

Complaint Investigation Report
Legal Guardian v. AOS #97

July 5, 2011

Complaint #11.085C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Legal Guardian
Address
City, Zip

Respondent: Briane Coulthard, Superintendent
17A Highland Ave.
Winthrop, ME 04364

Special Services Director: Lew Collins

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on May 10, 2011. The Complaint Investigator was appointed on May 10, 2011 and issued a draft allegations report on May 17, 2011. The Complaint Investigator conducted a complaint investigation meeting on June 10, 2011 (rescheduled from the original date of May 26, 2011 at the Respondent's request), resulting in a set of stipulations. On June 16, 2011, the Complaint Investigator received 287 pages of documents from the Complainant, and received a 5-page memorandum and 57 pages of documents from AOS #97 (the "District") on June 14, 2011. Interviews were conducted with the following: Nancy Godfrey, principal and teacher for the District; Liz Keach, CDS director; Barbara Ray, Teacher for the District; Susan Morin, teacher for the District; Teri Sherrets, OTD, OTR/L, occupational therapist for the District; Tia Dixon, outside case manager; Sarah Charland, outside clinician; Katherine Perry, outside clinician; Scott Hayward, outside clinical director; and the Student's legal guardian.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Other Health Impairment. This complaint was filed by the Student's legal guardian,

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

IV. Allegations

1. Failure to provide special education, related services and supplementary aids and services during the period from the start of the 2010-2011 school year until March 2011 sufficient 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 in violation of MUSER §IX.3.A(1)(d);
2. Failure to have an IEP in effect at the beginning of the 2010-2011 school year in violation of MUSER §IX.3.B(1);
3. Failure to complete an evaluation of the Student for initial eligibility within 45 school days of receiving the legal guardian's consent in September 2010 in violation of MUSER §V.1.A(3)(a)(i);
4. Failure to complete an occupational therapy evaluation within 45 school days from the receipt of the legal guardian's consent in the spring of 2010 in violation of MUSER §V.1.A(3)(a)(i);
5. Failure to provide special education and related services in the nature of behavior therapy during the period from March 2011 through May 10, 2011 sufficient 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);
6. Failure to provide supplementary aids and services in the nature of full-time one-on-one support to enable the Student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d);
7. Failure to conduct an evaluation and assessment of the Student in all areas of suspected disability, including speech and language, in violation of MUSER §V.2.C(4);
8. Failure to provide a complete and accurate summary of comments made by the Student's legal guardian in the Written Notice of the March 2011 IEP Team meeting in violation of MUSER App. 1, 34 CFR §300.503(9);
9. Failure to amend inaccurate information contained in the Written Notice of the March 2011 IEP Team meeting regarding the comments made by the Student's legal guardian at the legal guardian's request within a reasonable period of time, or else notify the legal guardian of its refusal to do so, in violation of MUSER §XIV.8;
10. Failure to utilize the IEP Team as the vehicle for developing a behavior plan for the Student, and thereby enabling the legal guardian to participate in that decision-making, in violation of MUSER §§VI.2.I(3) and IX.3.C(2)(a);

11. Failure to develop a behavior plan for the Student that adequately addresses his behavioral needs in violation of MUSER §IX.3.C(2)(a);
12. Failure to respond to the legal guardian's request to hold an IEP team meeting to revise the Student's behavior plan by either holding the meeting or else issuing Written Notice of the District's refusal to do so in violation of MUSER §IX.3.D(1) and App. 1, 34 CFR §300.503;
13. Failure to provide advance written notice to the legal guardian of the April 14, 2011 IEP Team meeting at least seven days prior to the meeting in violation of MUSER §VI.2.A;
14. Failure to provide a copy of the full OT evaluation report to the parent at least 3 days prior to the April 14, 2011 IEP team meeting in violation of MUSER §V.4.G;
15. Failure to properly consider input from all IEP team members, specifically, the OT evaluator, at the April 14, 2011 IEP Team meeting in violation of MUSER §VI.2.J;
16. Failure to adequately consider the concerns of the legal guardian in the IEP decision making process by restricting the topics that the legal guardian is permitted to discuss at IEP Team meetings in violation of MUSER §§VI.2(I) and IX.3.C(1)(b).

V. **Stipulations**

1. The Student's legal guardian requested that the Written Notice of the March 11, 2011 IEP Team meeting be amended.
2. The District did not amend the Written Notice of the March 11, 2011 IEP Team meeting, and did not notify the Student's legal guardian that it would not do so.
3. No special education services were provided to the Student from the beginning of the 2010-2011 school year through March 11, 2011.

VI. **Summary of Findings**

1. The Student lives in Kents Hill with his sister and the Legal Guardian and is presently attending xx at Fayette Central School (the "School"). He began receiving special education services through CDS Southern Kennebec prior to entering xx in the District.
2. On August 27, 2009, the Student's IEP was amended to provide a one-on-one aide and a transportation aide. The Written Notice pertaining to the amendment states that the decision was made because the Student "presents with such a safety concern."
3. On March 22, 2010, an IEP Team meeting was held to review the Student's options for the following year as to whether the Student would continue to receive services through CDS or would be enrolled in public school, and whether the Student would attend xx for a full day, a half day or not at all. The Advance Written Notice for the meeting referred to it as a "transition meeting," however, the IEP was not reviewed and developed for the forthcoming year.

4. At an annual review IEP Team meeting on June 16, 2010, the Team determined that the Student was no longer eligible for special education services due to the lack of adverse effect of his disability. An unsigned note in the Student's file contains the following statement: "[The Student] is able to follow directions, respects boundaries, accepts consequences and poses no safety concerns in the classroom...Foster mom will enroll [the Student] in school next fall. He will have ½ day xx and ½ day xx The school will re-evaluate in the fall and determine if a 504 plan needs to be written. There also was a recommendation that the school do an OT evaluation in the fall as well."
5. The Student entered public school in the District in September 2010. The District referred the Student to the Student Assistance Team ("SAT") to monitor the Student's adjustment to school and consider whether any interventions would be appropriate. The SAT developed a behavior plan for the Student. During that time, Mr. Collins directed the OT, Terri Sherrets, to discontinue conducting the OT evaluation.
6. During November and December 2010, there were four documented Code of Conduct Violations involving the Student, with behaviors including spitting, rock throwing and sexualized behavior. The incidents occurred in the classroom, bathroom, playground and on the bus.
7. On December 22, 2010, the Legal Guardian made a referral to special education for the Student and, on the same day, signed a Parental Consent for Evaluation form, indicating evaluations to be conducted in the following areas: academic/developmental testing; observation; psychological evaluation; and a behavior rating scale.
8. The psychological evaluation, conducted on March 4, 2011, noted previous diagnoses of ADHD, Disruptive Behavior Disorder NOS and Impulse-Control Disorder NOS. The evaluation report stated that the Student was "having tremendous difficulty managing his activity level within the classroom," and made findings consistent with the diagnosis of ADHD-Combined Type. The report's recommendations include the development of a behavior plan, provisions of breaks during tasks, and the opportunity to go for a walk or to have a place where he can move around.
9. The Student's IEP Team, on March 11, 2011, made a determination that the Student was eligible to receive special education services, agreed to develop an IEP that would provide 15 minutes per week of special education consultation, agreed to develop a behavior plan, and agreed to conduct an OT evaluation. The Written Notice of the meeting, in the description of points made by the Legal Guardian, references the Legal Guardian's belief that the Student should be supervised at all times.
10. The Legal Guardian provided written consent to the OT evaluation on March 15, 2011.
11. The Student's IEP, with an effective date of March 11, 2011, contains three behavioral goals and provides consultation service by a special educator 30 minutes per month. The IEP references a behavioral intervention plan, attached to the IEP, which is "developed, reviewed, and updated on an as-needed basis."

12. The Student's behavior intervention plan identifies three antecedents (task completion, transition and group activities), identifying for each one: reinforcements (verbal praise and rewards); target behaviors (distracting others, does not maintain personal space, aggressive behavior, etc.); alternate strategies (prompts, giving motor breaks, etc.); and consequences (time out, loss of recess, etc.). The rewards are described as being given a marble, which will be placed in a jar in the front office, with additional rewards when the jar is full.

13. The Student's IEP Team met on April 14, 2011 to review a draft of the OT evaluation report that had been conducted by Ms. Sherrets. Although the Student did not qualify for OT services based on the results of the formal assessment utilized by Ms. Sherrets, the Team determined, based on clinical observation and practical assessment, that OT services would be beneficial to the Student. As the OT evaluation report had not been completed, the Team did not determine a specific level of services.

14. The Legal Guardian first received notice of the meeting, verbally, on April 11, 2011, and was given the option of scheduling the meeting for a later date. At the April 14, 2011 meeting, the Legal Guardian signed a waiver of the seven day advance notice requirement.

15. During March and April 2011, there were four more documented Code of Conduct Violations involving the Student, with behaviors including spitting, screaming, physical aggression and sexualized behavior. Three of the incidents occurred on the bus in the afternoon, and the other on the playground. One of the bus incidents occurred after the District had assigned an older student to sit with the Student on the bus as a "buddy."

16. The Legal Guardian removed the Student from school on May 5, 2011 citing lack of adequate support for the Student and lack of adequate communication with her.

17. On May 6, 2011, the Legal Guardian provided to the District a note from Teresa Hermida, M.D. which stated that she had been treating the Student for Disruptive Behavior Disorder, NOS and Impulse Control Disorder, that there were times when the Student's symptoms were under good control and other times when they became abruptly exacerbated, and that therefore "there may be times when his behaviors require more supervision from adult providers, in order to prevent him from crossing the physical and emotional boundaries of his peers. During these times it will be medically necessary for him to have an adult one-on-one support, in order to facilitate a safe environment for him and his peers."

18. Another meeting of the Student's IEP Team was held on May 26, 2011. The Team determined that OT would be provided as a related service for two 30-minute sessions per week, with OT consultation services for 15 minutes per week. In addition, the Team determined: to provide educational technician support for 60 minutes per day, plus an aide for the Student's bus ride home on a daily basis; to conduct additional evaluations to assess phonological processing, articulation and academic achievement; to change the behavior plan to include immediate consequences; and to add various classroom accommodations to the IEP. The Team decided that the meeting would serve as an annual IEP review, and that the IEP with the foregoing services and accommodations and dated May 26, 2011 would be

reviewed by May 25, 2012. The Legal Guardian agreed to return the Student to school as of May 31, 2011.

19. The Student's behavior intervention plan was revised to: set out three goals related to the antecedents; delete reference to marbles as rewards, substituting "tangible reinforcement" and an additional reward and/or activity when a determined amount of rewards are collected; and deleting loss of recess as a consequence.

20. During an interview conducted by the Complaint Investigator with Liz Keach, Ms. Keach stated the following: She is the director for CDS Project PEDS. In July 1, 2010, as part of a reorganization effort, her site became responsible for services previously provided by CDS Southern Kennebec, including the Fayette school. Her site received records from CDS Southern Kennebec, including records regarding the Student. Some time in late September or early October 2010, her site received a request for the Student's CDS file from the District. She sent the file to either the principal or the school secretary. She reviewed the CDS data base and found that the Student was listed as a "closed child" (i.e., that the Student had been discharged from CDS services). This is consistent with the information found on the CDS "face sheet" (activity log) with regard to a determination that the Student was no longer eligible for services.

In the year when a CDS child is to turn five years of age, CDS sends a 676 form to the parents to explain what the options are. There is usually a 676 meeting where both CDS and the public school describe what their programs would look like the next year. This is not the same as a transition meeting, which shouldn't be held prior to April 1. The annual review meeting on June 16, 2010 should have been chaired by the District, and would typically be attended by the principal, the xx teacher and appropriate therapists.

21. During an interview conducted by the Complaint Investigator with Nancy Godfrey, Ms. Godfrey stated the following: She is a special education teacher and the principal of the School. She was invited to an IEP Team meeting on March 22, 2010. The purpose of the meeting was to determine whether the Student was ready to go on to xx, or should be held back in xx. The Team determined that the Student would do ½ day in xx and ½ day in xx. The meeting was facilitated by Michelle Keating of CDS. It was not a transition meeting, and neither the Student's IEP nor services were discussed. She was not invited to a June 2010 meeting, and never received nor saw a Written Notice from that meeting. She doesn't know who from the District, if anyone, attended that meeting.

The only records regarding the Student she had from CDS when the 2010-2011 school year began were a group of face sheets and a Written Notice from August 2009. The District had not received the Student's full CDS file by the time the school year began. From the face sheets, she knew that the Student had been discharged from special education. She decided that the District would monitor the Student and make its own determination whether to refer him to special education. The District referred him to the SAT in September 2010, and the SAT developed a behavior plan for the Student. The Legal Guardian ultimately made the referral to special education in December 2010.

Ms. Sherrets told her that she had started the process for conducting an OT evaluation of the Student in September. She asked about the Legal Guardian's consent for the evaluation and no one had it. Mr. Collins told Ms. Sherrets not to go ahead with the evaluation because the Student had been discharged and the District was engaged in determining whether to make a re-referral. When, after the Student was referred, the Parent signed the consent for evaluation form, OT was not one of the evaluations listed.

She observed the Student on two occasions in March 2011 in each of his classrooms. She saw that the Student didn't do well with down time. He had a short attention span, was distractible, and needed extra motor activities and breaks. She didn't believe that he needed one-on-one support in the classroom, however, and she saw no safety issues. In the xxx class, there was a CDS person as well as the teacher, and they both prompted the Student when necessary. There was an educational technician in the xxxx. The Student's behavior issues were during unstructured activities – on the playground, on the bus and during transition. She believed that the District was adequately managing the Student's behavior with his behavior plan, although she did assign an additional educational technician to the playground during recess.

At the suggestion of the superintendent, an older student was assigned to sit with the Student on the bus in April as a "buddy." The first day this was tried the Student assaulted that older student and that plan was abandoned. After that, the Student was assigned a seat on the bus directly behind the driver, by himself and belted in. On May 26, 2011, the Team agreed to provide one-on-one support during transition and to put an educational technician on the bus, but she didn't believe it was necessary. It was done because the Legal Guardian was so adamant that the Student needed it.

Behavior plans are revised on an ongoing basis. Marbles might work well one week and then not at all the next. After the March 11, 2011 meeting, she, Ms. Morin and Ms. Ray revised the plan that had been in place before the eligibility determination and sent it to the Legal Guardian for her input. The Legal Guardian said that it was a mistake to take away recess as a consequence, and this was taken out of the plan when it was revised in May at a meeting that included the Legal Guardian and a representative from Graham Behavioral Services ("GBS"). GBS came to the School to observe the Student. GBS was never refused access to allow them to do this. The District never received a report or written recommendations, or a proposal to provide services. The District wanted to have its behavioral consultant, Dave Moran, do a behavioral assessment of the Student so that he could give the Team input on behavioral strategies. It was scheduled for May 5, 2011, but the Legal Guardian called and said that Mr. Moran was not allowed to observe the Student.

The Team agreed to provide a speech/language evaluation at the May 26, 2011 IEP Team meeting, although she didn't believe it was warranted. The District had done a speech/language screening and the Student had performed above the average range for his age.

The Legal Guardian signed the consent for an OT evaluation on March 15, 2011, so the evaluation report was due at the end of May, 2011. The Legal Guardian was very anxious to

review the report and kept insisting that it be finished. In an effort to appease the Legal guardian, the District agreed to hold a meeting in April when the report was still in draft form. She hurriedly got a meeting scheduled, and she asked the Legal guardian whether she was willing to meet on that date and to waive the seven-day notice requirement. The Legal Guardian agreed to meet, and signed the waiver. At the meeting, Ms. Sherrets mentioned another OT provider named Cindy Spence as a possible resource to the Legal Guardian. She thought that the Legal Guardian may have misinterpreted Ms. Sherrets to mean that the District was referring the Student to Ms. Spence, and so she interrupted Ms. Sherrets to clarify that point.

The meeting was only to review the draft OT report, and was not fully staffed for an IEP Team meeting. The Legal Guardian was therefore restricted at the meeting from discussing things beyond OT for the Student. That was the only time she heard any restriction placed on the Legal Guardian with regard to what could be discussed at a meeting.

In late April or early May 2011, the Legal Guardian asked for a meeting to review the Student's behavior plan. She scheduled an informal staffing meeting for this purpose. The Legal Guardian began insisting that she wanted to review the whole IEP, for which the meeting was not set up with the appropriate staff members. Mr. Collins decided to cancel the meeting until a new date could be established for a formal IEP Team meeting. This was the May 26, 2011 meeting.

22. During an interview conducted by the Complaint Investigator with Barbara Ray, Ms. Ray stated the following: She is a teacher of xx and xx grade at the School. During the 2010-2011 school year, the Student was in her class four days per week, from 1:00 to 3:00. The Student spent the mornings in the xx classroom. She attended an IEP Team meeting towards the end of last year. The Legal Guardian initially thought she wanted the Student to stay in xx, but that was because she thought that if he went into xx it would have to be all day.

The Team also discussed the Student's needs. That year, the Student had a one-on-one aide, but Ms. Morin said she didn't think that was needed. Her understanding when the 2010-2011 school year began was that the Student was not in special education, but that if she felt it was needed, she would make a referral to special education. She did not refer the Student. The Student did fairly well in her class. She modified her expectations for the Student. Behaviorally, he was always "on her radar." She had an educational technician in her classroom most of the time, and she felt the support provided by her and the educational technician was sufficient. At the end of the day, there was usually a hands-on activity, and the educational technician would sit at a table with the students who needed to be monitored a little more closely. The Student was one of those students. She never felt that the Student was unsafe in her classroom.

Some time after January 2011, the staff felt that the Student should have a behavior plan. She worked on a plan with Ms. Morin, Ms. Godfrey and perhaps others as well. She doesn't recall the Legal Guardian having input to the plan. The plan used giving the Student marbles as a reward. They didn't really have much time to implement the plan and get the "bugs" out of it before the Legal Guardian took the Student out of school.

She didn't observe the Student to have any speech/language problem that warranted a referral for that service.

23. During an interview conducted by the Complaint Investigator with Susan Morin, Ms. Morin stated the following: She is a teacher of xx at the School. The Student was in her class during the 2009-2010 school years. She attended the IEP Team meeting at the end of the 2009-2010 school year. The Legal Guardian was present, as well as Ms. Ray, and possibly Ms. Godfrey, Mr. Coulthard, Ms. Dixon and Sara Charland. The purpose of the meeting was to discuss whether the Student would continue in CDS or transition to public school, and whether the Student continued to need services. The only service the Student received that year was a one-on-one educational technician. The Team felt that the Student had made a lot of progress during that year, and came to consensus that the Student no longer needed services. She believes that the Legal Guardian was in favor of that result, as the Legal Guardian felt that the Student's educational technician had been ineffective and that the support available in the classroom (there was also a Head Start teacher in the room) was adequate.

This year, the Legal Guardian started asking about additional support for the Student in November or December. There had been some behavior incidents, and the Legal Guardian thought the Student needed more support. She doesn't know of any referral to special education before December 2010. In her opinion, the Student had adequate support, and there were other strategies to address the behavior issues outside of the classroom. On the bus, for example, preferential seating and the seat belt should have been used, and the Student could have been given a book or toy to keep him occupied.

With regard to the Student's behavior plan, the plan was rewarding the Student for good behavior and the Student was enjoying the positive input. The plan was really in effect for only a short while before the Legal Guardian pulled the Student out of school and for a short time after the Student returned, so she doesn't believe it was given enough time to see how it was working. The Student really likes getting positive feedback, so she believes that it's a good strategy for him. The Legal Guardian was part of the discussion about the plan at the March 2011 IEP Team meeting, and Ms. Godfrey may have shared the plan that was developed by Ms. Godfrey, Ms. Ray and her afterwards to get her comments. It was discussed again in May 2011, and the Legal Guardian contributed to the discussion.

During the 2009-2010 school year, Ms. Sherrets was in her classroom and Ms. Sherrets told her to keep an eye on the Student. The first time she heard the Legal Guardian bring up the subject of OT was at the March 2011 meeting. With regard to behavior therapy, no therapy services were being delivered directly to the Student in the classroom in 2009-2010. Ms. Charland from Kennebec Behavioral Health was observing in the classroom and consulting with her regarding classroom behavior management tools. The Legal Guardian may also have been receiving in-home services during that year. With regard to speech/language issues, she has not observed anything that made her think that the Student had a speech/language problem.

She never witnessed the Legal Guardian being prohibited from speaking about any issue that she wanted to address. That certainly didn't happen at the March 2011 meeting. She was not present at the April 2011 meeting. At the May 2011 meeting, the only time it happened was when the Legal Guardian brought up restrictions that had been placed on her ability to communicate with school personnel. Mr. Collins said that issue did not pertain to the Student's IEP and would not be discussed until after the IEP Team meeting had concluded. After the meeting was closed, the Legal Guardian met with her, Mr. Coulthard, Ms. Dixon and Ms. Godfrey to discuss the issue.

24. During an interview conducted by the Complaint Investigator with Teri Sherrets, OTD, OTR/L, Ms. Sherrets stated the following: She is an OT employed by the District. During the 2009-2010 school year, she was in the Student's classroom on a regular basis working with all the students generally. The Student was not receiving targeted OT at that time, but she believed he needed those services. She did a xx OT screening of the Student in April 2010, and although the Student's gross motor skills were fairly good, his fine motor skills were the lowest in the class. She did not attend any IEP Team meetings for the Student during that year. She was told after the June 2010 IEP Team meeting that CDS was going to recommend an OT evaluation.

When the 2010-2011 school year began, Ms. Godfrey told her that she was to do an OT evaluation of the Student. She had partially completed the evaluation when Ms. Godfrey told her to stop because CDS had discharged the Student from special education so the District didn't have an official referral. Ms. Godfrey said the District would have to start from a clean slate. She doesn't recall whether she ever saw a signed consent from the Legal Guardian for the evaluation.

At some later time, she was told that the OT evaluation was back on. She resumed the evaluation with different tests (because she couldn't redo tests that she had so recently given). When she eventually prepared her report, she used information collected from both testing periods. As she was in the process of completing the evaluation, Ms. Godfrey was urging her to finish because the Legal Guardian was pressing to get something started. When she attended the April 14, 2011 meeting, all of the testing had been done, but she hadn't finished writing the report. She gave the Legal Guardian a draft of the report at the meeting. The meeting was also attended by Ms. Godfrey and Ms. Dixon. There was discussion at the meeting about the Student receiving OT services, but she understood that the decision would first have to be run by Mr. Collins.

The evaluation of the Student was one of the most challenging evaluations she has ever done due to the Student's behavior. She had to give the assessments in 5 – 15 minute increments, and doing it this way resulted in the Student's scores being okay; if she had given the assessments in the normal way, the Student would have failed. The evaluation also raised sensory modulation issues for the Student, and Ms. Dixon mentioned that there were sensory issues at home as well. She said that she could work with the Student on sensory issues at school, but she recommended Ms. Spence as a resource if the Legal Guardian was interested in services or suggestions for the home. She never suggested that she would recommend that the District refer the Student to Ms. Spence. At the meeting, she was not prevented from

saying anything that she wanted to say, and she doesn't recall Ms. Godfrey preventing the Legal Guardian from saying anything, either. She could tell right away, however, that the Legal Guardian was someone with whom she would have to be very careful about what she said.

That same day, she left for a vacation to return the following week. On the way back from vacation, however, her brother died, and this further delayed the completion of the report. She handed in the completed report on May 5, 2011, and mailed it to the Legal Guardian the same day. By that time, the Student was not in school because the Legal Guardian took him out. No one from the District told her to exclude or include anything in the report. OT services started for the Student the week he returned to school.

She observed the Student in the xx classrooms on many occasions. She thinks that the Student's behavior was worse the previous year when he had a full-time aide. This year, with the exception of some times when he was in the hallway on a bathroom break or for some other reason, she didn't see that there was any need for that level of support. For the most part, the Student behaves better than some of the other students in the class. The Student would get himself ready and go out to recess by himself with no difficulty, so he didn't even need support for all transition times.

She didn't notice any speech/language issues with the Student. She could understand him and, once she got his attention, he could understand and follow her directions. She thinks that the Student is very bright, and she is trying to figure out how to access that intelligence.

25. During an interview conducted by the Complaint Investigator with Tia Dixon, Ms. Dixon stated the following: She is a targeted case manager for GBS, and has had the Student on her caseload since February 2010. She attended one meeting at CDS, in March 2010. She did not attend the June 2010 meeting, but the Legal Guardian told her the next day that the meeting was to discuss what would be happening with the Student during the next school year, and she has a progress note saying that the Student would be going into a program with ½ day in xx and ½ day in xx. In September, the Legal Guardian told her that the Student was supposed to have an IEP. The Legal Guardian said that she had requested CDS records but that they didn't have them.

She has attended meetings at the District in March, April and May 2011 and never heard the Legal Guardian be restricted in what she was permitted to discuss at a meeting.

She has observed the Student in each of his classrooms, typically once per month. Most of the time the Student was compliant and followed prompts. Once in a while she saw non-compliant behaviors, and the teacher always took the time to process the incident with the Student. Nothing that she saw suggested that the Student needed one-on-one support, although transition times were always harder for the Student. That was the only time she thought the Student might need additional support, and now he has that.

The Legal Guardian called a meeting, which she attended, to discuss the OT evaluation report before it was completed. Ms. Sherrets said that the evaluation would be completed by the end

of that day and would be put in the mail. The Team reviewed Ms. Sherrets' suggestions and Ms. Godfrey recommended that OT be added to the Student's IEP, but said that the District couldn't do anything until after the final report was reviewed. Ms. Godfrey said that she would get the evaluation and all the documentation together by May 26, 2011. The Legal Guardian said she wanted to have a sensory profile done of the Student, and Ms. Sherrets suggested Ms. Spence for that. She made the referral to Ms. Spence; she never understood Ms. Sherrets to say that the District would be making the referral.

At some point, she believed that the Legal Guardian was requesting in-home behavioral services. GBS does not do Home Community Treatment services, and she referred the Legal Guardian to Providence Service Corp. for that. She did not understand that the Legal Guardian was talking about services being delivered in the school.

The District agreed to do a speech/language evaluation at the May 26, 2011 meeting, based upon results from a neuropsychological evaluation. Mr. Collins said that the Student might need a learning disabilities battery as well, but that the speech/language evaluation would come first. The Legal Guardian signed consents for both. She has never had a problem communicating with the Student.

With regard to the Student's behavior plan, when the Legal Guardian requested that the plan be changed so that the Student wasn't walking up and down the hallways, the District agreed to change it. When the Legal Guardian requested that the plan be changed to provide immediate rewards and consequences, the District agreed to change it. She attended the staffing to review the behavior plan with the Legal Guardian on May 31, 2011.

26. During an interview conducted by the Complaint Investigator with Katherine Perry, Ms. Perry stated the following: She is a clinician with Providence Service Corp. Providence received a referral for home and community treatment ("HCT") for the Student, and she went to the Legal Guardian's home to conduct an assessment. The Legal Guardian was very clear that she wanted services to be delivered in the school. Providence doesn't do that, so Providence discharged the Student. The Legal Guardian contacted her again later on, and said that the school was ready to meet with her, but she reminded the Legal Guardian of their prior conversation about not providing school-based services.

27. During an interview conducted by the Complaint Investigator with Scott Hayward, Mr. Hayward stated the following: He is the clinical director for Providence Service Corp. Ms. Perry referred the Legal Guardian to him after the Student was discharged, and he explained to the Legal Guardian that Providence does not provide school-based services. The Legal Guardian said that she had a meeting scheduled at the school, and he offered to attend as someone who could speak to behavior management issues. The meeting was rescheduled a few times, but finally happened on May 26, 2011. At the meeting, he suggested other services that Providence could provide that might be helpful to the District and to the Student, and the District appeared interested. He delivered more information to them the following week.

He felt that the District staff members were fairly accommodating of the Legal Guardian's concerns. The District agreed to several changes to the Student's behavioral program. He observed no instance of the District not permitting the Legal Guardian to express her concerns. Based on what he heard from the Legal Guardian, he had expected the District staff to be very combative, but it was the Legal Guardian who was contentious.

28. During an interview conducted by the Complaint Investigator with Sarah Charland, Ms. Charland stated the following: She is a clinician with Kennebec Behavioral Health, and she provided HCT services to the Legal Guardian and the Student for six months during the 2009-2010 school year. The services were in-home services to address behavioral/emotional issues, but she went into the school a couple of times to observe the Student and consult with the teachers.

She attended the June 16, 2010 meeting with the Legal Guardian. They were told that CDS services would be ending because the Student was aging out, so the District was going to decide what the Student needed in order to meet his needs. The Team agreed that the Student didn't need one-on-one support, and that was her opinion as well. The one-on-one support he was getting was not all that helpful; sometimes that support accentuates behaviors rather than helps reduce them. The Team decided that the Student would do a split day between xx and xx. She doesn't remember if there was discussion about whether the Student was going to have an IEP or not, or whether the District would be providing the Student with services at the start of the year. It sounds right to her that the Team decided that the Student was no longer eligible for special education services.

29. During an interview conducted by the Complaint Investigator with the Legal Guardian, the Legal Guardian stated the following: At the June 2010 IEP Team meeting, the Team was trying to decide whether the Student would continue to attend xx or move up to xx, and he ended up spending ½ day in each, four days per week. There was an issue that the Student couldn't stay in CDS because he was five years old, but the District was supposed to pick up where CDS left off. The Team agreed that the Student at that point didn't need one-on-one support; the teachers said that he showed a lot of maturation. The educational technician they had for the Student that year was inexperienced and didn't really understand what he was supposed to do. Also at the meeting, Ms. Morin said that the OT had told her that the Student needed an OT evaluation, and the Team decided that the evaluation should be done. She asked for a speech/language evaluation as well; the Team said that there would be a xx speech/language screening and they would wait and see the results of that. Nobody told her until after the Student started school the following year that he wasn't going to receive any special education services. She doesn't know whether she ever received an IEP for the coming year.

When the 2010-2011 school year started, she wasn't getting the daily communication from the School the way she had in the prior year when there was a notebook that went back and forth with the student every day. The Student was struggling and there were behavior incidents. At first they were not serious incidents (things like throwing something or calling someone "stupid"), but she didn't want to wait until there were serious incidents before giving the Student more support. Ms. Dixon would report that the Student was not staying on task,

or was not respecting boundaries. Even though the educational technician from the previous year was inexperienced, when the Student was having a problem he would take the Student for an activity out of the classroom, or would free up a teacher to work with the Student.

She thinks that the behavior plan this year was better than the plan that was in effect the previous year because this year's plan was based on positive rewards, but it was a mistake to have the Student walk to the office unsupervised to put his marbles in the jar. The Student's more extreme behavior has been when he was not being supervised. Although the District agreed at the May 2011 meeting to add support for transition times and on the afternoon bus, he should have a full-time one-on-one aide. The Student is prone to mischief, and one can never tell when he might misbehave. The teacher the Student will have next year is very good with behavior management, as was the teacher he had last year, but more demands are going to be placed on the Student, and he will not be able to move around as much and not be as free to choose his activities. It is a mistake to set the Student up for failure, to let him develop bad habits and then have to try to break him of those habits.

She was continually requesting an OT and speech/language evaluation of the Student since September 2010. The District kept saying they had to wait until they got the CDS file. The District told Ms. Sherrets not to proceed with the OT evaluation. Also, the Student still couldn't recognize all his letters, and she wanted a psycho-educational evaluation.

With regard to behavioral therapy, she wanted this year with Ms. Perry the same services the Student was getting the previous year with Ms. Charland, with services at home and at school. The District refused to let Ms. Perry into the School, and then the Student was discharged from Ms. Perry's caseload. Mr. Hayward got involved, and now the Student is on a waiting list. She wants someone with behaviorist training to observe the Student and consult with the staff. With regard to Mr. Moran, Ms. Godfrey told her that he could only work with the Student on Friday, the day that the student was not in school. By the time that Ms. Godfrey told her that Mr. Moran could do the observation on May 5, 2011, she had decided that she couldn't let the Student go to school because it was not safe for the Student as a result of the restrictions the District had placed on her ability to communicate with the staff.

With regard to the Student's behavior plan, she didn't even know one existed until she went to parent-teacher night for the Student's sister sometime between March 11, 2011 and March 17, 2011, and Ms. Ray told her that she was concerned because the plan had the Student walking to the office by himself. She got a copy of the plan the next day, and on March 17, 2011 she asked Ms. Godfrey for an IEP Team meeting to discuss the behavior plan. She never intended to have a meeting to discuss the OT evaluation before the report was completed. She was anxious for that report to be finished and was asking for it, but the meeting she wanted was to review the behavior plan. Ms. Godfrey grabbed her in the hallway and said that she had set up a meeting for April 14, 2011, and that if she didn't have the meeting it would delay the Student's getting OT services. At the meeting, Ms. Sherrets said that she thought that the Student might have a sensory disorder, and she wanted the Student to have further evaluation with Ms. Spence. Ms. Godfrey interrupted her and said that Ms. Sherrets was not recommending that evaluation; she was not making a referral. She kept making those kind of interruptions. Ms. Sherrets said that she would get her the final report right away, but it kept

getting delayed. When she got the report a few weeks later, it came directly from Ms. Sherrets, but she believes that Ms. Sherrets didn't send it until Mr. Collins had read it and approved it.

She did ask Ms. Sherrets at the meeting about the implications of her testing for the behavior plan, and Ms. Sherrets agreed that the consequences built into the plan – making the Student sit in time out or taking away recess – were not appropriate given his OT profile. She also wanted to discuss the need for rewards and consequences in the plan to be more immediate, but Ms. Godfrey told her it wasn't on the agenda. The District was always trying to trick her by changing the purpose of meetings so that she couldn't discuss the issues she wanted to. At the March 2011 meeting they wouldn't discuss the speech/language evaluation, and in May, they ran out of time before she could discuss ESY services.

VII. Conclusions

Allegation #1: Failure to provide special education, related services and supplementary aids and services during the period from the start of the 2010-2011 school year until March 2011 sufficient 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 in violation of MUSER §IX.3.A(1)(d)

Allegation #2: Failure to have an IEP in effect at the beginning of the 2010-2011 school year in violation of MUSER §IX.3.B(1)

NO VIOLATION FOUND

Three different written sources document a decision at the June 16, 2010 IEP Team meeting to discharge the Student from special education.¹ That being the case, there was no obligation on the part of the District to provide special education services or to have an IEP in effect. It should be noted that the District did not ignore the needs of the Student. The District referred the Student to the SAT, who monitored the Student's adjustment to xxxx and developed a behavior plan for the Student.

Allegation #3: Failure to complete an evaluation of the Student for initial eligibility within 45 school days of receiving the legal guardian's consent in September 2010 in violation of MUSER §V.1.A(3)(a)(i)

NO VIOLATION FOUND

No signed consent for initial evaluation dated in September 2010 was produced by either party. The earliest consent from the year 2010 uncovered through this investigation is dated

¹ Unfortunately, no Written Notice (the definitive source for such information) for this meeting was found in the file maintained by CDS, nor did the Legal Guardian submit one. The CDS site that would have been responsible for preparing the document was dissolved less than one month after the meeting, and the CDS site that took over the file, besides not being a party to this investigation, does not employ the case manager who was in charge of the file. Certainly, a failure to prepare a Written Notice would have warranted a finding of violation under different circumstances.

December 22, 2010. The Legal Guardian claims that she requested reevaluation verbally, and was told by the District that it was waiting until it received the file from CDS, but that file was sent by early October at the latest. The Legal Guardian asserts that she was seeking to have an OT evaluation conducted, but when she signed the consent for evaluation form in December 2010, it did not list OT as one of the areas to be evaluated. In short, there was insufficient evidence that the Legal Guardian explicitly requested reevaluation and provided written consent before December 22, 2010.

Allegation #7: Failure to conduct an evaluation and assessment of the Student in all areas of suspected disability, including speech and language, in violation of MUSER §V.2.C(4)

NO VIOLATION FOUND

The Legal Guardian, on the special education referral form, makes no mention of a problem with speech/language skills. The initial parental consent for evaluation form which the Legal Guardian signed does not include a speech/language evaluation. The District conducted a speech/language screening of the Student on which the Student performed better than average for his age. In short, there was nothing of which the District was aware which suggested that speech/language was an area of suspected disability for the Student prior to a neuropsychological evaluation obtained by the Legal Guardian, which the District received on May 20, 2011. The latter evaluation described a suspected phonological disorder, which prompted the District to order a speech/language evaluation at the May 26, 2011 IEP Team meeting.

Allegation #6: Failure to provide supplementary aids and services in the nature of full-time one-on-one support to enable the Student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d)

Allegation #10: Failure to utilize the IEP Team as the vehicle for developing a behavior plan for the Student, and thereby enabling the legal guardian to participate in that decision-making, in violation of MUSER §§VI.2.I(3) and IX.3.C(2)(a)

Allegation #11: Failure to develop a behavior plan for the Student that adequately addresses his behavioral needs in violation of MUSER §IX.3.C(2)(a)

NO VIOLATION FOUND

The Student had, for a time, been provided with one-on-one support while receiving services through CDS. By the end of the Student's time with CDS, however, that agency found that the Student "is able to follow directions, respects boundaries, accepts consequences and poses no safety concerns in the classroom," to the extent that they found him ineligible to receive special education services. At the point that the IEP Team again found the Student eligible, in March 2011, there continued to be little indication that the Student required that level of support in the classroom. Both of the Student's classrooms had a support person available to

the class in addition to the teacher. Neither Ms. Morin, Ms. Ray nor Ms. Dixon were seeing behavior that in her mind warranted provision of a full-time one-on-one aide to the Student. As there was some indication that the Student was having a more difficult time outside of the classroom, however, the Team proceeded to discuss the behavior plan for the Student that was already in place and determined that the Student required an updated and more formalized plan, with the expectation that it would improve the situation. The Legal Guardian described several concerns she had for the behavior plan. After the meeting, Ms. Morin, Ms. Ray and Ms. Godfrey developed a draft behavior plan, and sent it to the Legal Guardian for additional input (the Legal Guardian acknowledges having received it the day after she attended a parent-teacher conference).

At the April 14, 2011 meeting, the Legal Guardian discussed the implications of the OT evaluation for the Student's behavior plan and, based upon Ms. Sherretts' response, requested a further meeting to revise the plan. The subsequent history of that meeting is discussed below.

In the months after the eligibility determination, the Student continued to demonstrate that, while his behavior was adequately controlled in the classroom without need of further support, he was more prone to act out during unstructured times, including on the afternoon bus ride. When the IEP Team finally met again, the Legal Guardian, along with Ms. Dixon and a representative from GBS, fully participated in discussions regarding the plan, and the meeting resulted in several changes to it. In addition to revising the behavior plan, the Team agreed to provide support to the Student during transition times and on the afternoon bus. This is consistent with the recommendations of Dr. Hermida, although the law did not require the District to follow those recommendations, only to consider them. The District also hired an additional aide to monitor the playground when the Student was at recess.

Under the circumstances, the District's decisions as described above were reasonable responses to the nature and degree of the behavioral problems that the Student presented at the time. Should the recent revisions to the program prove insufficient to keep the Student safe and able to make progress towards his behavioral goals, further changes will need to be made. Additional support should again be considered at such time.

The foregoing history also reveals that the Legal Guardian meaningfully participated in the continued development of the behavior plan.

Allegation #12: Failure to respond to the legal guardian's request to hold an IEP team meeting to revise the Student's behavior plan by either holding the meeting or else issuing Written Notice of the District's refusal to do so in violation of MUSER §IX.3.D(1) and App. 1, 34 CFR §300.503
VIOLATION FOUND

On March 17, 2011, six days after the initial eligibility meeting, the Legal Guardian requested in writing a new IEP Team meeting to discuss the provision of further support to the Student on the bus. She followed that up with another letter on April 12, 2011 noting that she had

received no response to that request. The next meeting that took place was specifically restricted to discussion of the OT evaluation. Although the Legal Guardian denied that she had requested that meeting, it appears to have been a response to the urgency expressed by the Legal Guardian with regard to that issue.

The Legal Guardian made a further request to convene a meeting for the purpose of revising the Student's behavior plan at the April 14, 2011 meeting, and the District agreed. On April 28, 2011, Ms. Godfrey e-mailed the Legal Guardian asking for some proposed dates for that meeting. Based on the Legal Guardian's response two days later, the District scheduled it for May 5, 2011 as an informal staffing meeting, making arrangements to have those persons attend who would be able to address proposed changes to the behavioral plan. Over the intervening time period, however, the Legal Guardian insisted that participants at the meeting also be prepared to consider changes to the IEP, so that the District no longer had all the necessary participants ready to attend. Once it became clear that the Legal Guardian would not agree to the more limited scope, the District canceled the May 5, 2011 meeting. This did not constitute a refusal to hold the meeting, however. The District simply needed to reschedule the meeting as a comprehensive IEP review meeting, holding the meeting that the Legal Guardian said she wanted on May 26, 2011.

Although it is a close case, the delay of over six weeks from the date of initial request for a meeting (March 17, 2011) until it was first scheduled to occur (May 5, 2011), without a written notice of refusal to hold the meeting, did not satisfy the regulatory requirement.

Allegation #13: Failure to provide advance written notice to the legal guardian of the April 14, 2011 IEP Team meeting at least seven days prior to the meeting in violation of MUSER §VI.2.A

Allegation #14: Failure to provide a copy of the full OT evaluation report to the parent at least 3 days prior to the April 14, 2011 IEP team meeting in violation of MUSER §V.4.G

Allegation #4: Failure to complete an occupational therapy evaluation within 45 school days from the receipt of the legal guardian's consent in the spring of 2010 in violation of MUSER §V.1.A(3)(a)(i)

NO VIOLATION FOUND

MUSER §VI.2.A requires both that a school district notify a student's parent or legal guardian of the scheduling of an IEP Team meeting at least seven days prior to the meeting, and that the meeting be scheduled at a mutually agreed on time. In cases where the mutually agreed on time leaves insufficient time to permit the full measure of notice, the parent or guardian may elect to waive the seven-day notice requirement. The parent or guardian cannot be forced to grant that waiver; it is merely a device to accommodate a pressing need to meet. Here, a meeting was scheduled on April 14, 2011 to accommodate the Legal Guardian's urgent request for information about the evaluation, prior to the completion of the OT evaluation report and prior to the date by which the District was legally obligated to review the final report. The Legal Guardian elected to waive the notice requirement (in writing) in order to facilitate the early scheduling of the meeting. Just as the District was not required to

hold the meeting, the Legal Guardian was not required to waive advance notice. Having done so, she is precluded from challenging its legality now.

MUSER §V.4.G requires that a copy of any evaluation report expected to be discussed at an IEP team meeting be provided to a parent (or guardian) at least 3 days prior to the meeting. In this case, however, the meeting was being held before Ms. Sherrets had the opportunity to complete the report. As the District was holding this interim meeting before the report was completed in response to the Legal Guardian's urging, the Legal Guardian cannot now assert that the District failed to provide her with a copy of the report in advance.

The Legal Guardian gave her written consent for the OT evaluation on March 15, 2011. The District held the IEP Team meeting to review the completed OT report on May 26, 2011, within the required 45 school day time frame. The Legal Guardian received her copy of the completed report more than three days before that meeting.

Allegation #15: Failure to properly consider input from all IEP team members, specifically, the OT evaluator, at the April 14, 2011 IEP Team meeting in violation of MUSER §VI.2.J

NO VIOLATION FOUND

The Legal Guardian bases this allegation on her perception that Ms. Godfrey did not permit Ms. Sherrets to say what she truly wanted to say. That is not Ms. Sherrets' perception, nor that of Ms. Dixon. The Legal Guardian may have misinterpreted Ms. Sherrets' efforts to be especially careful in what she said to the Legal Guardian at the meeting.

Allegation #5: Failure to provide special education and related services in the nature of behavior therapy during the period from March 2011 through May 10, 2011 sufficient to enable the Student to advance appropriately toward attaining his annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d)

NO VIOLATION FOUND

During the 2009-2010 school year, the Student was receiving HCT services from Ms. Charland. Although being basically home-based, the services did include a couple of occasions when Ms. Charland observed the Student in the classroom and consulted with the staff regarding behavioral strategies. HCT is not a service provided by school districts, and behavior therapy is not a category of related service referenced in MUSER. The District offered to provide consultation services from a behavioral consultant, Mr. Moran, but the Legal Guardian chose at that point to remove the Student from school. As to the Legal Guardian's contention that the District is somehow responsible for the Student not getting HTC services from Providence Service Corp., Ms. Perry and Mr. Hayward provide an

alternate explanation, based upon apparent confusion over whether the Legal Guardian was seeking home-based or school-based services.

Allegation #8: Failure to provide a complete and accurate summary of comments made by the Student's legal guardian in the Written Notice of the March 2011 IEP Team meeting in violation of MUSER App. 1, 34 CFR §300.503(9)

Allegation #9: Failure to amend inaccurate information contained in the Written Notice of the March 2011 IEP Team meeting regarding the comments made by the Student's legal guardian at the legal guardian's request within a reasonable period of time, or else notify the legal guardian of its refusal to do so, in violation of MUSER §XIV.8

VIOLATION FOUND

MUSER §XIV.8 provides that a parent (or guardian) who believes that information contained in a child's education records (which would include a Written Notice) is inaccurate or misleading may request that the school district amend those records. Upon the district's receipt of that request, the district must either amend the information within a reasonable time, or inform the parent that it refuses to do so, advising the parent of the right to a hearing on the matter.

Here, the Legal Guardian wrote a letter to Ms. Godfrey on April 12, 2011 in which she stated her belief that the Written Notice of the March 11, 2011 meeting did not mention most of the concerns (set forth in the letter) she had raised at the meeting. She requested that a copy of her letter be attached to the Written Notice as an addendum. The Legal Guardian further supplemented this request with a second letter dated April 13, 2011. The District did not attach either of the letters to the Written Notice as requested, nor did it notify the Legal Guardian of a refusal to do so and inform her of her right to a hearing.

Allegation #16: Failure to adequately consider the concerns of the legal guardian in the IEP decision making process by restricting the topics that the legal guardian is permitted to discuss at IEP Team meetings in violation of MUSER §§VI.2(I) and IX.3.C(1)(b)

NO VIOLATION FOUND

None of the people interviewed for this investigation support the Legal Guardian's claim that she was not permitted to fully participate in discussions at Team meetings. There may be certain occasions (as on April 14, 2011) where a meeting is held that is not a full-blown IEP Team meeting, where not all the necessary Team members are present to allow for full review of the IEP, and where a parent or guardian may discuss a particular issue with school personnel in an effort to come to agreement on a modification to the student's program. At such a meeting, it would be entirely appropriate for a school district representative to restrict the scope of the meeting to what had been initially designated and to defer any discussion of broader issues until a full IEP Team meeting was convened.

VIII. Corrective Action Plan

The District shall issue a memorandum to all special education staff and contractually engaged providers regarding: the necessity for responding to a request from a parent or guardian for an IEP Team meeting by either holding a meeting within a reasonable time from the request, or else issuing Written Notice of its refusal to do so; and the necessity for responding to a request from a parent or guardian to amend school records by either amending the records as requested, or else notifying the party making the request that the request was being denied and of the party's right to a hearing on the matter. The District will submit a copy of the written memorandum, together with a list of the names and job titles of all those to whom the memorandum is issued, to the Due Process Office and the Legal Guardian.