

Complaint Investigation Report
Parents v. RSU #18

August 15, 2011

Complaint # 11.099C

Complaint Investigator: David C. Webb, Esq.

Date of Appointment: May 31, 2011

I. Identifying Information

Complainants: Parents
Address
City

Respondent: Gary Smith, Superintendent
Cheryl Mercier, Director of Special Education
RSU #18
41 Heath Street
Oakland, ME 04963

Student: Student
DOB xx/xx/xxxx

II. Summary of Complaint Investigation Activities

On May 26, 2011 the Maine Department of Education received this complaint. The complaint investigator was appointed on May 31, 2011.

The complaint investigator received 216 pages of documents from the respondents and 254 pages of documents from the parents. Interviews were conducted with the following people: Parent; Parent; Cheryl Mercier, Director of Special Education; Jessica Poulin, Special Education Teacher; Janet Delmar, Regular Education Teacher; Dr. Nancy Ponzetti-Dyer, Child Psychologist; Rebecca Judd, Case Manager; Erika Wing, Special Education Teacher; Mary Goulette, Behavior Specialist; Dr. Nancy Reynolds, Principal; Heather Kerner, Occupational Therapist; Deb Levenseller, Case Manager Supervisor; Carol Hubbard, MD, Child/Adolescent Behavior Specialist; and Bryan Engert, Educational Technician.

III. Preliminary Statement

The Student is xx years old and currently attends James Bean Elementary School, which is part of RSU #18, in Oakland, Maine. He recently completed his xx grade year. He has a diagnosis for autism, attention deficit and anxiety disorder and a mood disorder and receives special education services under the category of autism.

This complaint was filed by the Student's parents ("Parents") alleging that Regional School Unit #18 ("District") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on June 16, 2011 alleging 11 separate violations of the MUSER. A Complaint Investigation Meeting was held at the Superintendent's office on June 23, 2011. In addition to the Complaint Investigator, persons present at this meeting were: Parent and Parent, Parents; and Cheryl Mercier, Special Education Director, RSU #18. A Complaint Investigation Meeting Report was prepared and sent to the parties on June 23, 2011.

Due to the unavailability of several key interviewees, the submission of the Complaint Investigation Report draft was delayed.

IV. Allegations

1. Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I);
2. Failure to properly prepare and provide the parents with prior written notice of the district's proposals regarding the student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503);
3. Failure to provide qualified staff in violation of MUSER §X.2.A(5);
4. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;
5. Failure to follow required evaluation and reevaluation procedures in violation of MUSER §V;
6. Failure to review existing evaluation data in violation of MUSER §VI.2.J.(1) or to determine the levels of the Student's performance and needs in violation of MUSER §VI.2.J.(2);
7. Failure to implement an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §IX.3.B;
8. Failure to identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d).
9. Failure to conduct a manifestation determination in violation of MUSER § XVII.1.E;
10. Failure to conduct a functional behavioral assessment or to develop a behavioral intervention plan in violation of MUSER §XVII.1.F; and
11. Failure to consider the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a).

V. Stipulations

The following is a list of stipulations agreed to by the parties at the Complaint Investigation Meeting held on June 23, 2011:

1. The Parent's allegations refer only to special education services provided to the Student between the time period of September 2010 to the present;
2. A functional behavioral assessment had been completed but not discussed at the March 22, 2011 IEP team meeting;
3. The District did not provide a copy of the functional behavioral assessment report to the Parents at least three days prior to the March 22, 2011 IEP team meeting;
4. The functional behavioral assessment was not discussed at the May 24, 2011 IEP team meeting;
5. The District had a list of parent concerns prior to the May 24, 2011 IEP team meeting, however not all of the parent's concerns were discussed at this meeting;
6. The Student's class was evacuated on May 2, 2011 due to behavioral concerns with the Student; and,
7. At no time has the Student been suspended from school.

VI. Summary of Findings

1. The Student is xx years old and recently completed xx grade at the James Bean Elementary School in the town of Sidney, Maine, which is part of RSU #18. He is identified as eligible for special education services under the category of autism.
2. The Student's IEP Team met on March 23, 2010, and developed an IEP dated March 29, 2010 which provided that the Student would have full time 1:1 Educational Technician support in the regular education classroom. The IEP referred to a Behavior Support Plan and noted as follows with respect to the Student's present levels of academic achievement and functional performance:
[The Student] is doing well academically...concerns rest around his aggression and frustration. [The Student] has progressed so that he now tolerates the cafeteria 5 days per week with only 1 meltdown episode in the last 2 months...[he still needs] support in the areas of self regulation and self care in the educational setting to allow him to be as successful as possible.
3. The March 29, 2010 IEP included the following annual goals related to the Student's behavior:
 - a) Improved meal time behavior by eating 75% of his lunch within the 30 minute lunch period (from less than 25%)
 - b) By November 2010 the Student will be introduced to various strategies for calming/awakening in the classroom setting 75% of the time; and
 - c) Improved independence and social behaviors with peers in multiple settings by 3/22/11.
4. The March 29, 2010 IEP included the following components:
 - a) Behavior consultation 1x per month for 2 hours;

- b) Special Education Consultation 1x per month for 30 minutes; and
 - c) Occupational Therapy 1x per week for 60 minutes.
5. The March 29, 2010 Written Notice proposed an additional behavioral goal to be added to the Student's IEP and increased the Student's occupational therapy services from 30 minutes to 60 minutes per week. The Written Notice also stated as follows: "[the Student's] behaviors have increased throughout the school year...[and the] parent's [sic] suggested additional goals be reflected in the IEP." The District proposed that transition issues to grade one and ESY services be addressed at the next IEP team meeting.
 6. The Written Notice prepared in connection with an IEP team meeting on April 29, 2010 noted that the Student has had difficulty staying on task and that the "tech provides much social skill training and is able to talk him down if there is some agitation." The IEP team proposed to continue weekly progress reports, using the behavior plan, escort by staff to/from classes and using positive incentives.
 7. The IEP developed on April 29, 2010 added seven weeks of ESY services, five days per week for four hours per day.
 8. The Behavior Support Plan (BSP) revised by behavior analyst Catherine Cote on March 29, 2010 provided in relevant part as follows:
 - a) Provide enthusiastic praise when the Student is either engaging in positive behaviors or not engaging in negative behaviors;
 - b) With regard to inappropriate loud voice and vocalizations towards others, try to catch the Student being good at least once every 2 minutes and remind the student that he needs to use a quiet voice;
 - c) In the event that the Student was "aggressive" (defined as an attempt or occurrence of offensive physical contact with a peer or teacher) or caused "major property destruction" (defined as "any occurrence of purposefully throwing or knocking over large or multiple objects that could potentially injure another person), the following time out procedure would be implemented:
 1. The Student will be removed from the activity and guided to a designated time out area, where he will remain for a minimum of one minute with the last 20 seconds his body must be calm and his voice quiet;
 2. If the Student has not maintained calm and quiet for the requisite time after 15 minutes, the Special Education Teacher/Case manager is to be contacted;
 3. At no time should adults talk about the problem behavior in front of the Student.
 9. In April, 2010 Catherine Cote modified the March, 2010 BSP in relevant part as follows:

- a) [Staff should] “always maintain a positive tone or neutral tone (during problem behaviors) when working with the Student”;
 - b) With regard to the Student’s reinforcement system, he should be provided with a token or sticker for every 15 minutes that he did not engage in aggression and major property destruction;
 - c) The Student should be able to cash in for a reinforcer two times a day for keeping a safe body...the tokens/stickers should also be visual so that he can see how many he has earned and how many more he needs to cash in;
 - d) The Student should be within 3-5 feet of an adult at all times within the school building and at recess.
- 10.** The May 25, 2010 Written Notice noted that the Student “was everywhere. He was struggling in class staying focused... and had his hands on others....Ms. Cote (Behavior Specialist) told members that the behavior plan needs to be stuck to very closely. He needs a lot of positive reinforcement (3-4 positives for one correction).”
- 11.** In an e-mail to Cheryl Mercier dated November 1, 2010, the Parent notified the District that the Student was discontinuing his medication due to the onset of physical side effects, including tics. In her e-mail, the Parent warned of the following specific behavior concerns due to the medication changes: inattention, impulsivity, and hyperactivity. The parent specifically stated as follows:
Based on what may seem like the inevitable need to use reactive procedures such as time-out and removals to manage these distracting behaviors, it may be the perfect time to implement a formal positive behavioral reinforcement program for him and to what ever degree possible for his peers...
- 12.** In a written summary dated December 19, 2010, Mary Goulette, the Student’s behavior consultant, stated as follows:
[The Student’s] performance at school has been steadily deteriorating. He is having more difficulty responding favorably to adult supports, especially since his medication had to be changed...For the medicated, neurologically centered [Student], the current behavior support plan remains quite appropriate. The current chain of behavior begins with a precipitant followed by name calling to the adults. Within a minute or so of redirect and disregard (per support plan) behavior escalates to name calling and verbal threatening including classmates...to threatening to throw items at peers and adults.

In the December 19, 2010 summary, Ms. Goulette recommended the following behavior support/programming changes:

- a) Teach [the Student] to ask for a break from the area where he is losing self control;
- b) Practice social stories/social skills to help the Student to express himself appropriately;

- c) Establish criteria when a space change option would be implemented early in the behavior chain; and
 - d) Provide more frequent access to reinforcers or preferences, for the Student and his peers.
- 13.** The Student’s BSP was revised in December, 2010 by behavior specialist Mary Goulette as follows:
- a) [With respect to preventative and reinforcement procedures] “...do not single the Student out for receiving or requiring additional support”;
 - b) “Remain within ear shot of the Student¹”;
 - c) “Do not hold hands with the Student except when the Student is outside the building or going to the Van”;
 - d) Staff should provide the Student with “coupons” to reinforce positive behaviors.
 - e) The Student should be removed from class to the hallway or private area if he is unable to discontinue a “loud voice and inappropriate vocalizations” for more than 5 minutes.
- 14.** On January 10, 2011, the IEP team met at the parent’s request to discuss concerns relating to the Student’s behaviors. Pursuant to the Written Notice developed in connection with this meeting, the IEP determined as follows:
- a) Behavioral Consultation time would be increased from one time per month for two hours per session to four times per month for one hour per session.
 - b) Special Education Consultation would be increased from one time per month for 30 minutes per session to four times per month for one hour per session.
 - c) A Functional Behavior Assessment was ordered, and the team was to “reconvene to review results and update the program as needed.”
 - d) Two parts of the December 2010 BSP prepared by Mary Goulette would be adopted immediately: 1) adding positive supports; and 2) data collection around the Student’s entrance to and exit from to school.
 - e) The BSP would be updated by the Behavior Consultant by January 14, 2011 in order to address the Student’s transitioning to and from the van. Adoption of the full draft BSP would be withheld until the members had “an opportunity to review it.”
 - f) A Functional Behavior Assessment would be completed and additional goals would be added with regard to the Student’s transitions in and out of the school building.

The WN further noted that the Parents did not want the Student removed from the classroom, even though Special Education Teacher Jessica Poulin stated: “last year the [Student’s removal from class] worked very well and happened on a few occasions [of] aggressive acts... which was a deterrent from his behaviors...”

¹ Pursuant to the January 20, 2010 Written Notice, Catherine Cote, the Behavior Specialist, was reported to have stated that “she met with the tech and has reinforced the plan and has stated that the range would be 3-5 feet away.”

15. At the January 10, 2011 IEP Team meeting, the Parents expressed concern that Bryan Engert, the Student's Ed Tech, was not within the 3-5 foot distance from the Student during a recess period in December, as required by the BSP. The District agreed to perform follow up observations, BSP trainings and a sign-off sheet for all ed techs.
16. At the January 10, 2011 IEP Team meeting, the Parent noted that the Student's medication had changed. There was no indication within the written notice of further discussion of this issue.
17. In a letter dated January 14, 2011, which appears to be directed to the IEP Team members, the Parents reiterate that Mr. Engert does not have the "required clinical skill" nor an adequate level of professional discretion to remove the Student from main stream programming for inappropriate vocalizations. The Parents conclude that they are not in agreement of the Student's removal in these circumstances.
18. The BSP revised on January 23, 2011 no longer had a provision that allowed for the removal of the Student. Instead, it provided for a time-out procedure within the classroom in the event that the Student was "aggressive" (defined as an attempt or occurrence of offensive physical contact with a peer or teacher) or caused "major property destruction" (defined as "any occurrence of purposefully throwing or knocking over large or multiple objects that could potentially injure another person"). The time out procedure stated in relevant part as follows:
 - a) The Student will be removed from the activity and guided to a designated time out area (within the classroom), where he will remain for a minimum of one minute with the last 20 seconds his body must be calm and his voice quiet;
 - b) If the Student has not maintained calm and quiet for the requisite time after 15 minutes, the Special Education Teacher/Case manager is to be contacted;
 - c) At no time should adults talk about the problem behavior in front of the Student.
19. On February 2, 2011, the Parents gave consent for a Functional Behavior Assessment (FBA), which was conducted by QBS, Inc. from Holliston, Massachusetts. The initial FBA review was conducted on February 7, 2011, with observation sessions on March 14, 2011 and March 30, 2011.
20. The FBA report noted that "none of the behaviors targeted for reductions occurred during the assessment, [however] adequate information was obtained through interviews and observations to make [the following] inferences as to the function of behaviors targeted for reduction: Inappropriate Vocals/Noncompliance and Physical Aggression/Property Destruction." The FBA made a number of programmatic recommendations, including:
 - a) Increased consultation support, including ed tech and teacher training;
 - b) Behavior programming;
 - c) Preference assessments;

- d) Conditional reinforcement; and
- e) Programming to integrate Student with his peers.

21. In a behavior consultation summary prepared by behavior consultant Mary Goulette in March, 2011, she stated as follows:

Since the introduction of Depakote (medication) in mid-January, 2011, the Student has shown excellent progress...Improved work, active participation and social interactions have all been noted by his educators. With these substantial improvements, finding an appropriate area (out of the classroom) for the Student to regain his composure has lost its urgency.

Ms. Goulette also noted in her March, 2011, behavior consultation summary that the Student's incidents of total negative behaviors almost doubled during the January-March, 2011 period, as compared to the period from September to December, 2010.²

22. In a Written Notice prepared in connection with the March 22, 2011 IEP Team meeting, it was noted:

- a) Additional scripting will be provided to deal with social interactions;
- b) The team will meet again to finalize behavior support plan and review FBA that is being completed by Zachary Houston;
- c) Greater pull out service for social skills for direct instruction by the special educator was suggested however at this time was not agreed upon.

23. On May 2, 2011, the Student came into the classroom in the morning and was visibly upset at seeing one of his peers wearing shorts. The Student's new Educational Technician, Andrea Tyler, had been working with the Student with Jessica Poulin for several weeks, but was alone with the Student for the first time that day. The Ed Tech prompted him to modify his voice and directed him to his table. Shortly after taking his seat, he scratched one student with the tip of his pencil and shouted that he "wanted her dead." The Student was then put into time out, while he was shouting that he hated the student he scratched and "wanted her dead."

After five minutes of time out, the student calmed down and was allowed to join his classmates attending physical education class. Upon entering the gym, the Student started yelling and ran across the gym where he bit another student on the chest, causing bruising. Although the Student momentarily calmed down, later in the day, the Student escalated again, grabbing materials from other kids, throwing

² In an interview with the Complaint Investigator, Ms. Goulette noted that the increase in negative behaviors during this time could be related to anxiety related inward behaviors, such as picking and self stimulation, as opposed to the outwardly aggressive behaviors she was seeing in November and December, 2010.

things, swearing and shouting to other students: “I hate... and I want to kill.” When the ed tech was unable to control his behavior, Janet Delmar, the regular education teacher, evacuated the other students from the room, while the ed tech remained in the classroom with the Student until other school staff were able to provide assistance.

24. On May 24, 2011 an IEP Team meeting was held. Special Education Consultant Michael Opuda was hired by the District to facilitate the meeting.

In an audio recording provided by the District of the May 24, 2011 Team meeting, the relevant portions of the meeting are as follows:

Mr. Opuda: [acknowledging] the “letter from the Parent with 10 different issues.....[it] seems that we ought to include those [in our agenda] as well”

Parent: “If they don’t get touched upon in the nature of the meeting, I’ll just bring up at the end.”

Mr. Opuda: “what I propose is [to first address] issues we can dispose of quickly, put at the top of the agenda...of these 10 [parent] concerns, are any that can be handled quickly?”

Parent: “last time most were addressed in the context of the discussion anyway.”

Mr. Opuda: “so lets hold on to parent concerns...I’m going to suggest [the following Agenda in order of priorities] Extended Year Services number 1, Occupational Therapy number 2, and maybe that would be the time to move into a discussion of the Functional Behavior Assessment, the Emergency planning, and the behavior support plan, which I think are really the more critical issues. Does that make sense?”

[no response]

Mr. Opuda: Is the May 2, 2011 event the critical issue to address?

Parent: “absolutely”

The Parents made the following points or raised the following concerns at the May 24, 2011 IEP Team meeting with regard to the May 2, 2011 event:

- a) The District was not following the IEP;
- b) The District didn’t take the class out when the Student hurt the girl;
- c) The District should acknowledge this was a mistake, and that it won’t happen again;
- d) The Student should be taken out of the class first, before evacuating the other students. It’s too socially demoralizing. Even if it’s a two person physical escort, and only in the event of a significant threat of personal injury or endangering others in the room;
- e) The Student says “I’m going to kill you” all the time;
- f) The District should not use class evacuation as standard practice;
- g) The Student is not who he once was. He has been “beaten down”-The District needs to teach him coping skills;
- h) “Thomas the Train” characters can help Student to cope with stressors;

- i) The Student might actually enjoy working with the Thomas the Train book in a “chill room” (space separate from classroom);
 - j) The proposed approach may be too clinical, interfering with program needs and social skills.
25. In an interview with the Complaint Investigator, the Parent stated that District staff, in particular Bryan Engert, the Student’s educational technician, was overly punitive with the Student. The Parent stated that Mr. Engert failed to provide the positive reinforcers called for by the IEP and the BSP. Specifically, the Parent noted that he infrequently gave the Student coupons for good behavior, as called for in the BSP, and on several instances he took back the coupons that he had previously given the Student.

Parent stated that she felt that Mr. Engert was not qualified to do his job, nor did he have the training or experience to properly provide services for the Student. She said that she asked the District to provide additional training for Mr. Engert, but the District refused.

Parent stated that the Student’s classroom teacher, Janet Delmar, was a good teacher for academic issues, but had no interest in learning about autism and the social, emotional issues that are involved with helping the Student in his educational setting.

Both parents stated that on one occasion, they observed Mr. Engert on the playground and that he was over 100 yards away from the Student, with his back turned to him and not within the 3-5 feet of the Student as required by the BSP. The Parents addressed their concern with the District at the January 10, 2011 IEP team meeting.

The Parents also stated that the Student’s social, emotional and behavioral issues were not addressed and that the BSP was not followed. They believed behavior specialist Mary Goulette was not qualified, and was “over her head” with the particular needs posed by the Student.

The Parents stated that the District did not appropriately respond to the Student’s behaviors on May 2, 2011. In particular, they note that the District did not properly implement the BSP when the Student’s behaviors started to escalate, and that the Student’s teacher should not have evacuated the other student’s from the classroom when the Student continued to have behavioral challenges. They were also concerned that Principal Reynolds discussed the Student’s behaviors in front of the Student, and that the District did not properly notify them after the classroom evacuation took place.

Lastly, the Parents stated that the District did not allow them to fully express their concerns at the IEP team meeting held on May 24, 2011. In addition, they said

that Michael Opuda, the facilitator hired by the District, “cut them off” when they tried to speak.

26. In an interview with the Complaint Investigator, Cheryl Mercier, the Special Education Director, stated that the team of people working with the Student met on a monthly basis, or more often, to address concerns with the Student’s programming and behavior issues. Typically in attendance at these meetings would be the Parents, Special Education Director Cheryl Mercier, the Behavioral Specialist, the Educational Technician and the Regular Education Teacher.

Ms. Mercier stated that Janet Delmar, the Student’s regular education teacher, was a good choice for the Student in that Ms. Delmar provided a more structured classroom environment. She said Ms. Delmar gave many verbal positive reinforcements to the Student instead of giving tangible “prizes.” She said that Ms. Delmar was supportive of the “caught-ya” coupons that were developed early in the 2010-2011 school year.

Ms. Mercier stated that Bryan Engert, an Educational Technician 1, is in his first year with the District. Ms. Mercier said that although Mr. Engert has only worked with one other autistic student, he has received training and supervision from the District with regard to the Student’s particular needs, including hands on training and supervision from the Student’s former educational technician, Jessica Poulin. Ms. Mercier also stated that Mr. Engert was more straightforward in his approach with the Student, and provided less detail in his reporting regarding the Student. Ms. Mercier did not, however, see any instances where Mr. Engert did not follow the Student’s IEP or BSP. Ms. Mercier stated that there were several instances where Mr. Engert did take reinforcing coupons away from the Student during the time that this methodology was being developed. Ms. Mercier said that she spoke to Mr. Engert about this and to her knowledge, he stopped taking back any coupons from the Student.

Ms. Mercier stated that she frequently offers training opportunities for staff, both within and outside the school district. She stated that Mr. Engert did take advantage of some of those training opportunities, and that the Parents wouldn’t necessarily be aware of these additional trainings. Ms. Mercier stated that the District and the Parents would hold “staffing” meetings on a monthly basis to discuss the student’s programming, support needs and any concerns. When she learned from the Parents that the Student was discontinuing some of his medications and could have some heightened behavior challenges, she met with Mary Goulette and the Educational Technicians to go over the BSP and to plan for increased behavior challenges. Ms. Mercier stated that during the period following the medication changes, the Student’s verbal statements were more violent and specific towards other students. She said that on at least one occasion the Student threatened to “come to the house of another student” and “use a knife” on the other student. Ms. Mercier said that several parents called her in January, 2011 with concerns regarding the Student’s interactions with their children. She

noted that one of the other students was reported to have seen a psychiatrist as a result of threats that the Student made against him. Ms. Mercier said that the Districts “hands were tied” to address these issues when the Parent’s refused to allow the Student to be removed from the classroom.

Ms. Mercier stated that during the January 2011 IEP team meeting, the team agreed to order a Functional Behavior Assessment and hired QBS Inc., a consulting firm from Massachusetts that specialized in autism issues.

Ms. Mercier said that on the day of the Student’s behavior outburst on May 2, 2011, Andrea Tyler was the ed tech working with the Student. Ms. Tyler had been working with the Student for several weeks with Jessica Poulin, the Student’s Special Education Teacher. Ms. Poulin was not in class on May 2, therefore it was Ms. Tyler’s first day in a solo capacity with the Student. Ms. Mercier stated that Ms. Tyler had not received safety training prior to May 2, 2011.

27. In an interview with the Complaint Investigator, Mary Goulette, the Student’s behavior consultant, stated that she is a master’s level behavior specialist and has worked with special needs students for over 30 years. Ms. Goulette said that there was a period during the end of the calendar year of 2010 where the Student was getting worse, not able to maintain positive behaviors. She stated that this behavior change coincided with a change in the Student’s medication.

Ms. Goulette stated that she revised the BSP in December 2010 for the IEP team in response to the Student’s behavior challenges. In her revised BSP, she proposed a “time out” that would involve the Student’s removal from the classroom environment. She said that removing the Student from the classroom when he was having challenging behaviors limited variables in his classroom environment and helped him to readjust. She noted that the Student had issues with any stimuli when he was in distress, and that it was very difficult to regain his composure if he could not be removed from the stimuli around him at the time of his aggressive behaviors. She also noted that removal would allow the child to minimize embarrassment in front of his peers in the classroom.

Ms. Goulette said that the Parents “vehemently” opposed the idea of removing the Student from the classroom. Ms. Goulette stated that “there was a huge hole in the BSP without a plan to remove the Student from the classroom when he was having uncontrolled aggressive behaviors.” Ms. Goulette stated that she believed that this limitation contributed to the difficulties encountered with the Student on May 2, 2011.

Ms. Goulette said that while she observed Bryan Engert giving praise for good things the Student did, she observed that he did not always precisely follow the part of the BSP that required positive reinforcement every two to three minutes.

She noted, however, that the Student did not seem uncomfortable with Mr. Engert.

- 28.** In an interview with the Complaint Investigator, Rebecca Judd, the Student's private Case Manager, stated that she feels that some of the Student's behavior difficulties were related to personality issues with the District staff. In particular, she believed that they were not being as supportive and proactive as they could have been. Despite this concern, she said that other than a potential violation of the FBA process, she had no direct knowledge of any specific incident where the District failed to comply with the IEP or the BSP. She also said that the District has conducted more meetings for this Student than with any other child she has worked with. She feels that the District has done a fairly good job at being available to address the Student's behavior difficulties.
- 29.** In an interview with the Complaint Investigator, Heather Kerner, the Student's Occupational Therapist, said that the Student had a hard time with self regulation and perspective taking, which interfered with his development of relationships with his peers. She noted that the Student is very "redirectable", but in her view the parents have restricted staff with regard to handling explosive behaviors. She feels that staff need freedom to remove the Student from his classroom, and that it is important for the Student to have a place he can go to de-escalate.
- 30.** In an interview with the Complaint Investigator, Erika Wing, the Student's Special Education Teacher from September to November, 2010, said that she supervised Brian Engert and checked in with him on a daily basis to review paperwork and go over any incidents. Ms. Wing stated that she observed "a couple" of times where Mr. Engert could have said things to the Student in a different manner that would have been more consistent with the BSP. Ms. Wing said that she spoke to Mr. Engert about modifying his language with the Student.

Erika Wing said that she developed "Caught-ya cards" designed to give positive reinforcement to the Student when he was exhibiting positive behaviors. She felt that these cards worked well for him. She said that it was against policy to take away these cards and that she was not aware of any of the cards being taken away from the Student. Ms. Wing said that she also oversaw the "Incident Log" which is a written summary of behavior incidents, with separate forms if the Student was involved with a major aggression or property destruction incident. She said that the Student did not have many incidents at the beginning of the year, but had more at the end of the year.

- 31.** In an interview with the complaint investigator, Jessica Poulin, the Student's educational technician and special education teacher, stated that she first worked in the District as the Student's educational technician while she was employed with Woodfords Family Services from April, 2010 through September 2010. From September 2010 to December 2010 she was reassigned to another position within Woodfords. At that time the District hired Bryan Engert to serve as the

Student's educational technician. Ms. Poulin was then hired by the District to serve as the Student's special education teacher in December 2010.

Ms. Poulin stated that when she returned to work with the Student in December, 2010 she noticed "definitely more and bigger issues...including inappropriate vocalizations, telling other kids he hated them, referring to killing people, and that his peers were stupid."

Ms. Poulin stated that the Student's behavior was "more intense" than the behavior she observed when she worked with the Student earlier in the year. She stated that he was more aggressive towards peers, and would even physically injure them. She said that playground and lunch times were the most difficult times, and that it was important that the educational technician always remain within ear shot as a way to diffuse problems, especially if the Student misunderstood what others did or said.

- 32.** In an interview with the Complaint Investigator, Janet Delmar, the Student's xx grade regular education teacher, said that things went pretty smoothly until late October, 2010 when she saw a big change in the Student's behavior which she understood was related to his medication changes. She said that the Student's behaviors would get in the way of learning and included biting, spitting, and hitting other students with objects.

Janet Delmar stated that the Student had several aggressive behavior outbursts on May 2, 2011. She stated that the Student entered the classroom at approximately 8:00 a.m. and was visibly angry about recess. The ed tech prompted him to modify his voice and directed him to his table. Upon sitting at his table, the Student then scratched the student sitting next to him with the tip of his pencil, causing a raised red mark on her arm. The Student was then put into time out, while he was shouting that he hated the student he scratched and "wanted her dead." After five minutes of time out, the student calmed down and was allowed to join his classmates attending physical education class. Upon entering the gym, the Student started yelling and ran across the gym where he bit another student on the chest, causing bruising. Nancy Reynolds, the school principal, came into the gym and escorted the Student into the office and the Parents were called.

Later in the day on May 2, 2011, Ms. Delmar stated that the Student escalated again, grabbing materials from other kids, throwing things, swearing and shouting to other students: "I hate...and I want to kill." She stated that the ed tech was with the Student trying to control his behavior, but was unable to do so. After this had been going on for some time one of her other students said, "I don't like this...it makes me nervous." Shortly thereafter, she had her class line up at the door, and walked them out of the class into an empty classroom with the other students while the ed tech remained in the classroom with the Student.

Janet Delmar said that this past year was her most difficult teaching experience in her 20 years of teaching because of this Student's aggression towards other students. She said that the Parent's refusal to allow the student to be removed from the classroom limited what she believed would be a more effective option to control his behavior. She noted that the Student would say to her "you can't put me in time out because I didn't hit [the other student]."

Ms. Delmar said that although it was difficult to find "positives" to say to the Student when the Student was misbehaving, she didn't observe the Student's educational technicians not following the Behavior Support Plan.

33. In an interview with the Complaint Investigator, Bryan Engert, the Student's ed tech from July, 2010 to March, 2011 stated that the Student's behavior got progressively better over the time that he worked with him. Mr. Engert at first did not recall whether the Student had increased difficulties with his behavior after his medication change in November, 2011; but later stated that any behavior changes related to medication changes were minor. Mr. Engert said that he always followed the BSP, and stated that he was always within the appropriate distance from the Student. He stated that he never took back a coupon that was given to the Student as a positive reinforcement tool. He stated that he "checked in" with his supervisor Jessica Poulin on a daily basis. Mr. Engert said it was "hard to tell" whether the Parents were concerned with his compliance with the BSP. He said that he stopped working with the Student in March, 2011. He said the reason he stopped working with this Student was because he simply wanted "a change" and that it had nothing to do with any concerns with regard to his approach with the Student.

34. In an interview with the Complaint Investigator, Principal Nancy Reynolds stated that the BSP was not conducive to the Student's learning as it allows him to "misbehave" in that he can come right back into the classroom too quickly without giving him time to process or to develop other strategies to change his behavior. She also said that because the staff was not allowed to remove the Student for his aggressive behaviors, other students were scared and did not want to be friends with him. She noted that the District continued to try other ways to address the Student's behavior, such as the FBA and longer time outs in the classroom.

Dr. Reynolds stated that after the Student's verbal outburst and class evacuation on May 2, 2011, she escorted the Student back to her office where she was joined by Ms. Lehay (the substitute special education teacher), Andrea Tyler, the Student's new educational technician and the Parent. During this meeting, a discussion was held in the presence of the Student about his behaviors.

35. In an interview with the Complaint Investigator, Dr. Carol Hubbard, the Student's behavioral pediatrician, stated that the Student discontinued his medication on or about November, 2010 due to negative side effects. She noted that the Student

would be very difficult to control when off of his medication. Dr. Hubbard noted that while the change in the Student's medication would have been a factor in his behavior regressions, she felt that the Student's behavior would be negatively impacted if the Student was not consistently rewarded. She noted that the Student's twin sister, who also has autism, seemed to be getting more frequent rewards, which made the Student more upset.

36. In an interview with the complaint investigator, Dr. Nancy Ponzetti-Dyer stated that she started working with the Student and his twin sister, who shares a similar diagnosis, in January, 2008. Dr. Ponzetti-Dyer's work with the family consists of providing therapy for the children, with involvement of the Parents, especially with providing support for the children. Although Dr. Ponzetti-Dyer stated that her knowledge of the school programming comes primarily from the Parents, she feels that the last school year was not positive for the Student. In particular, she was concerned that the communication between the school and the Parents had broken down, and that the Student was not getting positive behavioral supports. For example, she said that the Student would tell her that his sister was getting rewards but that he was not.

In a telephone interview with the Complaint investigator, Pat Julien of the Certification Office of the Maine Department of Education stated that Jessica Poulin has a provisional certification as a Special Education Teacher and taught under a waiver given by the Maine Department of Education for the 2010-2011 school year. Janet Delmar is an elementary school teacher with a Maine certification valid through July 1, 2015. Bryan Engert is certified as an educational technician II in Maine with an authorization valid through February 1, 2013. Mary Goulette is a master's level behavior specialist working with special needs students for over 30 years.

VII. Conclusions

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

MUSER §IX.3.C provides that an IEP Team must consider the concerns of the parents when developing each child's IEP. The Parents allege that their concerns were routinely overlooked by the District, and in particular, they were not granted ample opportunity to speak and provide parent input at the May 24, 2011 IEP team meeting.

A district's duty to consider the concerns of the parents when developing an IEP is addressed in the *Franklin School Department* case, 102 LRP 71730 (February 26, 2001). In *Franklin*, a multi-handicapped student had been receiving the services of a one-on-one aide prior to a PET meeting held in May of 2000. Following this PET meeting, the school principal gave a student's mother a copy of the PET meeting minutes, and stated that "his interpretation of the minutes was that student would no longer have

the full-time services of a one-on-one aide.” There was no evidence, however, that there was any discussion at the meeting about the level of Educational Technician support.

The Hearing Officer in the *Franklin School Department* case held that the school “failed to meet the procedural dictates of the Maine Special Education Regulations.” In her report, the Hearing Officer held:

As Maine Special Education Regulations state, "The PET meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding [the student's] program." MSER § 8.11 (C). Therefore, it was the responsibility of the school department to present an explanation of this change at the May 15, 2000 PET meeting, in order to allow the family and the student's providers to discuss the change and give the family the opportunity to agree to, or contest, the change.

It does not appear that the District in this case failed to adequately consider the concerns of the parents in the IEP decision making process. Rather, it appears from the record that the District gave reasonable consideration to the positions and opinions of the Parents.³ The team of people working with the Student met on a monthly basis with the Parents to address concerns with the Student’s programming and behavior issues. The Parents routinely attended each of the IEP Team meetings during the timeframes in question (March, 2010 to the present) and their concerns and points were noted in each of the Written Notices corresponding to the IEP team meetings. Of course, the regulations do not require the IEP team to adopt all of the Parents concerns, but rather to consider them.⁴

³When Ms. Mercier learned from the Parents that the Student was discontinuing some of his medications and could have some heightened behavior challenges, she met with Mary Goulette and the Educational Technicians to go over the BSP and to plan for increased behavior challenges. At the January 10, 2011 IEP Team meeting, the Parents were reported to have stated that they did not want the Student removed from the classroom. The draft Behavior Support Plan developed was modified on January 23, 2011 to discontinue the Student’s removal from class. The Parents requested that a Functional Behavior Assessment be performed, and an FBA was ordered shortly thereafter. The Parents expressed concern that Bryan Engert, the Student’s Ed Tech, was not within the 3-5 foot distance from the Student during a recess period in December, as required by the BSP. The District agreed to perform follow up observations, BSP trainings and a sign-off sheet for all Ed Techs.

⁴ MUSER §VI.2(I) confirms that the IEP Team must consider the parents’ concerns but the District has ultimate responsibility, with due process rights afforded to parents, to ensure that a child is receiving appropriate special education services and supports. MUSER §VI.2(I) provides in relevant part as follows: The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding:

- (1) The child’s needs and appropriate goals;
- (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and

With regard to the May 24, 2011 IEP team meeting, the parents allege that they came to this meeting with a list of 10 concerns and that the meeting concluded after almost two and half hours without the chance to address their concerns.

In an audio recording of the May 24, 2011 Team meeting, the facilitator acknowledged the Parents' concerns at several different points in the meeting. The facilitator invited the Parents to weigh in on the agenda items, and the parents agreed that the critical issue to address at the meeting is the May 2, 2011 behavior event with the Student. During the course of the two hour discussion that follows on this topic, the Parents were active and vocal participants, raising and discussing over 10 different points and concerns.⁵

**Allegation # 3 Failure to provide qualified staff in violation of MUSER §X.2.A(5);
No Violation Found**

The Parents stated in particular that they felt that Bryan Engert, the Student's educational technician, was not qualified nor did he have the training or experience to properly provide services for the Student.

The Parents also stated that while Janet Delmar was a good teacher for academics, she did not follow the Student's behavior plan in the areas of his social, emotional

(3) the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

⁵ Pursuant to a recording of the IEP Team meeting on May 24, 2011, the Parents made the following points or raised the following concerns during the discussion regarding the May 2, 2011 event:

- a) The District was not following the IEP;
- b) The District didn't take the class out when the Student hurt the girl;
- c) The District should acknowledge this was a mistake, and that it won't happen again;
- d) The Student should be taken out of the class first, before evacuating the other students. It's too socially demoralizing. Even if it's a two person physical escort, and only in the event of a significant threat of personal injury or endangering others in the room;
- e) The Student says ""I'm going to kill you" all the time;
- f) The District should not use class evacuation as standard practice;
- g) The Student is not who he once was. He has been "beaten down"-The District needs to teach him coping skills;
- h) "Thomas the Train" characters can help Student to cope with stressors;
- i) The Student might actually enjoy working with the Thomas the Train book in a "chill room" (space separate from classroom)
- j) concerned too clinical, interfering with home program Needs social skills

inclusion. The Parents stated that she appeared to have no interest in learning about autism. The Parents also stated that they believed Behavior Specialist Mary Goulette was not qualified, and was “over her head” with the particular needs posed by the Student. The Parents allege that they asked the District to provide additional training for staff, but the District refused.

MUSER §X.2.A.(5) addresses the issue of staff qualifications and provides in relevant part as follows:

- (5) Qualified Staff. Special education and/or related services provided to a child with a disability shall be considered as a part of the child's special education program, shall be specified in the child's IFSP/IEP and shall be provided by appropriately certified education personnel, or licensed contractors. An Educational Technician approved by the Office of Certification of the Department may provide special education services when supervised in accordance with requirements of Chapter 115. See Section XVIII(1)(C) of this rule for costs of qualified personnel.

If a school administrative unit is unable to hire qualified staff for the provision of related services, the unit shall make an ongoing, good faith effort to recruit and hire appropriately and adequately trained personnel to provide related services to children with disabilities. In a geographic area of the State where there is a shortage of qualified personnel who meet the requirements of this section, the unit may hire the most qualified individuals available who are making satisfactory progress toward completing, within three years, the applicable course work necessary to meet the licensing standards described in Chapter 115.

School districts typically have the sole discretion to assign staff. See e.g., *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR 122 (D.Md.2001) (stating that, when the provision of an aide is included in a student's IEP, the provision of an aide is mandatory, but that does not afford the student to the assistance of a particular aide); *Bd. of Educ. of Scotia-Glenville Central Sch. Dist.*, 3 IDELR 727 (SEA N.Y.1995) (rejecting a claim that a disabled student required the services of his mother as an aide, and finding that the services of any appropriately trained individual were sufficient). School districts generally have the prerogative to assign staff to provide educational services without parental consent. See, *Moubry By and Through Moubry v. Indep. Sch. Dist.* 696

Likewise, unless the method is either distinctive or exclusive, educational methodology generally falls within the discretion of the school district. *Central Bucks School District* 40 IDELR 106, 103 LRP 52413, Pennsylvania State Educational Agency, November 13, 2003; see also, *Medina Valley Independent School District*, Texas State Educational Agency, 106 LRP 29730 October 10, 2005; *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (d. Me. 1993), quoting *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir.), cert. denied, 109 S.Ct. 308 (1988). "A major part of the task of local and state officials in fashioning what they believe to be an effective

program for the education of a handicapped child is the selection of the methodology or methodologies that will be employed." *Lachman* Id. at 296. "[P]arents, no matter how well-motivated, do not have a right under the [Act] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." Id. at 297.

While it is clear that certain staff personalities and styles may not always mesh well with the Student or the Parents, there is no evidence that any of the staff working with the Student are not properly qualified under the standards set forth in the IDEA, the Maine Unified Special Education Regulations⁶ and the MDOE

Allegation #2: Failure to properly prepare and provide the parents with prior written notice of the district's proposals regarding the student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503);

Allegation #4: Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;

Allegation #6: Failure to consider existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c)

Allegation # 8 Failure to identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d). **Violation Found.**

MUSER §VI.2.J.(4) provides that one of the major IEP Team Responsibilities is to develop or revise an Individualized Education Program as described in §IX to provide each identified child with a disability a free appropriate public education. In developing each child's IEP, the IEP Team must consider the academic, developmental and functional needs of the child. MUSER §IX.3.C(1)(c).

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

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

⁶ The Maine Department of Education Certification Office reported as follows with regard to staff in question: Jessica Poulin has a provisional certification as a Special Education Teacher and taught under a waiver given by the Maine Department of Education for the 2010-2011 school year; Janet Delmar is an elementary school teacher with a certification valid through July 1, 2015; Bryan Engert is an educational technician II with a certification valid through February 1, 2013. Mary Goulette is a master's level behavior specialist working with special needs students for over 30 years.

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

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

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

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

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

The term “individualized education program” or “IEP” means a written statement for each child with a disability that includes A statement of the special education and related services to be provided to the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to be educated and participate with other children with disabilities and non-disabled children.

MUSER §IX.3.C(2)(a) provides that an IEP team for a child whose behavior interferes with his learning must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”

MUSER §II.21 defines “positive reinforcement interventions and supports” as “the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive

or defiant behaviors.” The definition further notes that these techniques may be based upon results of a functional behavioral assessment.

In this case, the Student’s behavior interfered with his learning, and the IEP Team included a number of positive behavior interventions, including a Behavior Support Plan (BSP), in the IEP.⁷ As the Student’s behavior became more challenging, the District responded to the behaviors by holding frequent meetings with staff and parents, and by making adjustments to the IEP and BSP.

In a written notice prepared on March 9, 2010, it was noted that: “[the Student] has had more aggressive acts since returning from vacation. His tone and language have been loud and inappropriate...in 10 days he has had 9 aggressive acts. Ms. Cote said this can be paired with his behavioral plan...the team talked about how to deal with aggressive and hurtful statements. This will be addressed through his behavioral plan and then scripted restorative plan.”

The March 23, 2010 IEP included annual goals related to the Student’s behavior including improved meal time behavior and improved independence and social behaviors with peers in multiple settings.⁸ This IEP included Behavior Consultation, Special Education Consultation, Occupational Therapy components and provided that the Student would have a full time 1:1 Educational Technician support in the regular education classroom.

A Behavior Support Plan was also referenced in the supplementary aids and services portion of the Student’s March 23, 2010 IEP. The Plan revised by Behavior Analyst Catherine Cote on March 29, 2010 specified Target Behaviors, Antecedent and Intervention Procedures and a specific Time Out Procedure.⁹ The BSP emphasized preventative, positive approaches for the Student, noting that the Student should receive enthusiastic praise both when he is engaging in positive behaviors and is not engaging in negative behaviors. The BSP encouraged staff to catch the Student being good at least once every 2 minutes. The BSP cautions that at no time should adults talk about problem behaviors in front of the Student.

The April 29, 2010 Written Notice noted that the Student had difficulty staying on task and that the “tech provides much social skill training and is able to talk him down if there is some agitation.” The IEP team proposed to continue weekly progress reports, using the behavior plan, escort by staff to/from classes and using positive incentives. The IEP developed on April 29, 2010 increased the Student’s occupational therapy services

⁷ The BSP was developed independently of the IEP process, and while the full BSP was not expressly adopted by the IEP team, it was frequently referenced during IEP team meetings and in the Student’s IEP.

⁸ The March 23, 2010 IEP was the annual IEP that was in place, with minor revisions in April and May, for the 2010-2011 school year.

⁹ The Time Out procedure is triggered in the event that the Student was “aggressive” or caused major property destruction. Aggression is defined as an attempt or occurrence of offensive physical contact with a peer or teacher; “major property destruction” is defined as “any occurrence of purposefully throwing or knocking over large or multiple objects that could potentially injure another person.

from 30 minutes to 60 minutes per week and added seven weeks of ESY services, five days per week for four hours per day.

The April, 2010 Behavior Support Plan modified the previous BSP by clarifying that [Staff should] “always maintain a positive tone or neutral tone (during problem behaviors) when working with the Student.” The April 2010 BSP also updated the Student’s reinforcement system by affirmatively providing the Student with a reward for every 15 minutes that he did not engage in aggression and major property destruction. The BSP emphasized that the tokens stickers should also be visual so that the Student “can see how many he has earned and how many more he needs to cash in.”

The Student’s behaviors remained relatively stable at the start of the 2010-2011 school year until late October, 2010 when the Student’s behavior became much more aggressive.¹⁰ This increase in aggressive behavior coincided with the Student’s discontinuance of his medication in early November, 2010 due to negative side effects.¹¹ In response to the Student’s behavior challenges, the IEP team directed Mary Goulette, the Student’s behavior consultant, to revise the BSP.

In her December 2010 draft BSP, Ms. Goulette proposed removing the Student from the classroom environment for uncontrolled behaviors that could not be resolved in the classroom area. She said that providing a process to remove the student would help him to readjust by “limiting stimuli” when he was in distress, She stated that it also allowed the child to minimize embarrassment in front of his peers in the classroom.

An IEP Team meeting was held on January 10, 2011, the team agreed that it would withhold adoption of the full draft BSP prepared by Mary Goulette until the members had an opportunity to review it. In a Written Notice prepared in connection with the March 22, 2011 IEP Team meeting, it was noted the team would meet again to finalize behavior support plan.

Special Education Teacher Jessica Poulin also supported this plan and stated during the January 10, 2011 IEP team meeting that the Student’s removal from class during his kindergarten year worked very well and was a deterrent to his negative behaviors. Principal Nancy Reynolds and Heather Kerner, the Student’s Occupational

¹⁰ Janet Delmar, the Student’s xx grade regular education teacher said that things went pretty smoothly until late October, 2010 when she saw a big change in the Student’s behavior which she understood was related to his medication changes. She said that the behaviors would get in the way of learning and included biting, spitting, and hurting other students with objects. Mary Goulette, the Student’s behavior consultant stated that there was a period during the end of the calendar year of 2010 where the Student was getting worse, not able to maintain positive behaviors. She stated that this behavior change coincided with a time that his medication changed due to a negative reaction he developed from the medication.

¹¹ Dr. Carol Hubbard, the Student’s behavioral pediatrician stated that the Student discontinued his medication on or about November, 2010 due to negative side effects. She noted that the Student would be very difficult to control when off of his medication.

Therapist both felt strongly that staff needed freedom to remove the Student from his classroom when he was exhibiting uncontrolled aggressive behaviors.¹²

In a written notice prepared in connection with the January 10, 2011 IEP Team meeting, the Parents were reported to have stated that they did not want the Student removed from the classroom. Mary Goulette said that the Parents “vehemently” opposed the idea of removing the Student from the classroom.

In the period from January to March 2011, the Student was able to somewhat stabilize his behavior after a medication change.¹³ However, the Student’s incidents of total negative behaviors increased by almost double during this period, as compared to the period from September to December, 2010.¹⁴

On May 2, 2011, the Student came into the classroom in the morning and was visibly upset at seeing one of his peers wearing shorts. The Student’s new Educational Technician, Andrea Tyler had been working with the Student with Jessica Poulin for several weeks, but was alone with the Student for the first time that day. The Ed Tech prompted him to modify his voice and directed him to his table. Shortly after taking his seat, he scratched one student with the tip of his pencil and shouted that he “wanted her dead.” The Student was then put into time out, while he was shouting that he hated the student he scratched and “wanted her dead.”

After five minutes of time out, the student calmed down and was allowed to join his classmates attending physical education class. Upon entering the gym, the Student started yelling and ran across the gym where he bit another student on the chest, causing bruising. Although the Student momentarily calmed down, later in the day, the Student escalated again, grabbing materials from other kids, throwing things, swearing and shouting to other students: “I hate...and I want to kill.” When the ed tech was unable to control his behavior, Janet Delmar, the regular education teacher, evacuated the other students from the room while the ed tech remained in the classroom with the Student until other school staff were able to provide assistance.

¹² Principal Nancy Reynolds stated that because the staff was not allowed to remove the Student for his aggressive behaviors, other students were scared and did not want to be friends with him. Heather Kerner, the Student’s Occupational Therapist, said that the parents have restricted staff with regard to handling explosive behaviors. She feels that staff need freedom to remove the Student from his classroom, and that it is important for the Student to have a place he can go to deescalate.

¹³ Behavior Consultant Mary Goulette noted in a March, 2011, report that since the introduction of Depakote (medication) in mid-January, 2011, the Student has shown excellent progress...Improved work, active participation and social interactions have all been noted by his educators. With these substantial improvements, finding and appropriate area (out of the classroom) for the Student to regain his composure has lost its urgency.

¹⁴ See Behavior Consultant Mary Goulette’s March, 2011 report. Ms. Goulette noted that the increase in negative behaviors during this time could be related to anxiety related inward behaviors, such as picking and self stimulation, as opposed to the outwardly aggressive behaviors she was seeing in November and December, 2010.

Shortly after the May 2 behavior incident, the District developed emergency procedures for the Student, which included a provision for the removal of the Student from the classroom.

Mary Goulette stated that there was a “huge hole in the BSP” without a plan to remove the Student from the classroom when he was having uncontrolled aggressive behaviors, and that she believed that this limitation contributed to the difficulties encountered with the Student on May 2, 2011. Janet Delmar, the Student’s classroom teacher, said that the Parent’s refusal to allow the student to be removed from the classroom limited what she believed would be a more effective option to control his behavior.

Although the District developed many appropriate academic, supportive and behavioral interventions for the Student, it failed to develop a plan to properly address the Student’s volatile behavior outbursts. At the time of the January, 10, 2011 IEP team meeting, it was objectively reasonable to anticipate the need for planning in the event that an uncontrolled behavior situation occurred. Despite the recommendations to include a plan to remove the Student from the classroom from the Student’s behavior analyst, a view supported by the majority of staff working with the Student, the District failed to make a decisive and clear plan with regard to situations where the Student was demonstrating aggressive and volatile behavior. The District again failed to develop a severe behavior plan when the IEP team met in March 22, 2011, despite additional data and a further recommendation from the behavior consultant.¹⁵

IEPs must anticipate a child's goals and needs and an IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. MUSER §IX.3.C. *see* Tennessee State Educational Agency 106 LRP 7800 (1998), *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F. 2d 1031, 1041.

In this case, this omission in the Student’s IEP became dramatically apparent on May 2, 2011 when the District did not have a clear plan on how to address the Student’s severe behavior issues. Both the regular education teacher and educational technician were left in a situation of uncertainty while the Student continued his threatening outbursts, culminating in the ultimate evacuation of the other students in the class.

As set forth in MUSER §VI.2.I it is ultimately the District’s responsibility, even if the Parents disagree, to ensure that the IEP includes the services that the child needs.¹⁶

¹⁵ Behavior Consultant Mary Goulette also recommended in her March, 2011, report that the District “should consider a separate protocol for extreme situations. Identify places for regaining composure.”

¹⁶ MUSER §VI.2.I states in relevant part as follows:
The IEP Team should work toward consensus, but the SAU has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child’s placement is in the least restrictive educational placement. It is not appropriate to make evaluation, eligibility, IEP or placement decisions based upon a majority “vote.” If the team cannot reach consensus, the SAU must provide the parents with

Cheryl Mercier was the administrator at the January, 10, 2011 IEP team meeting, and was therefore responsible for making the final decision with regard to the educational programming and services to be provided to the Student.¹⁷ Of course, the District is obligated to provide the parents with prior written notice of the district's proposals, and the parents retain their due process rights in the event that they disagree with the decisions made by the District.

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to develop and *revise* an Individualized Education Program. (emphasis added). A school district is obligated, within a reasonable period of time, to review and develop a programming alternative once it becomes clear the student's IEP is not working. M.C. ex rel. JC v. Central Regional School District, 81 F.3d 389, 396-97 (3d Cir.), cert. denied, 519 U.S. 866, 136 L. Ed. 2d 116, 117 S. Ct. 176 (1996). In addition, the District is obligated to consider the recommendations contained within the Student's evaluations. MUSER §IX.3.C(1)(c) provides that in developing each child's IEP, the IEP Team must consider the results of the initial evaluation or *most recent evaluation* of the child. (emphasis added). In the present case, the evaluations, recommendations and behavioral evidence all suggested that the District should have amended the IEP to develop a clear emergency plan for this Student, even if it was against the wishes of the Parents.

Finally, the District argues that the behavior plan itself is not part of the IEP. As noted above, the IEP Team routinely addressed the behavioral needs of the Student, and discussed the behavioral support services that were necessary to permit this Student to benefit from his instruction. Behavioral interventions and the BSP were consistently referenced within the Student's IEP and written notices. Unless specific behavioral recommendations were specifically rejected by the IEP team, the clear implication is that the substantive terms of the BSP to be followed by staff would be as enforceable and supported as other terms of the IEP.¹⁸

Allegation #11: Failure to consider the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a) **No Violation Found**

MUSER §IX.3.C(2)(a) provides that an IEP team for a child whose behavior interferes with his learning must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” MUSER §II.2.1 defines

prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation.

¹⁷ MUSER §VI.2.B(4)(c) states in relevant part that each IEP team shall include “...a representative of the school administrative unit who...has written authorization to obligate the unit.”

¹⁸ At the January 10, 2011 IEP Team meeting, the Parents expressed concern that Brian Engert, the Student's Ed Tech, was not within the 3-5 foot distance from the Student during a recess period in December, as required by the BSP. The District agreed to perform follow up observations, BSP trainings and a sign-off sheet for all Ed Techs.

“positive reinforcement interventions and supports” as “the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors.”

As noted above, the IEP Team included a number of positive behavior interventions, including a Behavior Support Plan (BSP), in the IEP. Although some of the provisions of the BSP, revised by Behavior Analyst Catherine Cote on March 29, 2010 were not consistently applied, the plan itself emphasized preventative, positive approaches for the Student, noting that the Student should receive enthusiastic praise both when he is engaging in positive behaviors and is not engaging in negative behaviors. The BSP encourages staff to catch the Student being good at least once every 2 minutes.

The April, 2010 Behavior Support Plan modified the previous BSP by clarifying that [Staff should] “always maintain a positive tone or neutral tone (during problem behaviors) when working with the Student.” The April BSP also updated the Student’s reinforcement system by affirmatively providing the Student with a reward for every 15 minutes that he did not engage in aggression and major property destruction. The BSP emphasized that the tokens stickers should also be visual so that the Student “can see how many he has earned and how many more he needs to cash in.” Finally, both of the proposed revisions to the BSP in December 2010 and January 2011 maintain the frequent use of positive behavioral interventions and supports to address the Student’s behavior issues.

Allegation #5: Failure to follow required evaluation and reevaluation procedures in violation of MUSER §V.

Violation Found

MUSER §V.4. B and G. provide as follows:

- B. Evaluation Report. The IEP Team shall require each person or agency completing an evaluation or diagnostic service recommended by the IEP Team to submit a written evaluation report no later than 40 school days from the receipt of parental consent to evaluate, recognizing the requirement that the parents receive the evaluation report at least 3 days prior to the IEP Team Meeting at which the evaluation will be discussed.

- G. A copy of the evaluation report must be provided to the parent at least 3 days prior to the IEP Team Meeting at which the evaluation will be discussed.

A functional behavioral assessment (FBA) was ordered as a result of the IEP Team meeting on January 19, 2011, and the parents signed a consent form for the FBA on February 2, 2011. The District has stipulated that the FBA had been completed but not discussed at the March 22, 2011 IEP team meeting and that a copy of the FBA was not sent to the parents at least three days prior to the March 22, 2011 IEP team meeting.

In fact, the FBA was not sent to the parents until April 27, 2011, approximately 48 school days from the date that parental consent to evaluate the Student was given.

Although the functional behavioral assessment was not discussed at the May 24, 2011 IEP team meeting, the FBA had been sent to the parents prior to the meeting and was on the agenda. The IEP team, including the parents, was involved with prioritizing agenda items for the meeting. While the FBA per se was not discussed, the team focused on the Student's behavior issues including a discussion of interventions and coping strategies to help the Student.

The District argues that the Maine regulations differentiate between evaluations and assessments, and that therefore the timelines that apply to evaluations should not apply to assessments. This position appears contrary to the language of MUSER §V.4.B which specifically provides that the IEP Team shall require each person or agency completing an evaluation *or diagnostic service* to comply with the noted timeframe. (emphasis added). While a functional behavioral assessment may be different than an evaluation, it is reasonable to conclude that it falls within the diagnostic service referred to in MUSER §V.4.B.¹⁹ The Office of Special Education Programs has also opined that an FBA would be considered a "reevaluation" subject to parental consent if it was conducted to determine whether positive behavioral interventions and supports in a current IEP would be effective in enabling a child to make progress towards the child's IEP goals/objectives or to determine whether the behavioral component of the child's IEP would need to be revised.²⁰

Allegation # 7: Failure to implement the Student's IEP within 30 days or to convene an IEP meeting to identify alternative service options in violation of MUSER §IX.3.B.(3).

No Violation Found

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

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability

¹⁹ MUSER §II.12 defines Functional behavioral assessment as *a school-based process used by the Individualized Education Program (IEP) Team, which includes the parent and, as appropriate, the child, to determine why a child engages in challenging behaviors and how the behavior relates to the child's environment. The term includes direct assessments, indirect assessments and data analysis designed to assist the IEP Team to identify and define the problem behavior in concrete terms, identify the contextual factors (including affective and cognitive factors) that contribute to the behavior, and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior. Formal documentation of the assessment by appropriately qualified individuals becomes part of the child's educational record and is provided to the IEP Team.*

²⁰ See OSEP letter to Edward J. Sarznski dated May 6, 2008.

The Parents allege that the District violated the IEP and BSP in a number of different areas, including District staff being overly punitive with the Student, failing to provide positive reinforcers, holding hands with the Student inside the school building and “taking back” coupons from the Student after they had been given to him for good behavior.²¹ The Parents state that on one occasion, they observed the Student’s educational technician Mr. Engert on the playground with his back turned towards the Student while he was over 100 yards away from him.²² The District disputes some of these violations occurred and disagrees that the particular supports are part of the Student’s IEP.²³

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 (9th 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.

While the District staff appears to have failed to implement some of the provisions of the BSP, there is insufficient evidence to establish that these discrepancies materially impacted the Student’s educational progress in order to amount to an IDEA violation. It appears that the behavior difficulties that may have impeded the Student’s learning were primarily related to his medication changes.²⁴

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. 3rd 267 (1st Cir. 2010). In the present case, although the District’s actions were not perfect, staff made a good faith effort to implement the

²¹ Erika Wing, the Student’s Special Education Teacher from September to November, 2010, said that observed “a couple” of times where Mr. Engert could have said things to the Student in a different manner that would have been more consistent with the BSP. Ms. Wing said that she spoke to Mr. Engert about modifying his language with the Student.

²² The Parents noted that the District failed to follow the BSP when Principal Nancy Reynolds discussed the Student’s behaviors in the presence of the Student on May 2, 2011, however the Parent also participated in the discussion knowing the Student was present.

²³ See analysis for allegations 2, 4, and 6, supra. At the January 10, 2011 IEP Team meeting, The District agreed to perform follow up observations, BSP trainings and a sign-off sheet for all Ed Techs as a result of the Parents expressed concern that the Student’s Ed Tech, was not within the 3-5 foot distance from the Student during a recess period in December, as required by the BSP.

²⁴ Dr. Carol Hubbard, the Student’s behavioral pediatrician, stated that the Student discontinued his medication on or about November, 2010 due to negative side effects. She noted that the Student would be very difficult to control when off of his medication.

Student's IEP: The District met with the Student's team on a monthly basis to address concerns and adjust programming; when the Student's behavior worsened following the medication changes, the District made a reasonable effort to address these changes through increased services, a modified BSP and performing a Functional Behavior Assessment.

Allegation #9: Failure to conduct a manifestation determination in violation of MUSER § XVII.1.E and **Allegation #10:** Failure to conduct a functional behavioral assessment or to develop a behavioral intervention plan in violation of MUSER XVII.1.F.

No Violation found.

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

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

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

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

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

In this case the parties have stipulated that at no time has the Student been suspended from school. Additionally, there is no evidence that the Student has been subjected to a "change of placement" as defined in 34 CFR §300.536. Nonetheless, the

IEP team ordered a Functional Behavior Assessment for the Student which was completed in March, 2011.

VIII. Corrective Action Plan (CAP)

1. The IEP Team shall convene within 30 days of the SAU's receipt of the complaint investigation report in order to:
 - a) Review the FBA and recommendations of the FBA, determine any necessary educational and supportive services that the Student might require including procedures for preventing and addressing his aggressive behaviors (could include staff and/or parent training);
 - b) Develop a clear protocol for removal of the Student from the classroom;
 - c) Determine in what manner the parents will be given notification of removals of the Student from the classroom;
 - d) Amend the IEP and BSP accordingly; and,
 - e) Reiterate the MUSER time frames for evaluations and issuance of evaluation reports to parents.

2. Prepare and distribute a memorandum to all Special Education Staff in the District with regard to MUSER VI.2.I and MUSER App. I ; MUSER §VI.2.J.(4) and MUSER §IX.3.C; MUSER §IX.3.C (1)(c); MUSER §IX.3.A.(1)(d); and, MUSER §V.4. B and G.

2. The following compliance documentation shall be sent to the Due Process Office and the Parents:
 - a copy of the Advance Written Notice for the IEP Team meeting;
 - copies of the amended IEP and BSP;
 - copy of the FBA report;
 - a copy of the Written Notice (WN); and
 - a copy of the memorandum in Item #2, plus a list of the names and job titles to whom it was distributed.