an occupational therapy evaluation, and that Dr. Bruce's assessment and consultation services would continue. The Written Notice further stated: "[The Parent] reported that she is pleased with [the Student]'s transition...and her current and improving program."

10. The Parent did not request that the Written Notice of the October 5, 2009 meeting be amended.

11. The Student's IEP dated November 4, 2009 provides as follows:

- a. With regard to consideration of the Student's behavior, "behavior consultation as needed";
- b. Occupational Therapy Consultation is identified as a related service, with the frequency to be 30 minutes weekly;
- c. Tutorial Services is identified as a special education service, provided by a tutor with the frequency to be 3 hours per day;
- d. Adaptive Physical Education is identified as a special education service with the frequency to be 30 minutes twice per week;
- e. Augmentative Communication Consultation is identified as a related service, to be provided by a speech pathologist, with the frequency to be determined;
- f. A voice output device is identified as a supplementary aid, service, modification and/or support, to be provided by a speech language therapist or special education teacher as needed;
- g. ESY is identified as a special education service with the frequency to be 6 hours per day, 4 days per week, for 6 weeks;
- h. Gradual Re-introduction to School is identified as a supplementary aid, service, modification and/or support, with the frequency to be "as needed";
- i. Psychological Services Consultation is identified on two separate lines as a related service, with the provider identified as a school psychological service provider on both lines and the frequency stated as 20 hours total on one line and 24 hours total on the other;
- j. Specially Designed Instruction is identified as a special education service, Speech and Language Therapy Consultation, Orientation and Mobility Services Consultation and Transportation are all identified as related services, and Educational Technician is identified as a supplementary aid, service, modification and/or support.

12. On or about January 6, 2010, the Parent wrote a letter to the director of special education of the Bangor School Department, in which she states that the Student "seems to really be enjoying school and is eager to go in the mornings." She further stated that she reviewed the November 4, 2009 IEP and had only two requests for amendment she wished to make, one with regard to the issue of whether autism was properly listed as one of the Student's component disabilities, and the other regarding the "apparent redundancy" of the duplicate listing of psychological consult services.

13. The District issued a Written Notice, sent to the Parent on May 10, 2010, purportedly recording an agreement on October 5, 2009 to amend the Student's IEP without a meeting with the proposed action being the provision of an OT evaluation of the Student.

14. On or about July 30, 2009, Joan Furbish of the Bangor Regional Program wrote that the Student had visited the ESY program for 16 partial days during the summer, staying for anywhere from 15 minutes to 2 hours and 20 minutes.

15. In a September 28, 2009 consultation report by Lori Spence, teacher of the blind and orientation & mobility specialist, Ms. Spence wrote that one of the Student's teachers, Mary Marshall, was "concerned that [the Student] does not like sitting tasks, which are most of the pre-voc. and vocational tasks that we would be working on. I suggested starting with very short time periods or numbers of tasks and rewarding the Student for completing them."

16. On December 3, 2009, Ms. Marshall, wrote to Dr. Bruce that the staff was having "the most difficulty finding enough activities (especially ones [the Student] might enjoy) to keep her busy and engaged along with keeping behaviors down. Some days she is not even interested in her favorite leisure activity of listening to music on the couch but also does not want to do anything else we might offer except to say 'bye bye' indicating her desire to leave." Dr. Bruce wrote back, on December 4, 2009, that she thought "the big problem is that [the Student] was out of school and used to doing things in her own determined way for a very long time." On December 17, 2009, Dr. Bruce wrote to Ms. Marshall that the Student "is doing a great job of reaching out to you all and to engaging with you-but, she has a long way to go. We can't expect too much too soon or she will withdraw more and you will have the problem of her not doing anything."

17. In a report of her observation of the Student on April 30, 2010, Dr. Bruce noted that the Student's behavior had deteriorated significantly since her previous visit in December 2009: "The current state of her behavior is that she is frequently non-compliant, often engages in aggression (hits/swipes/bites/digs her nails into others, head butts others and objects) to escape from task demands, exhibits aggression when her communication is not understood, and most recently, she lies down on the floor to avoid tasks....In between these bursts of aggression, [the Student] generally appeared very lethargic."

18. In a report of her May observation dated May 20, 2010, Dr. Bruce stated that the BRMH staff members "take the ideas I give them and implement well. They are very simply being challenged by the frequency and level of [the Student]'s behaviors."

19. During the 2009-2010 school year, Dr. Bruce recorded hours of service connected with the Student as follows: Observation: 11 hours 20 minutes; Document Review: 3 hours 10 minutes; Writing Reports: 3 hours 45 minutes; Attend IEP Team Meeting: 1 hour 30 minutes; Miscellaneous: 1 hour 50 minutes. The hours recorded totals 21 ½.

20. During the 2009-2010 school year, psychologist M. Elizabeth Cuddy, Ph.D. provided consulting services to BRMH regarding the Student, consisting of observations, meetings with teachers and the Parent, record reviews, and numerous phone discussions. Dr. Cuddy also reviewed behavioral data sheets maintained by the Student's teachers on an ongoing basis. In a Behavioral Programming Summary dated April 30, 2010, Dr. Cuddy provided recommendations for dealing with a large number of the Student's problem behaviors. Dr. Cuddy also addressed the issue of extending the Student's school day, stating her recommendation that any decision on this issue await an anticipated occupational therapy evaluation and training to be conducted by Dr. Bruce. Dr. Cuddy reported that the Parent indicated that she did not think the school day needed to be extended right away.

21. In a written note submitted at the June 2010 IEP team meeting, Barbara Wais, speech language pathologist, described the Student thusly: “[The Student] does use ‘challenging behaviors’ to get across ideas. In particular she consistently hits herself, throws school materials and hits teachers as a way to avoid tasks. Not only does she avoid tasks, she also consistently uses striking out as a way to avoid interaction. Talking with her, and engaging her in communication frequently ‘overstimulates’...[The Student]’s small gains in getting her ideas across have not helped her reduce her negative behavior. Even though teachers with decades of experience have tried to decipher [the Student]’s feelings and tried to increase positive, supportive interchanges every day, [the Student] has not been able to become significantly more tolerant of interaction. It has seemed like the more educational activities she participates in, the more the increased interaction ‘gets on her nerves’.”

22. On May 24, 2010, the Student engaged in self-injurious behaviors at school and returned home with scratches and bruises around her jaw. The Parent wrote to the school on May 28, 2010 that the Student would not be returning to school “until the problems that led to her injuries have been fully addressed.” Sometime thereafter, the Student contracted a serious infection.

23. On or about June 9, 2010, Mr. Peer wrote to the Parent, confirming that an IEP team meeting scheduled for that day had been cancelled by the Parent due to the Student’s illness, and reminding the Parent that the ESY program at Bangor would be available to the Student in the forthcoming summer. On August 4, 2010, Mr. Peer wrote to the Parent inquiring whether the Student had recovered from her illness so that she would be attending the ESY program. The Parent did not respond, and the Student had not returned to school since that time.

24. By letter dated July 20, 2010, the Commissioner of the Department granted an appeal from the Parent from a denial of a superintendent’s agreement between the District and AOS #91, and AOS #91 became the district responsible for providing a FAPE to the Student as of September 7, 2010.

25. During an interview conducted by the Complaint Investigator with Susan Bruce, Ph.D., Dr. Bruce stated the following: She has a doctorate in special education, is certified as a teacher of the visually impaired and blind, and is fully university-prepared in deaf-blindness. Her particular area of expertise is in symbolic expression an issue of primary importance to the Student, who is a pre-symbolic communicator.

She was hired by the District as a deaf-blind expert, and was asked to do staff training. She spent considerable time during the 2008-2009 school year preparing District staff to work with the Student, but the Parent never allowed the Student to come to school. For the 2009-2010 school year, she doesn’t believe that the District failed to adequately utilize her services. The District was limited by her availability more than anything else.

With regard to the abbreviated school day, the Parent definitely agreed to an abbreviated day at the start of the year. It was expected that the school day would expand after the winter break. The Parent was initially very happy with the partial day. Nobody raised the issue of the length of the school day with her. The year started very well in general until the Parent,

some time in the winter, started to express anger towards the District, including with regard to the length of the school day.

When she came to observe the Student in April 2010, she saw a child much more behaviorally involved than at her previous visit. The Student had definitely regressed, and she was surprised that no one at the school had contacted her. Staff members told her that the regression only began in February, and they believed it would only be temporary. They told her that the Student's decline was related to the Student's UCP worker, Kysha Woodye, having left. They said that by the time they could see that it was more serious, her April visit was not far away so they decided to just wait for that.

She believes that if the Student's behavior had not deteriorated to such a degree the school could have increased the length of the Student's day. There was always the intention that this would happen, but it was very difficult to fill the Student's day because there weren't many activities that the Student was capable of doing. The Student could be uncooperative and aggressive. She believes that the school could have done more to develop activities for the Student, but she doesn't know whether the Student would have been willing to do them. As a result of the Student's disabilities, it takes her a long time to learn to like something new.

The Student is very complex and needs a lot of services available to deal with her. Then the Student can change and the school has to retool everything in their program. The Student has learned her repertoire of aggressive behaviors, and the Student's truancy is a huge part of this behavioral overlay. The Student finds emotional safety from being all alone, and so much of the Student's behavior is directed towards escape. The Student wraps herself in a shell, and she has seen the Student do this at home as well as at the school. Being out of school reinforces this pattern, and the Student has learned that she can use certain behaviors that will result in her not having to attend school.

After the April visit, she was asked to develop a behavior plan for the Student. The Student didn't have a behavior plan at the start of the year. She believes that there was a consultant, Dr. Cuddy, who was collecting behavior data, but she doesn't believe this was connected with a positive behavior support plan. Dr. Cuddy was only collecting data on misbehavior. When she was asked to develop a plan, she said that she couldn't do it herself, that she would need to collaborate with a licensed psychologist. The District began to try to make this happen, but the Parent had a serious disagreement regarding who was going to be involved in it.

The plan was to begin to have the Student attend a full day during the 2010 summer program, and during that same time work to develop the behavior plan. This is when the Parent decided to keep the Student out of school, so they lost the opportunity to get this done.

With regard to the issue of the restrictiveness of the Student's program, she wasn't asked until recently to look at other, less restrictive programs to see whether they might be appropriate, so she didn't have an opinion on that during the past year. She thinks that the Student might benefit from contact with higher functioning students, but she is not sure that the Student is ready to do that at this time.

She thought that the school staff members worked very well with the Student, and thought that Ms. Marshall was a very talented teacher. The staff members were doing very good things with regard to the Student's behavior. They were very thoughtful about ways to work with the Student while avoiding getting into conflict with her. The Student is not one of those children who gets mad and is not able to move on. Even in April, she was able to deal with the Student's behavior and to engage with her.

26. During an interview conducted by the Complaint Investigator with Elizabeth Cuddy, Ph.D., Dr. Cuddy stated the following: She is a licensed clinical psychologist working with children, teens and families. She also acts as a consultant to schools. She was first contacted by Dr. Shulman and Ms. Rapaport in October 2009, and was asked to look at the program being implemented for the Student and make suggestions for addressing the Student's behavior. She reviewed records, observed the program, and spoke with Ms. Marshall, Dr. Gruenich, Dr. Bruce and the Parent. She observed the Student in the program, and reviewed behavioral data being collected by the staff. She had multiple phone calls with staff members and made several visits to the school. The frequency of those calls and visits increased considerably beginning in March 2010.

Initially, the staff was working from a report by Dr. Rogers which contained proactive and reactive strategies for the Student's behaviors. She was very comfortable with what the staff was doing. There was an emphasis on choice making, providing options to the Student and making her comfortable with the school day. There was a greater reliance on proactive rather than reactive strategies. At her observation of the Student in December 2009, she observed a number of protest behaviors – attempting to scratch or bite staff members, pounding the table, hitting herself – but they were manageable. The Student could be redirected to the task at hand. The staff seemed comfortable with what they were doing. Dr. Bruce told the Team that she also felt positive about what was happening. At that point, there was discussion about the Student spending more time in the regular education environment, but she didn't think the Student was ready for that.

She was not asked specifically to develop a behavior plan, but she doesn't believe that a more formal plan would have helped. If she thought differently, she would have asked about developing one. She was reviewing the behavioral data to look for patterns – whether there was something that was setting the Student off, and what seemed to make the Student happy. She didn't find anything that suggested that the staff should change what they were doing with the Student. Even when the Student was engaged in one of the things that made her happy, like music or dancing, there was still sometimes protest behavior during the activity. By the end of the year, she had no further ideas to offer, and she suggested getting an Applied Behavior Analysis consultation. That person would have a different skill set and could look at the Student's behaviors in a different way.

At one of her visits, she accompanied the Student to the gym for adaptive PE, and she saw the Student's unpredictable behavior in the hallway. As they walked past classrooms with open doors, there was a sudden loud noise from one of the rooms. The Student became agitated, started crying and reached out in an attempt to scratch. On another occasion, the Student was out in the hall when a fire drill began. The Student collapsed to the floor, which was very

unsafe. She recommended to the staff that they continue to take the Student on short walks in the school. She also suggested that the van that took the Student home be parked at increasing distances from the school, so that the Student would have to walk further through the school to reach it. At her last observation of the Student in May 2010, she saw the Student walking to the van when a ROTC group walked past her. The Student did not respond negatively to the commotion.

Even after there was an increase in negative behaviors from February to May, the Student was still having good days and bad days. At first, everyone assumed the deteriorating behavior was just a rough patch and that the Student would eventually stabilize. They thought the cause might be physical, medical, or the loss of Ms. Woodye. The only change at school she was able to identify that might account for the increase in negative behaviors was that the Student's transportation had changed, with a different driver and without Ms. Woodye accompanying her. She was asked by Ms. Marshall in March 2010 whether the length of the Student's day should be increased, and she told her that it was not a good idea if they were seeing an increase in negative behaviors. The Student's behavior needed to stabilize, not become worse, for that to happen, as when the school day was increased in December 2009.

At the April 30, 2010 meeting, Dr. Bruce suggested that some more staff training and an OT consult be conducted in the first week of summer, during which the Student would attend for a full day. She thought that was a good next step towards increasing the length of the Student's school day. The reason for the OT consult was that the Student sometimes seemed to be seeking sensory stimulation, like when the Student pounded the table. Dr. Bruce also said at that meeting that more things needed to be specified and written down, such as how the staff was to respond to the Student's behaviors, a detailed schedule of the Student's day, the activities that were offered each day, etc. Although the staff had not been writing these things out, they had been very consistent, with the same five staff members working with the Student on a rotating basis. At the same time, the staff maintained some necessary flexibility, as when the Student came to school hungry or sleepy and her schedule was adjusted to accommodate these needs.

27. During an interview conducted by the Complaint Investigator with Mary Talbot-Fox, Ph.D., Dr. Talbot-Fox stated the following: She has a doctorate in developmental psychology, and is licensed as a school psychologist. She has conducted two psychological evaluations of the Student, the last one in November 2007, and in that year went to observe the Student while she was in her class at the District's school. She is not able to formally evaluate the Student, but conducted informal assessments and obtained the rest of the information from the Parent. She never observed the Student at BRMH and what little information she has about the program came exclusively from the Parent. She is not able to comment on whether BRMH was the least restrictive appropriate environment for the Student.

She is not able to comment on the appropriateness of the length of the Student's school day, although given the Student's skill levels and behavior she should be capable of attending a full day of school, providing she is given breaks and time for rest, and providing she is not exhibiting self-injurious behavior. If the Student was engaging in such behavior, one would have to look at what was causing it by doing a functional behavior analysis. If the Student

was exhausted by her school day, that would be one thing, but if she just didn't want to do an activity, she would be reluctant to send her home. Instead, she would give her a rest and then resume the activity.

28. During an interview conducted by the Complaint Investigator with Royal Gruenich, Ph.D., Dr. Gruenich stated the following: He is a clinical neuropsychologist and has performed several neuropsychological evaluations of the Student - beginning in 2001, again in September 2007, and most recently on April 12, 2010. He has also participated in several of the Student's IEP Team meetings.

It has been several years since he last observed the Student in a school setting. The only information he has regarding the BRMH program came from the documents he reviewed. He is unable to comment on whether the program is appropriately restrictive because he doesn't know enough about the program. He finds it difficult to address the issue of the length of the Student's school day because he is unsure of the degree to which that decision was based on the Student's behavior.

He can't make a direct comparison between the results of the 2007 and 2010 evaluations. It is never possible to administer the evaluations directly to the Student because of the nature of her disabilities. He bases the evaluations in large part upon the Parent's descriptions and on her completing the Vineland Adaptive Behavior Scale, and relies on the accuracy of the Parent's descriptions. It is difficult to know whether there was any real change in comparing the two evaluations, although the recent school records he reviewed show that there were gains in some daily living skills.

29. During an interview conducted by the Complaint Investigator with Steve Peer, Mr. Peer stated the following: He is the special education director for the District, and started in that position shortly before the October 2009 IEP team meeting. The Parent said that there was an OT evaluation that was supposed to have been done, so he sent out a consent form to the Parent. He never received it back from her. He doesn't know what happened with the deaf-blind evaluation.

He, along with the rest of the staff, would have liked the Student to have a longer school day, but she wasn't ready for it.

With regard to the 2010 ESY program, it was set up for the Student to attend, but the Parent kept her at home. He wrote to the Parent asking whether the Student was well enough to attend the program, but never got a response.

30. During an interview conducted by the Complaint Investigator with Barbara Wais, Ms. Wais stated the following: She has been a speech language pathologist for the Bangor School Department since 1999, and she serves the BRMH program in that capacity. Starting with the ESY program in 2009, she was in the Student's classroom for at least some part of the day every day. There was never a week that she was in the classroom less than 30 minutes. Her services are consultative, so she works with the BRMH staff to come up with communicative structures to help students with receptive and expressive communication. She sometimes

makes a suggestion for a student and then works directly with the student to model the technique for the staff. From time to time, she worked directly with the Student.

When the Student first came to the program, there was an ongoing assessment, looking at her skills and what she could handle in the program. In terms of receptive skills, they saw that the Student understands a variety of sound cues, non-verbal prompts and also some verbal direction (she was able to use her listening skills). The staff members were cataloging these different modes, trying to determine which directions were working. When they found ones that were working, they wanted to be sure that they were all using them consistently.

In terms of expressive skills, there was a lot of taking and comparing notes, again cataloging observations. The Student has a lot of different means of expression. She can use gestures, point, tap things, she knows a couple of manual signs and has a small repertoire of spoken words that she can use successfully. She most often uses object symbols that represent items that the Student is working with or that she might request. They tried to teach the Student manual signing, but this was difficult for the Student. She can't see the signs, so they had to work hand-over-hand.

They also worked with the Student on voice output devices ("VOD"s). In the classroom, they have all kinds of devices that make noise for communication and they are always available to the students. Some of them are toys that make sounds. Students in the program generally enjoy these devices, but the Student didn't enjoy them as much. The Student can use her fingers with no problem, but she doesn't enjoy touching and handling things. This attitude carried over to the VODs. They weren't something that the Student sought out and thought of as entertaining or fun. The Parent provided a VOD that had buttons, and the ability to record sounds or spoken words that would be activated when the buttons were pushed. For example, the Student enjoyed watering plants as an activity, and they recorded "water plants" to correspond with one of the buttons. They encouraged the Student to press that button as they went to that activity. They also recorded food choices, such as "more chips," and encouraged the Student to use that button to express that preference.

The staff members used the VODs every day of the week, and she doesn't know of any device that they didn't know how to operate. One of the problems with the VODs was that the Student wasn't able to see anyone responding to the sounds she made. They never got to the point where they felt that the Student understood why they were using the VODs. The Student took much more quickly to using the object symbols.

When the Student first began in the program, she hadn't been in school for a long time. It was decided that the Student should come and stay for as long as she could tolerate it. She saw outside evaluations in the Student's file that recommended that the Student should only have a partial school day. They initially began slowly lengthening the Student's school day in small increments, and the Student was doing well with this. The Student had so many new routines, objects and ideas that she had to learn, so it was very challenging for her. The Student was enjoying her time at school learning these new things, but they didn't want to overwhelm her. They gradually extended the successful parts of her day. Some time during the winter there was a meeting at which it was agreed that the Student's day would be a certain length, and

then there would be another meeting where they would look at this again, with the idea that if the Student could do more her day would be increased. She's not sure if that later meeting ever took place.

Between February and April, the Student had several bouts of illness, and had missed many days of school. She is not sure that the Student was able to handle a longer day by that time. They wanted the Student to leave school on a happy note, and not push her to the point that she became unhappy.

Some of the students in the program had behavior plans as such, but for many students behavior plans were wrapped into the activities of the day. She doesn't recall whether the Student had a free-standing behavior plan. The Student, typically for students in the program, used unconventional behavior for communicative purposes. For the Student, this sometimes consisted of hitting herself or hitting objects. Sometimes, the staff couldn't see what the antecedent events were for these behaviors. They were working on better understanding why these behaviors were being used and what triggered them. The Student has had all kinds of evaluations, but not one of her emotional status. She didn't always understand what the emotion was behind the Student's use of these behaviors.

In the building where the BRMH program was housed, there were other programs for disabled students, but those students were operating communicatively at a higher level and could use speech pretty freely. The talk in those classes was about ideas that were more abstract and more sophisticated. They might discuss job sites, girl- or boyfriends or current events. The Student talks about things that are more concrete – greetings, the bathroom, eating, etc. – and she communicates in single words. Moving up a placement level would have been a big leap for the Student in terms of what she could understand and communicate about. She believes that the Student's placement at BRMH, where she could understand and attempt to participate in the activities of the class, was appropriate.

31. During an interview conducted by the Complaint Investigator with Murray Shulman, Ph.D., Dr. Shulman stated the following: He was the special education director for the Bangor School Department when the Student was first admitted to the BRMH program. At the May 2009 IEP Team meeting, the team agreed that the Student would begin the program with an abbreviated day. The Team didn't want the Student to experience the stress of a full day and become oppositional and difficult, so they decided that the day would be shorter and end before that happened. The school day would then be gradually lengthened. The Parent was in agreement with this decision. He worked really hard to make sure everyone was communicating clearly and this decision was spelled out.

There was never a promise to hire Ms. Woodye as an educational technician. He told the Parent that Ms. Woodye was welcome to apply for the position and she would be considered. He would always have had to follow the normal hiring process. He doesn't know whether Ms. Woodye would have qualified, and doesn't remember her submitting an application.

There was discussion about taking the Student out into the community. He said that the Student would first have to demonstrate that she was able to accept adult supervision. The

Student would also have to stop hurting people. With regard to the Parent's suggestion of taking the Student to chorus or other classes where she would not be an active participant, he doesn't know the educational value of that. The staff was working on getting the Student to follow simple directions without negative behaviors.

When the Student became overwhelmed, she would withdraw. Then the staff would have to leave her alone or else the Student would strike out. The Student was really not equipped to accept adult direction. The Parent claimed that the Student's behavior was fine at home, but it was his and the staff's impression that the Student could do what she wanted at home.

The Student wasn't capable of benefitting from a less restrictive program; if anything, she needed a more restrictive one. The staff was struggling with how to provide the program they had at BRMH in the face of the Student's self-injurious behavior. Once the Student's behavior started to deteriorate, they couldn't seem to reverse it. He tried really hard to make the program a success for the Student, but he doesn't think the school could undo in the few hours it had with the Student the effect on the Student of being allowed to do whatever she wanted at home the rest of the time.

32. During an interview conducted by the Complaint Investigator with Patti Rapaport, Ms. Rapaport stated the following: She is the special education director for the Bangor School Department. Her role with regard to the Student was essentially administrative, although she visited the Student's classroom at least once per week, for anywhere from 5 to 45 minutes.

The Student's transition into the 2009 summer program went quite smoothly. The Student came with Ms. Woodye and generally stayed for about 1½ hours. Nobody called her to complain about anything in the ESY program. The ESY teacher was a retired special education teacher who had worked with many of the students in the program, as had most of the educational technicians. There was no special training for the staff in preparation for the Student's attendance. They are used to taking children into the program without a lot of extra training. They have very experienced staff members who don't have a problem with challenging behavior and know how to redirect a student. They used Ms. Woodye as a resource to get information about the Student. Ms. Woodye worked with the staff on how to manage the Student and how the Student communicated.

As the school year began, the school was looking to hire an additional educational technician for the Student's classroom. She doesn't believe that Ms. Woodye applied for that position, but she would have considered her for the position if she had been qualified. The school does not permit non-employee providers to come into the school to work with students, however. This applied to Ms. Woodye, although an exception was made to allow Ms. Woodye to accompany the Student into the program during the summer transition period, and would have applied to the Student's music therapist. This policy is based upon advice received from counsel to the Bangor School Department.

With regard to tutoring, the Student already had a one-on-one educational technician working with her throughout the day. It took all that person's time and energy to focus on the Student, with no time left to record data about the Student's behavior – type of behavior, cause of

behavior, antecedents, reinforcers, etc. The tutor was hired to record this data, and they used the designation “tutor” because there was no other designation for someone in this role. As it happened, the tutor that was hired, Karen Drown, was a certified special education teacher. Ms. Drown worked with the Student until May 2010. It was not Ms. Drown’s job to intervene with the Student.

With regard to evaluations, the only one she can recall being ordered by the Student’s IEP team was an OT evaluation. It was the District’s responsibility to get the Parent’s consent for this and forward it to her, but she never received the Parent’s consent.

With regard to adaptive physical education, Bangor High School, where the BRMH is located, is a big school with approximately 1,400 students. The BRMH classroom was approximately 300 feet away from the gymnasium, and the Student had to walk down a hallway and through the lobby to get there. The Student’s adaptive physical education class was at the back of the gymnasium. The first day the Student was brought to the gymnasium, the Student was not cooperative going down the hall – she kept hitting people with her cane. The staff decided not to continue with the adaptive physical education program for the Student. She doesn’t remember discussing this decision at an IEP Team meeting.

With regard to a behavioral intervention plan, the District was working on developing a plan with Dr. Cuddy, the school’s contracted consulting psychologist, and staff members (particularly Ms. Drown) were collecting data. At one point, Dr. Cuddy provided written recommendations for managing the Student’s behavior. Everything was going smoothly from September through December with Ms. Marshall working without a formal behavior plan and making good progress. The Student’s behaviors got significantly worse after February vacation, however. Once things started to spiral downwards, there were a lot of e-mails and telephone calls between Ms. Marshall and Dr. Cuddy, and she asked Mr. Speer in February to set up an IEP Team meeting which would include Dr. Bruce. She wanted Dr. Bruce’s input before further developing a behavior plan, but Dr. Bruce’s schedule was such that it wasn’t until April that she could attend a meeting. In the meantime, the Student’s negative behaviors increased. The school was moving forward with development of a behavior plan, but the Parent didn’t give them the opportunity to work it through.

The length of the Student’s school day was being gradually increased from September through December. Initially, the Student was staying for about 2 hours, and by the December break it was up to 3 ½ hours. It was everybody’s intention to continue to increase the day beyond that, but there were days the Student didn’t want to engage in any instruction. The Student would wrap up in a blanket, refuse to get off the couch, flop onto the floor or strike out at people. The staff never felt that the Student reached a point where she would be able to benefit from a longer school day. Dr. Bruce was brought in to help program for the Student so that the Student’s school day could be lengthened, but because of Dr. Bruce’s schedule, she only became available to work on this towards the end of the year.

The table top activities Ms. Marshall engaged in with the Student were functional in nature. They required use of fine motor skills, following directions, and often involved counting. Just as importantly, they required the Student to attend to a task and work to completion, even

though the task was not something she wanted to do. These educational activities were preparation for such life activities as the Student being asked to fold her clothes and put them away. The school had intended to introduce activities that involved taking the Student out into the community, but the staff never reached the point where they felt that it was safe to do so.

With regard to whether the Student could benefit from a less restrictive environment, even in the very highly specialized program at BRMH, the Student was not receptive to instruction. She would strike out at others or throw things if she didn't want to do an activity, or simply not get off the couch. The Student was not under the voice control of a teacher. BRMH does not typically accept into the program students with the Student's level of behavior problems; those students typically are placed in a day treatment program. If the Student was in the less restrictive program at Bangor High School, she would probably be suspended for non-compliance. She also doesn't believe that the Student would benefit from exposure to less disabled students. She is not sure that the Student was very aware of other students; she never saw the Student initiate social contact with any of them. The Student's actions and screaming were actually upsetting to the other students. In her opinion, the Student needed a more restrictive setting.

33. During an interview conducted by the Complaint Investigator with Mary Marshall, Ms. Marshall stated the following: She was a special education teacher for the District until her retirement at the end of the 2009-2010 school year, a year during which she was named Teacher of the Year by the Department of Education. The Student was in her class during that year. She also was a teacher in the 2009 ESY program for half of that summer.

When the length of the Student's school day was discussed at the IEP Team meeting in May 2009, the Parent agreed that the Student should begin with a shortened day. During that summer, the Student came with Ms. Woodye and stayed for as long as she seemed able to tolerate it. Some days, this was for less than one hour. When school started in September, the Student's school day lasted for 2 ½ hours. In October, the day was lengthened to 3 hours. Staff members were always trying to develop new activities for the Student, but it was a challenge to find things in which the Student would cooperatively participate. She consulted with Dr. Bruce and Lori Spencer (deaf-blind consultant) about this. The Student had good motor skills, but her behaviors became a big problem when trying to work on new activities. It was difficult to use hand-over-hand technique to show the Student how to do something, because the Student would grab, pinch or dig her nails into the instructor's hand. From February through May the staff never reached a point where they felt that the Student could benefit from a longer day. Typically, for children with limited communication ability, once the staff establishes a routine and a system for communicating they become more compliant. Instead, the Student's behavior became more aggressive.

At the start of the school year, there was no set behavior plan. Dr. Tim Rogers had written a report that contained suggestions for managing the Student's behavior. For example, he recommended following a less preferred activity with a more preferred one, and avoiding power struggles. The staff used these as a starting point. In the first couple of months, as the staff was getting to know the Student, developing a routine for her, things were going nicely

and the lack of a set plan wasn't a problem. Shortly before the February break, Ms. Woodye told her that she would be out for a few days leading up to the break. Ms. Woodye never returned after school resumed. After the break, the Student's behaviors really escalated and she felt that there was a need for a plan, but she knew that Dr. Bruce would be coming soon to observe the Student and meet with the staff. She also consulted with Dr. Cuddy, who made regular visits to the classroom, more often after February. During that time, the Student seemed almost unhappy, like she didn't want to be there. When Dr. Bruce visited, she could see that the behaviors had escalated, and agreed that a behavior plan needed to be developed. Dr. Bruce was going to return to work on this with the staff, but then the Student's attendance became sporadic until the Student stopped coming to school altogether.

With regard to the ESY program in 2009, she doesn't recall any training the staff received regarding the Student in preparation for her attendance at the program, but she doesn't believe it was necessary. The staff was very well trained and experienced, each member with 10 or more years of experience working with this student population. She did not hear any complaints about the ESY program from the Parent or anyone else.

With regard to tutoring, the District hired Karen Drown to come to the classroom a few hours a day and record the Student's behavioral data. She was being paid at the rate of a tutor, so they used that designation for her. It was not Ms. Drown's role to intervene with the Student, but the Student was never alone with Ms. Drown – there was always an educational technician or teacher with her. The staff always tried to figure out what the Student wanted when she behaved aggressively, and offered her the communication symbols. A staff member couldn't just hold down her hands and say "No hitting!" Staff members would offer things that the Student might want, but there were times when the Student was being self-abusive and the staff couldn't figure out why.

With regard to OT, she doesn't believe that the Student actually received the OT consult service provided in the IEP. There was an OT who was regularly in the classroom, but she's not sure if the Student was on her list, and she may have come in the afternoon when the Student had already gone home. She doesn't know why the IEP contained this service. The Student had pretty good fine motor skills. As for the OT evaluation, she thinks Mr. Peer didn't realize at first that it was supposed to be provided. When this was called to his attention, it took some time to find someone qualified to do it, because it was to be focused on sensory motor issues. By the time everything was ready, the Student was no longer in school.

With regard to the use of VODs, the staff tried to use these with the Student, but she would just throw them. One attempt was to record "more swinging" on a VOD device and give it to the Student to use when she was engaged in that activity, but the Student already had a way of communicating this idea and resisted substituting the VOD. If the Student had been more receptive, there were other things they could have done with the devices. There were no VODs that the staff didn't know how to operate.

With regard to adaptive PE, the staff's hope was that one of them would walk the Student to the gym so she could participate in some of the PE activities, but the Student became very aggressive during those walks. On one occasion the Student started swinging her cane and

might have injured another student. The staff was never able to successfully get the Student to walk to the gym.

The Student's behaviors after February were escalating to the point that the Student required a more, not less, restrictive environment. The Student needed to be in a behavior-based program. The staff felt they weren't reaching her, and the nature of the program limited them in what they could do with the Student.

34. During an interview conducted by the Complaint Investigator with the Parent, the Parent stated the following: In May 2009, the only thing she agreed to with regard to the length of the Student's school day was that the Student needed to first visit the BRMH program in the summer and spend some time there before attending for a full day. At the October 2009 IEP Team meeting, she told the team that Dr. Fox, who was not present at that meeting, had recommended at other meetings that the Student receive a full school day. The District was unwilling to agree to a full day. She believes that the Student was capable of attending for a full day. The Student had been in school for a full day starting in 1st grade, and she had a full day at Surry Elementary School and at Perkins School for the Blind.

The 2009 summer program could not be an ESY program because the Student had not been in school during that school year, so the summer program could not be an extension of the school year. It was agreed that Ms. Woodye would accompany the Student to the summer program to help with the transition. The Student was able to spend only a small amount of time at school because of the long distance Ms. Woodye had to drive to get to the school.

She was told that the school would hire Ms. Woodye as an educational technician for the Student when school began. It was approved by Mr. Peer, but Ms. Rapaport told her that the school already had educational technicians and would not hire someone from the outside to perform that task. As a result, the Student started the 2009-2010 school year not knowing anyone who would be there and this made the transition difficult for the Student. She believes that Ms. Marshall never met the Student until September 2009, and even by the end of September Ms. Marshall still couldn't understand the Student's attempts to communicate. There were, however, some positive developments during the first four months of the school year.

One of the reasons given for not extending the Student's school day was that there weren't a lot of activities for the staff to do with the Student. She suggested that staff could work with the Student on developing life skills out in the community, as Ms. Woodye had been doing. Ms. Woodye took the Student to stores and restaurants, and they went to the YMCA where the Student enjoyed using the hot tub. She suggested allowing the Student to attend school chorus rehearsals, if not to join in then just to listen, and going to PE classes, again if not to join the activity then just to listen. Even when the Student is unable to participate in a group activity, it is still a social learning experience for her. Dr. Bruce also had suggestions regarding activities for the Student.

The activities that the staff chose for the Student were not always appropriate. The Student prefers social, physical, gross motor activities, rather than the table-top activities chosen by

the staff. The Student is tactily defensive, and doesn't like working with her hands. The Student has never liked arts and crafts for this reason. That doesn't mean the Student should never do table-top activities, but the Student should also be provided with some of her preferred activities. She never understood the purpose of the table-top activities; they seemed like busy work to her.

She also suggested that the Student's music therapy be provided in the school as part of the school day. The Student's music therapist likes to work together with OT and speech therapists, but the school was adamant that outside people would not be allowed to come into the school to do their work. As music therapy was not so useful to the Student when not integrated with the Student's other therapies, the Student only went for music therapy occasionally.

The staff was having trouble communicating with the Student, and she believes that the Student was confused about what staff members were trying to do. One of the educational technicians didn't know any of the Student's tactile signs, and others were misinterpreting them. For example, a note from school said that the Student was tapping her hands together, which meant she wanted more. The staff member wrote "I think this means no" and took what the Student wanted more of away from her. She gave the staff a list of words and signs used by the Student, but they still consistently said they couldn't understand the Student's speech. It requires attentive listening, and although the Student sometimes speaks softly, the Student will willingly repeat what she says if asked. The staff never asked for her help with communication. There are other strategies for communicating with the Student. One can describe a list of alternatives, and the Student can signal when she hears the right one.

At the end of January 2010, the Student's attitude towards school began to change. There was an increase of protest behavior and self-injury. She doesn't believe that this was because of Ms. Woodye's departure – Ms. Woodye had stopped being the Student's day habilitation worker in December, although she continued to accompany the Student on the van to and from school until she stopped all contact with the Student in February. This may have contributed to some depression on the Student's part, but the school shouldn't have relied on Ms. Woodye to provide the only rewards in the Student's day. They should have been doing the same things with the Student that Ms. Woodye had been doing.

After a meeting with Dr. Bruce, Dr. Shulman promised to hire someone to take the Student out into the community, and that person would be designated a tutor. Ms. Drown was hired for this position, and if she was hired only to collect data, it was not a decision made by the Team. She does not agree that Ms. Drown was only observing and recording data. When she visited the Student's classroom in April 2010, she saw Ms. Drown interact with the Student, at times inappropriately. Sometimes Ms. Drown stood there recording data, but at other times Ms. Drown was the only person interacting with the Student. She believes that the other adults in the room were busy and that they assumed Ms. Drown would take care of the Student. Ms. Drown couldn't communicate with the Student at all, and this appeared to make the Student feel very frustrated.

In March 2010, Ms. Marshall told her that it seemed that the Student didn't like being in school. The Student was coming home bruised, and Ms. Marshall explained this by saying that maybe the Student was poking at herself with her thumb. The Student was also having increased tremor activity, and this is often stress-related. Staff reported that the Student collapsed to the floor at times and this was interpreted as task avoidance, but she believes it was related to the tremors. She spoke with Dr. Cuddy around this time, who expressed concern that the Student's behavior appeared to be deteriorating. Dr. Cuddy told her that she hadn't been to the school in over a month and that the staff hadn't asked her to come. By this time, the school still hadn't developed a behavior plan for the Student. On May 24, 2010, as the Student was continuing to come home with scratches and bruises, she decided to remove the Student from school.

In April 2010, the Student was invited to attend the 2010 ESY program, and she agreed providing that Dr. Bruce would be there during the first week. Then she removed the Student from the school in May and told the school that she wouldn't send the Student back until they did some serious work regarding communications and a behavior plan. The Student then became seriously ill, and didn't complete treatment for the illness until July. At that point, she asked Dr. Bruce whether she could reschedule her time to come to the school. By the time Mr. Peer wrote to her on August 4, 2010, the summer program had ended, and he never told her whether Dr. Bruce was available or what the program would look like.

The IEP Team agreed to do the OT evaluation in October 2009 but Mr. Peer didn't send out a consent form until June 2010, and at that time the Student was ill. As the evaluation hadn't been done, it was difficult to develop OT goals and provide services. The IEP Team agreed in May 2009 to also provide PT, augmentative communication and adaptive PE evaluations. She didn't request that the Written Notice of that meeting be amended to include those determinations because she has made such requests in the past and they were ignored.

With regard to providing adaptive PE, she recommended that the staff habituate the Student to walking to the gym gradually. She suggested that, if necessary, they could put the Student in a mobile chair. Once in the gym, they could show the Student the things she could do there. The school didn't attempt to start this process until the winter, by which time the Student was much less receptive. The Student generally loves PE. She thinks that it was a trust issue for the Student. She doesn't know what resources they consulted to try and solve this problem. When the Student balked at performing her table tasks, the staff persisted; when the Student balked at going to the gym, they just gave up.

With regard to augmentative communication, the Student had been taught how to use a 2 button VOD, using it successfully at home. She brought one to the school, but when she visited the classroom in April 2010, she didn't see it being used. She asked where it was, and the staff couldn't find it. They later returned it to her, and the same messages were still recorded that were on it when she gave it to the school. She doesn't believe that they ever programmed it themselves.

With regard to consulting services from a deaf/blind educator, the IEP Team agreed, in October 2009, that Dr. Bruce would come to the school every 2 months, for at least one full

day. The IEP says 20 hours total, but Ms. Rapaport said it could be amended to increase this amount. She doesn't believe that Dr. Bruce provided the full 20 hours; she was only there in December and April (in October, she was unable to observe the Student). Dr. Bruce stated in April 2010 that she was upset that she had not been called by the school when the Student's behavior started to deteriorate. Later, Dr. Bruce was told to do staff training even though she had already told the District she was not going to send the Student back to BRMH.

She agreed that the Student could start the year without a behavior plan, in part because the plan was developed by Dr. Rogers, who didn't even know the Student. She expected, however, that a plan would be developed right away. At the October 2009 meeting, she asked that Dr. Gruenich be invited to come to the school and provide input to the plan, but no one called him to do so. Some months into the school year, Mr. Peer said the school would be working with Dr. Cuddy. She told Dr. Cuddy that Dr. Gruenich was supposed to take part in developing the plan, but Dr. Cuddy said she didn't know anything about that - she was going to the school by herself. As the year progressed, the Student started coming home bruised and unhappy, but nobody from the school consulted with any of the specialists (neither Dr. Gruenich, Dr. Bruce nor Dr. Talbot-Fox) and there was still no behavior plan. Some time in February or March, Dr. Cuddy told her she hadn't been contacted in over a month. Dr. Cuddy still seemed not to know much about the Student. Some time after April 30, 2010, Dr. Cuddy produced a report with recommendations.

She understands "least restrictive" to include a placement closer to the Student's home. She believes that if the program that was promised for the Student at BRMH had been provided at MDI High School, then it would have been successful and would have been the Student's least restrictive appropriate environment. She has another child who attends the life skills class at MDI and she feels that they are more inclusive there. She believes that at MDI the Student would have been permitted to have lunch in the regular lunchroom, attend chorus practice and go to the gym. The attitudes of staff at MDI are what would make it less restrictive. The students in the Student's class at BRMH were basically sedentary and very noisy, while the Student is more mobile and very sensitive to noise. The staff played very juvenile music loudly, and there were also students watching television. The Student was not getting an education at BRMH, and should have been in a class with children with whom she could have engaged in peer group activities.

VII. Conclusions

Allegation #1: Failure to provide a free appropriate public education by providing the Student with an abbreviated school day in violation of MUSER §II.11 and 34 CFR §300.101(a)

NO VIOLATION FOUND.

In both the Student's June 2009 and October 5, 2009 IEPs, gradual reintroduction to School is identified as a supplementary aid, service, modification and/or support, with the frequency to be "as needed." Dr. Shulman had a clear recollection that the IEP Team, including the Parent, was all in agreement with this, based primarily on the prolonged period of time that the

Student was out of school. The Parent did not seek to have the IEP amended in this regard, although she demonstrated knowledge that she could do so in relation to other aspects of the Child's IEP. In fact, the October 5, 2009 Written Notice states that the Parent was pleased with the Student's program. The Parent's assertion in connection with this complaint investigation that she did not agree with this provision is not supported by the information obtained in this investigation.

Several of those interviewed reported consensual understanding that the goal was to gradually increase the length of the Student's school day until she was attending for a full day. That plan was followed throughout the fall - as the Student appeared to be making progress, the length of her day increased. The improvements in the Student's performance at school seemed to plateau in January, however, after which, for reasons that are mostly unclear, the Student's behavior began to deteriorate. The staff struggled to turn the Student around, but without success. Under the circumstances, with the Student becoming increasingly non-compliant and aggressive despite efforts to remediate the situation, the decision to not further increase the day until the Student's behavior stabilized, as recommended by the school's psychological consultant for the Student (Dr. Cuddy), was reasonable.

The District nevertheless continued to work towards the goal of restoring the Student to a full day. A plan was developed to have the Student attend for a full day during the first week of the summer program, during which time Dr. Bruce would be training the staff and working, together with a psychologist consultant, on developing a behavior plan. The District never had the opportunity to put this plan into effect, as the Parent withdrew the Student from the school and did not send her to the summer program due to the Student's illness. As of the time the investigation was being conducted, the Parent had still not returned the Student to school.

Allegation #2: Failure to provide extended school year services during 2009 and 2010 in violation of MUSER §X.2.A(7)

NO VIOLATION FOUND

There is no dispute that the Student accessed the BRMH summer program during 2009. The Parent, in advancing this allegation, relies on the hyper-technical argument that, since the Student didn't attend school during the 2008-2009 school year, the summer program could not be said to be an extension of the school year. In other words, the Parent would have the Department find a violation based on the District failing to provide what was impossible to provide. The Department declines to so find.

With regard to 2010, there is no dispute that the District made available to the Student the summer program at BRMH. The Parent believed that the Student was unable to attend due to illness. The District cannot be found at fault for this circumstance.

Allegation #3: Failure to fully and adequately implement the Student's IEP with respect to provision of occupational therapy, physical education and augmentative communication technology and services in violation of MUSER §IX.3.B(3)

VIOLATION FOUND WITH RESPECT TO OCCUPATIONAL THERAPY

No evidence was uncovered in this investigation that OT consultation services were provided as specified in the Student's IEP. Ms. Marshall stated that she didn't believe they were provided and said that she didn't understand why the service was even in the IEP, as the Student seemed to have no fine motor skill deficit. The Student's IEP does not contain any goals that could be fairly identified as OT goals. The Parent connected the failure to provide services with the failure to conduct the OT evaluation, which would have enabled a determination to be made as to what services the Student actually needed. If this was indeed the case - that the IEP Team understood that delivery of services would await completion of the evaluation - then it was important to record this determination in the Written Notice and either reference this in the IEP (e.g., under the heading "Beginning Date"), or else omit reference to OT services in the IEP and determine that the IEP would be amended following the evaluation. As the IEP was actually written, OT was required to be provided, and the failure to do so constitutes a violation.

With regard to adaptive PE, there were certainly efforts made to provide this service. Those efforts were reasonably discontinued when it appeared that the Student was unable or unwilling to travel to the gym and behave in a way that was safe for her and for other students. This uncooperative and unsafe behavior was part of a pattern of such behavior that needed to be addressed through a behavior plan, as discussed in reference to Allegation #7.

With regard to augmentative communication technology and services, the Parent's allegation is based upon her visit to the classroom in April 2010, when the staff was unable to find the Student's VOD, and her claim that the VOD was later returned to her with the same recordings on it that were there when she gave it to the school. Both Ms. Marshall and Ms. Wais, however, stated that multiple VODs were used with the Student repeatedly, and they described reprogramming the device provided by the Parent. They also both agreed that the Student was generally unreceptive to working with those devices, and this may explain why the Parent's VOD wasn't readily available on the day of her visit.

Allegation #4: Failure to provide education in the least restrictive environment in violation of MUSER §X.2.B
NO VIOLATION FOUND

The question of least restrictive environment focuses on the extent to which a student is to be educated with children who are not disabled. MUSER §X.2.B. The Parent contends that the life skills program at MDI would be more inclusive than the program at BRMH, i.e., the Student would be spending more time being educated with children who are not disabled. Specifically, the Parent believes that at MDI the Student would, among other things, have the opportunity to have lunch in the regular lunchroom, attend chorus practice and go to the gym. This belief ignores the Student's actual experience at BRMH when exposed to the regular education environment.

The efforts made to provide the Student with adaptive PE by guiding her to the gym led to aggressive, uncooperative behavior and, on one occasion, to the Student collapsing to the floor in the middle of the hallway. As described by Ms. Rapoport, the Student was basically

not under the voice control of a teacher, surely a prerequisite for expanding the Student's experience in the regular education environment. Both Dr. Cuddy and Dr. Bruce expressed their opinion that the Student wasn't ready at this time to spend more time in the regular education environment. Moreover, Dr. Shulman, Ms. Rapoport and Ms. Marshall all stated their belief that the appropriate setting for the Student was, not less restrictive, but more restrictive.

The Parent further asserts that the assigning of the Student to a program that is not at the school which the Student would attend if not disabled (MUSER §X.2.B) renders the placement unduly restrictive. The IEP Team previously determined that there was not an educationally appropriate program available at the school which the Student would attend if not disabled (MDI), which determination is already the subject of the pending U.S. District Court litigation. As several court decisions have established, the IDEA's preference for education in a student's neighborhood school must yield where, as here, a student's educational programming needs justify placement at another school. *See, e.g., Kevin g. v. Cranston School Committee, 5130 F. 3d 481, 482 (1st Cir. 1997); Flour Bluff Ind. School Dist. V. Katherine M., 91 F. 3d 689, 694 (5th Cir. 1996); Murray v. Montrose County School Dist., 51 F. 3d 921,929 (10th Cir. 1995).*

Allegation #5: Failure to develop the IEP in conformity with the determinations of the IEP team regarding augmentative communication devices and services in violation of MUSER §VI.2.J(4)

NO VIOLATION FOUND

The Written Notice of the May 15, 2009 IEP Team meeting does not expressly reference augmentative communication devices and services. In the June IEP, augmentative communication consultation is identified as a related service, to be provided by a speech pathologist, with the frequency to be determined. An augmentative communication system is identified as a supplementary aid, service, modification and/or support, to be provided by a special education teacher up to 6 hours per day.

The Written Notice of the October 5, 2009 IEP Team meeting also does not expressly reference augmentative communication devices and services, but says that the team agreed on the IEP components. In the IEP of November 4, 2009, augmentative communication consultation is identified as a related service, to be provided by a speech pathologist, with the frequency to be determined. A voice output device is identified as a supplementary aid, service, modification and/or support, to be provided by a speech language therapist or special education teacher as needed.

The Written Notice serves as the vehicle for recording the determinations of the IEP team. To ensure that the Written Notice accurately reflects the team's determinations, MUSER §XV.8 provides a mechanism by which parents can request that a Written Notice be amended. In this case, the Parent did not seek to amend either of the Written Notices from May and October 2009. Neither of those Written Notices refers to a determination regarding augmentative communication devices and services, so that the reference in the Student's IEP to augmentative communication consultation as a related service and a voice output device as a

supplementary aid cannot be said to be at variance with such a determination. Furthermore, the Parent did not seek to amend the IEP in this regard, although she has demonstrated that she is aware that she can make such a request to correct an erroneous provision.

Allegation #6: Failure to develop the IEP in conformity with the determinations of the IEP team regarding consulting services from a deaf/blind educator in violation of MUSER §VI.2.J(4)
VIOLATION FOUND

The Written Notice of the May 15, 2009 IEP Team meeting stated that deaf/blind educator Dr. Bruce would do an in-service training for staff in November 2009 and would provide consultation services thereafter, with the frequency to depend on the time and expertise of the teacher of the blind with whom the Student would be working. In the June 2009 IEP, Deaf Blind Consultation is identified as a related service with the frequency to be determined. The Written Notice of the October 5, 2009 IEP Team meeting stated that the assessment and consultation services of Dr. Bruce would continue, but the November 4, 2009 IEP does not contain any provision for these services. There is a duplication of provision for psychological consult services to be provided by a school psychological service provider, the frequency for one of which is 20 hours. It is likely that this was an oversight on the District's part, and that the intention was to reference Dr. Bruce's services. This was not corrected, however, even after the Parent brought this to the District's attention. Nevertheless, it is apparent that Dr. Bruce did provide the requisite 20 hours of service, so that the violation is technical in nature only.

Allegation #7: Failure to develop a behavior intervention plan for the Student, using positive behavioral interventions and supports to address the child's behavior issues, in violation of MUSER §IX.3.C(2)(a)
NO VIOLATION FOUND

As the Student was preparing to begin her participation in the BRMH program, the IEP Team suggested utilizing a behavior plan for the Student that had been previously prepared by Dr. Rogers. The Parent requested that this plan not be utilized, but that the Student instead begin the year without a plan, which would then be developed over time as the staff became acquainted with the Student and her behavioral needs. The District acceded to this request, as recorded in the Written Notice of the May 15, 2010 meeting and in the Student's IEP. Nevertheless, the staff, according to Dr. Cuddy, began the year implementing Dr. Rogers' plan, or various elements of it at least.

Whether or not an obligation to develop a new plan arose during the fall, when the staff seemed to be able to successfully manage the Student's behavior, the need for a behavior plan became acute once that behavior started to deteriorate. At first, the staff hoped that the increase in negative behaviors was only temporary, and that the Student would stabilize. When it became clear that this was not going to be the case, the school addressed the problem with consultations by Dr. Cuddy and Dr. Bruce, the consultants available to the Student's program. The staff was collecting the Student's behavioral data, which was being reviewed

by Dr. Cuddy, but Dr. Cuddy didn't believe that she had been asked to develop an explicit plan, and furthermore didn't seem to think there was anything more or different that the staff should be doing. She ended her involvement with the Student's program by suggesting that someone with expertise in ABA be consulted. At the same time, arrangements were being made to bring Dr. Bruce to the school to observe the Student and offer advice. Dr. Bruce offered suggestions in April 2010, and a decision was made to have Dr. Bruce return at the start of the summer program, to provide training and to develop, together with a psychologist, a behavior plan. This never came to fruition as the Parent in the interim decided to remove the Student from the program.

The Student is a highly involved child, with intensive needs in multiple domains, including the area of behavior. There was a serious disagreement between the Parent and the District as to whether the BRMH program, which was not designed to accommodate students with severe behavioral issues, was an appropriate placement for the Student. The District ultimately agreed to that placement, and when the need for a more structured behavior plan became apparent, the school made reasonable efforts to put that into place. That it took a while to achieve this does not appear to have been due to a lack of attention or effort on the school's part, and does not warrant a finding of violation.

Allegation #8: Failure to fully and adequately implement the Student's IEP with respect to provision of tutoring services in violation of MUSER §IX.3.B(3)

NO VIOLATION FOUND

In the June 2010 IEP, "tutorial services" is identified as a special education service, with no further description provided. The November 4, 2010 IEP references "tutorial services" as a special education service provided by a tutor, three hours per day. Neither of the Written Notices of meetings where these IEPs were developed makes any mention of tutorial services. Thus, when the Parent expresses her understanding that the tutor in question was to be the person who took the Student out into the community, while the District contends that the tutor was the person hired to record behavioral data in preparation for the Student's behavior plan, there is no objective source to which recourse may be had that establishes whose understanding is correct. The use of the Written Notice to record such matters is especially important where a term, such as the use of the word "tutor" in this instance, is not being given its usual meaning.

The documents supplied in this investigation contain numerous references to Ms. Drown, the "tutor," as a recorder of behavioral data, thus supporting the District's interpretation leading to a determination that the service identified in the IEP was provided. Care must be taken in future, however, to avoid these kinds of misunderstandings by more fully explaining the Team's determinations in the Written Notice.

Allegation #9: Failure to conduct occupational therapy, deaf-blind developmental, physical therapy, and adaptive physical education evaluations as ordered by the Student's IEP team in violation of MUSER §V.1.B(1)

VIOLATION FOUND WITH RESPECT TO OCCUPATIONAL THERAPY

The only reference in any of the Written Notices to a determination that one of the above evaluations was ordered by the IEP Team was the reference in the Written Notice of the November 4, 2009 IEP Team meeting that an OT evaluation was to be conducted, subsequently confirmed in the Written Notice from May 2010. The Parent did not seek to amend either Written Notice to reference any additional evaluations.

There was no dispute that the OT evaluation was never conducted. Mr. Peer only provided the consent form to the Parent in June 2010, by which time the Parent had withdrawn the Student from the school.

VIII. Corrective Action Plan

Upon the Parent presenting the Student to the program designated by the IEP in effect at that time, AOS #91 shall promptly schedule an OT evaluation for the Student, with the expense of said evaluation to be born by the District. Within 20 days of the receipt of the results of that evaluation, the Student's IEP Team, including the OT evaluator and Dr. Bruce, shall meet to consider those results and determine what level of OT services the Student requires, if any, and to develop appropriate OT goals. In determining the frequency of any services deemed needed by the Student, the IEP Team shall consider the effect, if any, of the Student's lack of OT during the past year. Any OT services ordered by the IEP Team shall be provided by AOS #91 at its own expense.

In addition, the District shall promptly correct the Student's IEP to include provision for deaf-blind consultation services consistent with the determination of the Student's IEP Team.

The District will submit documentation of compliance with the foregoing provisions to the Due Process Office and the Parent.