

**Complaint Investigation Report**  
**Parents v. Brewer**

January 25, 2011

Complaint #11.040C

Complaint Investigator: Jonathan Braff, Esq.

**I. Identifying Information**

Complainant: Mother & Father  
Address  
City Zip

Respondent: Daniel Lee, Ed.D., Superintendent  
49 Capri St.  
Brewer, ME 04412

Special Services Director: Kathleen Kazmierczak

Student: Student  
DOB: xx/xx/xxxx

**II. Summary of Complaint Investigation Activities**

The Department of Education received this complaint on December 1, 2010. The Complaint Investigator was appointed on December 2, 2010 and issued a draft allegations report on December 7, 2010, amended on December 8, 2010 and again on December 9, 2010. The Complaint Investigator conducted a complaint investigation meeting on December 21, 2010 (rescheduled from the original date of December 14, 2010 at the Respondent's request), resulting in a set of stipulations. On December 29, 2010, the Complaint Investigator received a 3-page memorandum and 76 pages of documents from the Complainant, and received a 3-page memorandum and 148 pages of documents from the Brewer School Department (the "District"), on December 30, 2010. Interviews were conducted with the following: Heather Wheaton, case manager; Judy Anderson, M.A., CCC-SLP, speech pathologist for the District; Kara Wisniewski, director of psychological services for the District; Nikki Ellis, teacher for the District; Dianne Cyr, teacher for UCP of Maine; Linda Bonnar, M.A., CCC/SLP-ATP, director of communication pathways for Pine Tree Society; and the Student's mother.

### **III. Preliminary Statement**

The Student is xx years old and is currently receiving special education under the eligibility criterion Autism. This complaint was filed by Mother and Father (the "Parents"), the Student's parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below. In addition, two ancillary issues were found in the course of this investigation, also set forth below.

### **IV. Allegations**

1. Failure to provide supplementary aids and services in the nature of an augmentative communication device, beginning in April 2010, 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), IX.3.C(2)(e) and XI;
2. Failure to fully and adequately implement the Student's IEP with respect to provision of assistive technology and services, specifically the PECS program, during the period from December 2008 to present, in violation of MUSER §IX.3.B(3);
3. Failure to develop the IEP in conformity with the determinations of the IEP team regarding provision of the PECS program by omitting it from Section 8 of the Student's IEP, in violation of MUSER §§VI.2.J(4), IX.3.A(1)(d);
4. Failure to fully and adequately implement the Student's IEP with respect to provision of speech language services during the 2009-2010 school year in violation of MUSER §IX.3.B(3);
5. Failure to convene the Student's IEP team within 30 days after the start of the 2009-2010 school year to identify alternative service options when sufficient speech language services were unavailable in violation of MUSER §IX.3.B (3);
6. Failure to provide written notice of the refusal to acquire an augmentative communication device following the IEP Team meeting of 4/15/10 in violation of MUSER App. 1, 34 CFR §300.503;
7. Failure to enable the Student's parents to function as equal participants in making joint, informed decisions regarding acquisition of an augmentative communication device at the IEP Team meeting of 4/15/10 by misleading the parents as to the District's obligation to bear the expense of doing so in violation of MUSER §VI.2.I.

#### Ancillary Allegations

1. Failure to provide written notice of the determination to amend the Student's IEP with respect to the frequency of speech/language services and to provide the amended IEP following the IEP Team transition meeting of 5/14/09 in violation of MUSER §VI.2.C(2)(a);

2. Failure to provide written notice of the refusal to include provision of an augmentative communication device in the Student's IEP and an explanation of that refusal following the IEP Team meeting of October 14, 2010 in violation of MUSER App. 1, 34 CFR §300.503.

#### V. **Stipulations**

1. The Written Notice for the 10/1/09 IEP Team meeting documented a determination that the Student would engage in a trial of the Vantage augmentative communicative device.
2. A Vantage was obtained for the Student's trial of the device from Pine Tree Society on a temporary basis from January 2010 through April 2010.
3. The Written Notice for the 4/15/10 IEP Team meeting documented a determination that an ed tech trained in the use of the Vantage augmentative communicative device would be in the Student's classroom during the following year.
4. The Student's October 2009 IEP does not identify in Section 8 the use of a PECS system, although the IEP references the PECS system in one or more of the goals.

#### VI. **Summary of Findings**

1. The Student lives in Brewer with the Parents and two older siblings, and is presently attending xx grade at Capri Street School. He began receiving early intervention services and then special education services through CDS-Penobscot under the category Autism prior to beginning xx.
2. A speech and language evaluation of the Student was conducted on January 30, 2008, resulting in a finding that the Student had a severe receptive and expressive language disorder.
3. On February 5, 2009, the Student's IEP Team met and determined to refer the Student for an assistive technology evaluation. The reason provided in the Written Notice of the meeting for this determination is that the Team "would like to know what the best communication system should be for [the Student] in order to help him learn to communicate with others."
4. The Student's IEP dated February 6, 2009 provided for three one-hour speech/language therapy sessions per week and, in Section 8 of the IEP, for the provision of a Picture Exchange Communication System ("PECS").
5. During a transition IEP Team meeting on May 14, 2009, one of the team members made hand written notations on Section 7 of the IEP. On the line marked "Speech and Language Services," where the frequency had been printed as "3xw/1hrs" and the duration "2/6/09-2/4/10," the words "end 8-31-09" were written. On the same line, below the foregoing printed frequency figures, was written "3xw/30 min" and below the foregoing printed duration figures was written "9-1-09 – 2-4-10." After the meeting, the CDS site issued an amended IEP which recorded that speech/language therapy would be provided with the

frequency “3xw/1hr” from 2/6/09 - 8/31/09, and with the frequency “3xw/30 min.” from 9/1/09 – 2/4/10.

6. The Written Notice of the May 14, 2009, although it references provision of speech therapy, does not discuss frequency or duration or any determination to amend the IEP.

7. An assistive technology evaluation of the Student was conducted by Linda Bonnar, M.A., CCC-SLP/ATP on July 27, 2009. Ms. Bonnar noted that the Student at the time was accessing over 100 picture symbols using PECS. Ms. Bonnar found that the Student demonstrated “emergent potential” for utilizing a high-tech augmentative communication device, but noted that it “took long, systematic and persistent intervention..in order for [the Student] to finally demonstrate any real, intentional success with the devices presented.” Ms. Bonnar therefore recommended that the Student be provided with such a device, preferably a Vantage Lite communication device (a “Vantage”), on a trial basis.

8. At the October 1, 2009 IEP Team meeting, the Team determined that the Student would be provided with a Vantage (expected to be obtained on loan by the Parents) on a trial basis, as well as 2 ½ hours per week direct speech/language therapy and ½ hour per week consultation.

9. The Student’s IEP dated October 1, 2009 contained goals for use of the PECS, and provided for speech/language therapy direct service five times per week for 30 minutes, and consultation one time per week for 30 minutes. Section 8 of the IEP states “No supplementary aids, services modifications, or supports for SAU personnel.”

10. The Parents were provided with a Vantage for the Student’s use by Pine Tree Society, on a temporary basis, from January 21, 2010 to April 29, 2010.

11. A speech and language evaluation of the Student was conducted by Judy Anderson, M.A. CCC-SLP in March and April 2010. In her report dated April 13, 2010, Ms. Anderson noted that the Student “demonstrated a keen interest” in using the Vantage, and that he “very successfully and consistently used his Vantage to express his wants and needs over various school and home environments.” In the recommendations section of the report, Ms. Anderson wrote that “since [the Student] has adapted well to using his Vantage, he would benefit from the use of a [Vantage] throughout all of his various educational and home environments to help him develop his communication skills to his optimal potential.”

12. A psychological evaluation of the Student was conducted by Kara Wisniewski, Ph.D. in April 2010. In her report dated April 14, 2010, Dr. Wisniewski noted that the Student “demonstrated quick generalization with the Vantage and has also independently utilized the Vantage to communicate information that has never been presented in any format.” Dr. Wisniewski stated that the Student “has demonstrated great success and understanding of the Vantage. For this reason, it is strongly recommended that [the Student] continue to use the Vantage....It is vital that [the Student]’s Vantage be accessible to him at all times and consistently utilized across settings.”

13. On April 15, 2010, the Student's IEP Team met, reviewed the speech and language evaluation report and the psychological evaluation report, and determined that an educational technician trained in the use of Vantage would be in the Student's classroom during the following year. The Written Notice of the meeting contains the following statement: "Team agrees that [the Student]... is a great candidate to use the Vantage for communication and learning."

14. An IEP progress note for a math goal dated June 16, 2010, on which the Student was rated as having partially met the goal, stated that "[i]t is hoped that once [the Student] gets the Vantage, we'll have more success in the math area." A progress note from the same date for a literacy goal, on which the Student was rated as having partially met the goal, stated that "[o]nce [the Student] gets the Vantage device, it should be easier for us to be more consistent in methods used to teach skills in the literacy area."

15. On October 14, 2010, the Student's IEP Team met and determined that the Student would receive five 30-minute sessions of speech/language therapy per week, that the Student would have access to the PECS in all educational settings, and that Section 8 of the IEP would reference provision of the PECS. The Written Notice of the meeting states that the Parents "believe that at the April 15, 2009 [sic] meeting the SAU agreed to provide the Vantage if [the Parents] did not get it through MaineCare. The [District]'s position will be to provide training for staff once the Parents obtain the device. Parents feel that Section 8 and Consideration of Special Factors (I.) of the IEP should contain 'augmentative communication device and augmentative communication device training.'"

16. The Student's IEP dated October 20, 2010 describes "a severe delay" in overall communication skills in Section 4, references PECS in Section 3(I), contains a series of short term objectives in Section 6 that involve use of a functional communication system, and provides for PECS and signing in Section 8.

17. Ms. Bonnar conducted an assistive technology evaluation update on December 12, 2010. As of that date, Ms. Bonnar noted that the Student was accessing over 500 picture symbols using PECS, and found that "although [the Student] demonstrated some adequate understanding of language during the preschool assessment... his increased orientation to his learning environment, ability to follow simple directions, and ability to react quickly and accurately to information spoken to him... have all shown some nice improvements." Ms. Bonnar went on to state that "it is important to note that [the Student] is showing that he is learning words and picking up new words from within his surroundings. As stated by his mother, she noted that some of the words [the Student] demonstrated knowledge of, she had 'no idea he knew.'" Ms. Bonnar concluded that the Student continued to be a good candidate for the Vantage, and that continued use of PECS was appropriate and necessary while the Parents awaited MaineCare's decision.

18. During an interview conducted by the Complaint Investigator with Heather Wheaton, Ms. Wheaton stated the following: She is a case manager for Penquis Autism Community Services, and has been the Student's case manager since July 8, 2010. She attended the IEP Team meetings of October 14, 2010 and November 23, 2010. At the October 14 meeting, there was discussion about the progress the Student was making. The Parents talked about the

Student's need for a Vantage, but District representatives said the District would not purchase one. They said something to the effect that they had made it clear that the District was not going to purchase a Vantage but, if the Parents wanted to purchase one through MaineCare, it was their right to do so. She doesn't remember a reason being given for the District's refusal, but the District did agree to do an updated augmentative communication evaluation.

With regard to PECS, she had the impression that not as much progress had been made as hoped because the speech therapist had been out for a significant period of time. There had been progress only in making PECS strips for the Student's scheduling, which she believes were made by Dr. Wisniewski with the teachers. She doesn't recall any discussion about the Student's mother having to make PECS strips. A new PECS book was ordered so that there could be one book kept at school and one at home, and the same book wouldn't have to travel back and forth.

19. During an interview conducted by the Complaint Investigator with Judy Anderson, M.A., CCC-SLP, Ms. Anderson stated the following: She is a speech/language pathologist for the District, and has been working with the Student since he started xx. She attended the April 15, 2010 IEP Team meeting, where the team reviewed the paperwork to be submitted in order for MaineCare to approve the purchase of a Vantage for the Student. She doesn't recall any discussion about what would happen if MaineCare decided not to approve the purchase, or of any other means of acquiring one. She doesn't recall anyone telling the Parents that the District was not required to purchase a Vantage. The Team agreed that the Student was a good candidate for the Vantage, but no one said that the Student had to have it. The Team agreed that the Student needed some kind of functional communication system, but that could be the PECS plus signing which he is using now.

The Student is communicating using signing more this year and has been doing really well with it. The Student hadn't worked with the Vantage long enough to enable her to say whether he is making more or less progress now compared to when he had the Vantage. She has been working with the teachers to make sure that PECS is being used all the time in the classroom. She also saw it being used with the Student in the lunchroom. The staff has been increasing their use of the PECS, but they could be more consistent with how they use it with the Student. They are working to improve this. PECS is still not being used at recess, but it's in the process of being implemented.

When the Student started xx, the Parents brought in the PECS book that had been used in the xx program. The District has its own book now. Part of the delay with this was that the software program needed to make the PECS strips was not available to the staff until recently.

At the beginning of the 2009-2010 school year, the Student's IEP provided for three 30-minute speech therapy sessions per week, and she was delivering services at that level (after an initial two week period during which she was engaged in screening and pre-testing). In October 2009, this was increased to five 30-minute sessions per week.

20. During an interview conducted by the Complaint Investigator with Dianne Cyr, Ms. Cyr stated the following: She was the lead teacher in the xx program that the Student attended at UCP of Maine starting in September 2008. She attended the IEP Team meeting of May 14,

2009, and her notes reflect that the District determined to adopt the Student's CDS IEP and to continue to provide the same services. She doesn't recall a discussion about reducing the level of speech/language services. The meeting was very short (about 45 minutes), and she remembers coming away from the meeting feeling good that the Student was going to get what he needed.

21. During an interview conducted by the Complaint Investigator with Kara Wisniewski, Ph.D., Dr. Wisniewski stated the following: She is the director of psychological services for the District. When the Student was in xx, she was asked to provide consultation services to his team. Since then, she has been in the Student's classroom several times a week, helping the Student's teachers with programming, both academic and non-academic, and behavioral needs.

She attended the IEP Team meeting of May 14, 2009. Ms. Anderson was not present, nor was the speech provider from the Student's xx, so there was no one at the meeting who had a good understanding of the amount of speech services the Student required. There was a discussion and determination made about the level of speech services that would be provided, however, she does not recall what the determination was. When, after the 2009-2010 school year began, the Parents requested that the level of services be increased, additional therapy time was added.

She also attended the IEP Team meeting of April 15, 2010. Ms. Bonnar was present, and there was discussion about the materials that had to be provided to MaineCare in support of the Parents' request for a Vantage. There was discussion about the progress that the Student was making with the Vantage, but no determination was reached as to whether the Student required a Vantage in order to access his education. Ms. Bonnar was very confident that MaineCare would approve the Parents' request, and there was no discussion about what would happen if the request was denied. She doesn't recall the Parents requesting that Vantage be referenced in the Student's IEP, and she doesn't believe that the District told the Parents that the only way the Student could receive a Vantage was if they acquired it for him. There was not that much discussion about the Vantage at the meeting – it was not the primary focus of the meeting.

She did not attend the October 10, 2010 IEP Team meeting. The Team met again in November 2010 to review the Student's progress. The District determined that the Student needed a functional communication system, but not specifically a Vantage. Based on her observations of the Student in the classroom, she believes that the system now in place – PECS plus signing – is adequate to enable the Student to make progress toward his goals. Most of the Student's day is built around PECS, and he has a PECS book that he takes home with him. Ms. Anderson works directly with the Student on using the PECS, and with the staff on how to use PECS in the classroom. The Student also has a visual schedule, and objects all around the classroom are labeled with symbols.

She has made at least half of all the PECS symbols that are in the Student's PECS book, and Ms. Anderson made most of the others. The Student's mother took it upon herself to make some of the PECS strips, but the staff would have done it if she hadn't. It's very important

that the PECS follows the Student throughout his day and, in the most recent evaluation, there was concern that there wasn't enough follow through in the Student's home. The Parents haven't always taken the PECS book home at the end of the day, or they forget to bring it back to school the next day.

22. During an interview conducted by the Complaint Investigator with Nikki Ellis, Ms. Ellis stated the following: She is a special education teacher at Capri Street School, and the Student has been in her class both last year and this year. She attended the May 14, 2009 IEP Team transition meeting, and remembers that there was discussion about the level of speech/language services the Student would receive when he came to the District. There was a decision to change the level of services, and she hand wrote into the IEP the new provisions. Her handwritten notations were given to CDS, which then typed up the new IEP. She doesn't remember what the new provisions were, or why the decision was made to change. She doesn't recall that the Parents objected to the decision.

She remembers meeting with Ms. Bonnar and other staff members, probably in March 2010, to discuss the Vantage. Everyone agreed that the Student seemed to be a good candidate for the device, and Ms. Bonner reviewed with the staff the materials that the District needed to provide in order for MaineCare to approve the purchase. At some point, possibly at the April 15, 2010 IEP Team meeting (which she attended), the Parents said they really wanted the Student to have the Vantage, and that if MaineCare didn't approve it they would get it themselves. She doesn't remember anyone from the District saying to the Parents that if they wanted the Student to have a Vantage they would have to pay for it, and doesn't remember the Parents asking if the District would agree to pay for it.

She doesn't believe that the fact that the Student hasn't had the Vantage this year has made a big difference, and he is making gains without it. It would be nice to have it, but the Student doesn't need it in order to access his educational experience. The Student was very motivated to use the Vantage – he seemed to like the technology. The Student is reluctant to use PECS to express emotions, and she thinks the Student might be more willing to do this with the Vantage.

The Student is signing more this year –he waives hello and goodbye, signs to express “mad” and “happy,” and uses other signs as well. There are now PECS strips for all the Student's activities at school, including out on the playground. The Student uses PECS at about the same level as last year, but he can now use the strips that accompany each activity and point to each of the steps as he goes through the activity. He uses PECS to request certain activities at recess, or certain food items at lunch. The Student has also improved in his ability to sit at the table for longer periods of time and work on tasks.

Last year, the Student's mother provided three PECS strips to be used for bathroom and personal hygiene activities. The Student uses them in connection with teeth brushing, but the other activities he goes through without needing the strips. All the other strips at school were developed by school staff. For example, she recently has developed strips for the Student to use at the swimming pool, and for home-school transitions.



23. During an interview conducted by the Complaint Investigator with Linda Bonnar, M.A., CCC/SLP-ATP, Ms. Bonnar stated the following: She is director of communication pathways for Pine Tree Society. She conducted an assistive technology evaluation of the Student when he was in xx and conducted a follow-up evaluation recently. As a result of her initial evaluation, she recommended that the Student use the Vantage on a trial basis, in order to determine whether the device would be of benefit. At that time, the Student had essentially no language, and she was uncertain that the Vantage would be useful.

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She further recommended to the Parents that, providing that the trial proved successful, the Parents obtain the Vantage through MaineCare. Her reasons for recommending that the Parents, rather than the District, obtain the Vantage were that then the Parents would own the device outright, and if the family moved or the Student moved to another school, the Vantage would follow the Student to the new location. Also, if the District owned the device, the District would have the right to restrict the Student from taking it home at the end of the school day (for example, if the District believed that the device would not be properly maintained and kept safe in the home, or that it would not be consistently returned to school with the Student). The Parents agreed with this recommendation, saying that it made sense for them to own it.

Pine Tree Society, as part of its demo and loan program, loaned a Vantage to the Parents for about three months. The Student did well with it, and the Parents along with the District decided that the Vantage was the device of choice and that the Parents should move forward with obtaining one. She never heard the District say that it would refuse to purchase it; the District agreed that it made sense for the Parents to own it, and said it would help by providing materials to submit to MaineCare and by providing training to staff members. At some point, she believes it was on March 18, 2010 (although it's possible she was at the April 15, 2010 IEP Team meeting), she met with District staff and provided samples of the kinds of materials that MaineCare needed in order to approve the purchase of the device. The District completed all the necessary material, and she has done staff training on the Vantage at the District's request. She is fairly confident that MaineCare will approve the purchase.

She believes that PECS and signing are adequate at the present time, in the absence of the Vantage, to enable the Student to access his education. For now, the only thing the Vantage offers over and above PECS is that it provides voice output. As the Student is taught new language concepts and vocabulary and his language skills improve, however, the Vantage can more efficiently incorporate those developments. Eventually, as the Student's language skills continue to improve, PECS will become more cumbersome and laborious, and it will no longer be a viable option.

24. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: At the May 14, 2009 IEP team meeting, the Team agreed that ESY speech/language services would be provided at a reduced frequency (three 30-minute sessions per week instead of three 60-minute sessions per week), and then would return to the same frequency as before. Laura Mellits from CDS wrote the reduced hours on the IEP and noted that it was to end on 8/31/09. The Parents left the meeting with a copy of the page with the hand-written notations, but never received a type-written amended IEP.

When the new school year began, she was spending a lot of time at the school, and she became aware that the Student wasn't getting the full three hours per week of speech therapy he was supposed to. Once she realized this, the Parents requested that the amount of speech services be put back to the previous level.

With regard to the Vantage, she feels that the Parents were never given an option as to how the device would be acquired. She never had a discussion with anyone about the pros and cons of the Parents owning the Vantage versus the District owning it. At the April 15, 2010 IEP Team meeting, after the Vantage had been returned to Pine Tree Society, the District implied that the Parents had to go through MaineCare to get the device. She turned to the Student's father and asked what would happen if MaineCare denies their request. The District special education director, Kerry Priest, said not to worry, that if that happened the District would do something about it. The District has never said specifically that they would purchase the Vantage if MaineCare denied the Parents' request, but they never said they wouldn't, either. As of now, MaineCare is reviewing the submitted materials and the Parents are waiting to find out whether it will be approved or not.

The Student loves working on the computer, and he was great with the Vantage. He was much more motivated to use the Vantage than he is with PECS. With PECS, he is more apt to just point to objects instead of pointing to an icon. Before the Vantage, the Student was basically just using PECS to request food, but he used the Vantage to identify animals, numbers and other things. With PECS, if the Student wants juice he signals "want drink;" with the Vantage, he asked for "fruit water."

It's somewhat difficult to evaluate the Student's potential for making progress using the Vantage because the District staff didn't really know how to use it. The Student's section 28 provider was familiar with the Vantage, and when the Student brought it home, that provider programmed it for home use. The next day she received an angry phone call from Mr. Priest who said that she had changed the programming and no one knew how to change it back. It actually only took four simple steps, but no one there knew how to do it. She also found lesson plans using the Vantage on the internet and gave them to Ms. Ellis. She doesn't believe anyone at the school was using lesson plans with the Vantage. For these reasons, the Parents asked the District to provide training for the staff.

With regard to PECS, she doesn't believe that Ms. Ellis has been adequately trained in how to use it. When the Student started in her class, she gave Ms. Ellis the PECS book he had been using in preschool. The icons that were added to the book were ones that she provided. It wasn't just three personal hygiene strips that she supplied to Ms. Ellis - she has sent in icons for colors, numbers and animals. The staff has made some PECS strips, but the school just got the Boardmaker computer program this year. They recently made a school PECS book that will be separate from the book he uses at home. They made a PECS strip for when the Student goes into the regular education classroom, and they just recently made a strip for the playground.

The strips are good, but the staff also has to learn to get the Student to ask for things himself. They make up strips so the Student will know what's coming in a sequence of activities, but

there aren't icons he can get hold of so that he can ask for things. Also, the Student doesn't take the book with him to the different activities, just the strips. In xx, from the moment the Student walked into his classroom, there were icons everywhere. For everything the Student wanted or needed to do he could use PECS.

When she was in the classroom last year, she saw that staff members weren't using PECS enough. They might just take the Student to the bathroom, instead of getting him to use PECS to tell them he needed to go. When reading a book with the Student, they weren't showing him icons that were related to the material in the book. She has not been in the classroom as much this year, and she doesn't know if they have improved in these areas. She has observed that, whereas last year the Student was mostly just using PECS to request food, this year he is using PECS to indicate numbers, body parts, animals and other things.

This year, the staff reported that the Student was having difficulty when he first came into the classroom in the morning with such things as taking off his coat. She had to suggest that they develop PECS for the morning sequence. The staff should be able to think of that solution themselves. Another problem they reported was that the Student was taking off his shoes in the classroom. The Student's father noticed that an educational technician in the room had her shoes off, and he had to explain that the Student is very visual and was just copying the educational technician. Ms. Ellis should be able to figure that out.

## **VII. Conclusions**

**Allegation #4:** Failure to fully and adequately implement the Student's IEP with respect to provision of speech language services during the 2009-2010 school year in violation of MUSER §IX.3.B(3)

**Allegation #5:** Failure to convene the Student's IEP team within 30 days after the start of the 2009-2010 school year to identify alternative service options when sufficient speech language services were unavailable in violation of MUSER §IX.3.B (3)

### **NO VIOLATION FOUND**

**Ancillary Allegation #1:** Failure to provide written notice of the determination to amend the Student's IEP with respect to the frequency of speech/language services and of the amended IEP following the IEP Team transition meeting of 5/14/09 in violation of MUSER §VI.2.C(2)(a)

### **VIOLATION FOUND**

At the conclusion of the May 14, 2009 transition meeting, the Parents left with the understanding that speech/language services were to be reduced for the summer, but then would return to previous levels when the Student started school in the District on September 1, 2009. The notations made on the IEP page in handwriting (whether by Ms. Ellis or Ms. Mellits), on the other hand, indicate that services were to be reduced starting on September 1, 2009. Those handwritten notations were typed out in an amendment to the Student's IEP.

Unfortunately, the Written Notice issued after the meeting said nothing about the level of speech/language services, or about a determination to amend the IEP. To make matters

worse, the District then failed to provide the Parents with a copy of the IEP amendments. As the two mechanisms built into the system to assure that the Parents understood what had been determined at the meeting failed, the Parents were deprived of the opportunity to object to the determination. As soon as they became aware of the change in level of services, they raised an objection and the District restored the level of service.

As no evidence was presented that the Student did not receive the services that were indicated in the amended IEP, no violation is found. As there was no failure to provide the services identified in the IEP, there was no obligation to convene the IEP Team to discuss alternative service options. Pursuant to MUSER §VI.2.C(2)(a), however, the responsibility for preparing the Written Notice and the new IEP belonged to the District, and its failure to provide the Parents with the proper notification of a determination to amend the Student's IEP, followed by the amended IEP itself, results in a finding of violation.

**Allegation #1:** Failure to provide supplementary aids and services in the nature of an augmentative communication device, beginning in April 2010, 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), IX.3.C(2)(e) and XI

**NO VIOLATION FOUND**

**Allegation #3:** Failure to develop the IEP in conformity with the determinations of the IEP team regarding provision of the PECS program by omitting it from Section 8 of the Student's IEP, in violation of MUSER §§VI.2.J(4), IX.3.A(1)(d)

**Ancillary Allegation #2:** Failure to provide written notice of the refusal to include provision of an augmentative communication device in the Student's IEP and an explanation of that refusal following the IEP Team meeting of October 14, 2010 in violation of MUSER App. 1, 34 CFR §300.503

**VIOLATION FOUND**

A student's IEP must identify all supplementary aids, including assistive technology, required 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." MUSER §IX.3.A(1)(d). As stated in MUSER §XI, "once the IEP Team determines that an assistive technology device...is necessary for the provision of a Free, Appropriate Public Education and specifies the assistive technology device...within the children's IEP, the school administrative unit is responsible for ensuring the provision of the assistive technology device...at no cost to the parents." This does not mean that the SAU may not access a student's MaineCare coverage; MUSER §XVIII.1.G(2)(a) clearly authorizes that procedure.

Looking first at the October 1, 2009 IEP, Section 8 states that no supplementary aids are needed, even though Section 5 contains goals that reference use of PECS, a functional communications system with which the Student was provided from the start of school that

year. PECS constituted a supplementary aid that was required to be listed in Section 8 (a violation that was corrected in the October 20, 2010 IEP, and consequently no corrective action is needed). As to the Vantage, no determination had been made at that time that the Vantage would be beneficial to the Student, only that it was appropriate to provide it on a trial basis, so there would be no reason to reference it in the IEP.

When, at the April 15, 2010 meeting, team members reported that the Student's trial with the Vantage had been a success, a discussion and determination should have followed as to whether the Student required the device in order to receive FAPE. Had the District determined that the Student needed the Vantage, it should properly have listed it in Section 8 of the IEP, and the Written Notice should have been used to record the decision that the Parents, rather than the District, would initially attempt to obtain the device. It is not clear that the District understood this point. The District may have believed that the fact that the Parents were proceeding to acquire the device meant that the District was relieved of the obligation to do so, and therefore it did not need to put it into the IEP. The question of who will own the assistive technology device, however, must be secondary to the primary question of whether the student needs it in order to receive FAPE.

At the October 14, 2010 IEP Team meeting, the Parents (assisted by their advocate) specifically requested that provision of an "augmentative communication device" be added to Section 8 of the IEP. The Written Notice of the meeting references the Parents' request under Section 6 (description of the points made by the parent), and in that section states that "[t]he SAU's position will be to provide training for staff once the parents obtain the device." Section 8 of the October 20, 2010 IEP references PECS and signing, but not the Vantage. This represented a refusal by the District regarding programming, and should have been recorded in Section 1 of the Written Notice, with an explanation of why the District was refusing to comply with the Parents' request set forth in Section 2. The Written Notice does not provide an explanation for the District's position, in Section 2, 6 or anywhere else.

More importantly, the Parents' request did not appear to trigger the kind of IEP Team discussion that was required as to whether a voice output communication device (the category of augmentative communication device which includes the Vantage) was necessary in order for the Student to receive FAPE. At most, the District may have communicated its refusal to commit to obtaining such a device, without explanation as to the reasons for this decision (i.e., how the Student could receive FAPE in the absence of such device). For this reason, the Department will not decide the substantive issue of whether or not the Student's IEP should have referenced the device; instead, the District will be directed to reconvene the IEP Team to enable it to discuss this issue and make a proper, FAPE-based determination.

**Allegation #6:** Failure to provide written notice of the refusal to acquire an augmentative communication device following the IEP Team meeting of 4/15/10 in violation of MUSER App. 1, 34 CFR §300.503

**Allegation #7:** Failure to enable the Student's parents to function as equal participants in making joint, informed decisions regarding acquisition of an augmentative communication device at the IEP Team meeting of 4/15/10 by misleading the parents as

to the District's obligation to bear the expense of doing so in violation of MUSER §VI.2.I

**NO VIOLATION FOUND**

The evidence uncovered in this investigation was not persuasive that the Parents specifically requested of the District at the April 15, 2010 meeting that it make a commitment to acquire the Vantage. Rather, according to the Student's mother, she expressed concern about what would happen if MaineCare refused coverage and received assurance from Mr. Priest that the District would "do something." This is fairly consistent with the Parents' position at the time of the October 14, 2010 meeting, which, according to the Written Notice, was that on April 15, 2010 the District "agreed to provide the Vantage if [the Parents] did not get it through MaineCare." Furthermore, the Student's mother conceded during this investigation that no one from the District ever told the Parents that the District would refuse to purchase the device if the Parents were unable to do so themselves. If no refusal was made at the April 15, 2010 meeting, there was no reason to document it in the Written Notice.

With regard to the issue of which party, the Parents or the District, was to acquire the Vantage, the Parents assert that their decision to proceed was based upon the District's having led them to believe that they had no choice in the matter. This assertion is contradicted by Ms. Bonnar, who had a very specific recollection of discussing with the Parents the benefits of their owning the Vantage rather than the District, and of the Parents agreeing with her recommendation that they be the ones to own it. Once the Parents made that initial decision, it appears that the District took a "wait and see" attitude on the question of what would happen if MaineCare denied the Parents' request for coverage. The only evidence of a direct request for the District to acknowledge responsibility to provide the Vantage, and its refusal to do so, was in connection with the October 14, 2010 meeting.

**Allegation #2:** Failure to fully and adequately implement the Student's IEP with respect to provision of assistive technology and services, specifically the PECS program, during the period from December 2008 to present, in violation of MUSER §IX.3.B(3)

**NO VIOLATION FOUND**

This allegation does not present the situation where a school district allegedly fails to provide a service, aid or modification indicated in the IEP, or fails to provide it with the frequency or in the manner indicated. Rather, the allegation goes to the quality of what is being provided. The Student's mother had several criticisms of the way PECS was being administered in the Student's classroom, including staff being slow to add icons to the PECS book, to post icons in the classroom, and to create PECS strips, and an insufficient effort to encourage the Student to use PECS. The validity of the criticisms is supported by information that the computer software for creation of new icons and strips was only obtained recently, a PECS strip was not created for the playground until just recently, and by Ms. Anderson's observation that the staff is somewhat inconsistent in its use of PECS with the Student. It appears from the information obtained during the investigation, however, that this situation is improving. The software is now in place, and many new strips and icons have been developed. Both Ms. Bonnar and the Student's mother note the Student's greatly increased PECS vocabulary.

The case law on the issue of implementation failure states a requirement that, in order for there to be an IDEA violation, there must be a “material failure” to implement, which requires more than a “minor discrepancy” between the services provided and the services required by the IEP. See *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9<sup>th</sup> Cir. 2007). See also *Mr. and Mrs. C v. Maine S.A.D. No. 6*, 49 IDELR 36 (D.Me. 2007). The court in *Van Duyn, supra*, further noted that, although “the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail..., the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” 502 F. 3d at 822. Courts have also looked to whether a school district made a “good faith effort” to implement the educational program agreed upon. See *Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 592 F. 3d 267 (1<sup>st</sup> Cir. 2010).

As previously discussed, there was no indication during this investigation that PECS, as presently being administered, was inadequate to enable the Student to meaningfully benefit from his education. Ms. Bonnar, in her recent evaluation update, found that the Student had made significant communication gains. The Student’s mother also described significant advancement in the way in which the Student utilizes PECS. Neither does there appear to have been any lack of good faith in the staff’s efforts to implement PECS. To the contrary, the staff appears to have worked to improve the system and extend it to an increasing number of school activities. While the Student’s mother feels that she should not have had to contribute ideas or materials to the effort, there was no indication that the staff was reluctant to utilize those contributions in order to improve this aspect of the Student’s educational program. There is undoubtedly further room for improvement, and it is hoped that the Parents will remain willing to work with staff members as they continue to work towards this goal.

#### **VIII. Corrective Action Plan**

The District shall promptly reconvene the Student’s IEP Team for the purpose of considering the question whether the Student requires a voice output communication device in order to receive FAPE. A determination shall be made on this issue apart from the question of who (the District or the Parents) shall own the device if it is deemed necessary for the Student. Following the meeting, the District shall issue a Written Notice stating the determination and the reasons for it, and the Parents may exercise their due process rights should they disagree with the determination. The District will submit a copy of the Advance Written Notice and Written Notice for the meeting, together with an amended IEP if a determination is made that requires it, to the Due Process Office, the Parents and the Parent’s advocate.

In addition, the District shall issue a memorandum to all special education staff regarding: 1) the necessity for including in the Written Notice all those actions regarding the referral, evaluation, identification, programming or placement of a student that the District is proposing to take, as well as those that the District is refusing to take, and the reasons for any such proposal or refusal; and 2) the obligation of the receiving SAU, following a CDS-public school transition meeting, to send to parents the IEP developed pursuant to that meeting. 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, the Parents and the Parent's advocate.