

Complaint Investigation Report
Legal Guardian v. RSU #3

April 12, 2012

Complaint #12.065C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Legal Guardian

Address

City

Respondent: Heather Perry, Superintendent

84 School St.

Unity, ME 04988

Special Services Director: Tamara Jetton

Student: Student

DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on February 29, 2012. The Complaint Investigator was appointed on March 2, 2012 and issued a draft allegations report on March 6, 2012. The Complaint Investigator conducted a complaint investigation meeting on March 21, 2012 (rescheduled from the original date of March 13, 2012 at the Complainant's request).

On March , 2012, the Complaint Investigator received a -page memorandum and pages of documents from the Complainant, and received 51 pages of documents from R.S.U. #3 (the "District") on March 25, 2012. Interviews were conducted with the following: Matthew Faragher-Houghton, principal for the District; Tamara Jetton, special services director for the District; Stacey Shields, special education teacher for the District; Sue Pellerin, teacher for the District; Vanessa McSpadden, educational technician for the District; Melissa Sprague, former teacher for the District; Jane Duperry, former teacher for the District; Paula Massey, former cook for the District; Michael Barnes Lopez, D. Au., audiologist; 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 Multiple Disabilities (Autism and Hearing Impairment). This complaint was filed by

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

IV. Allegations

1. Failure to fully and adequately implement the Student's IEP with respect to provision of an FM system in violation of MUSER §IX.3.B(3);
2. Failure to fully and adequately implement the Student's IEP with respect to provision of weekly reports to the Legal Guardian in violation of MUSER §IX.3.B(3);
3. Failure to fully and adequately implement the Student's IEP with respect to notifying the Legal Guardian of incidents of head banging in violation of MUSER §IX.3.B(3);
4. Failure to include the Legal Guardian as a necessary member of the IEP Team when meeting to develop the March 2011 IEP in violation of MUSER §VI.2.B(1);
5. Failure to provide a copy of the Student's IEP to the Legal Guardian within 21 days of the March 2011 IEP Team meeting at which the IEP was developed in violation of MUSER §IX.3.G.

V. Summary of Findings

1. The Student lives in Monroe with his sibling and his grandmother, the Legal Guardian, and had been attending xx grade at Monroe Elementary School (the "School") until February 9, 2012, when the Legal Guardian stopped sending him to school. He began receiving early intervention services at around xx.
2. The Student's IEP Team, including the Legal guardian, met on March 31, 2011 to conduct the annual IEP review. Determinations made at the meeting included the following: all occurrences of head banging by the Student would be documented and reported to the Legal Guardian; communication with the Legal guardian would be more frequent; the FM system would be fully utilized as soon as the system was finished being overhauled and recalibrated; there would be consultation with someone from the Maine Educational Center for the Deaf and Hard of Hearing ("MECDHH") about implementing the FM system; and Mr. Houghton, the School principal, would meet with the cook, Ms. Massey, to facilitate meeting the Student's dietary needs and to establish communication between the Legal Guardian and kitchen staff.
3. The IEP dated March 31, 2011 contains two OT goals, one writing goal, one math goal and one literacy goal. Services to be provided include: direct instruction in literacy, four 45 minute sessions per week; specially designed instruction in writing, five 30 minute sessions per week; specially designed instruction in math, five 30 minute sessions per week; direct speech/language service two 30 minute sessions per week; direct OT service one 30 minute session per week; and consultation service from MECDHH two 30 minute sessions per quarter. Supplementary aids, services, modifications and supports include the following: a behavior protocol for response to incidents of head banging distributed to all involved teachers and staff, with the special education teacher to contact each of those people in person

regarding the protocol; acknowledgment of the Student's food intolerance issues, with reasonable accommodations by cafeteria staff with the Student also being offered new foods; and the FM system to be utilized by all teachers when the Student was present in the class, the system maintained and checked daily, and the FM receiver detached and stored at the school at the end of each day.

4. On May 5, 2011, Tiffany Ahmann of MECDHH reviewed the FM system, conducted an observation of the Student and consulted with School staff. Ms. Ahmann checked the Student's hearing aids and found that the batteries were dead, although the Student told her they worked the previous day. She found the Student was seated at the front table with his right ear facing the front (Ms. Ahmann reported this with the comment: "great location!"). Ms. Ahmann noted that there were large carpets around the room, low acoustic ceiling tiles, and fabric covering the bookshelves. Ms. Ahmann's report contained a number of recommendations, including having a staff member check the FM equipment (including the hearing aids) every week at least and document its functionality, keeping replacement batteries for the hearing aids in the Student's desk or backpack, and passing the FM transmitter to all of the Student's teachers. She also recommended that the Student be taught to advocate for his listening needs, such as notifying staff when his hearing aids are not working. Ms. Ahmann further recommended that the District contact the Student's audiologist, Michael Barnes-Lopez, Au.D., about purchasing a new FM receiver and having two receivers rather than one.

5. The Student's IEP Team met again on June 16, 2011 to review the results of the Student's reevaluation. The Legal Guardian walked out at the beginning of the meeting because several team members were late to the meeting. The Team determined that the Student no longer qualified for speech/language services as all scores on his speech/language evaluation were within the average range. The accommodations with regard to the FM system and the protocol for head banging were continued.

6. In a report dated December 21, 2011 from Dr. Barnes, Dr. Barnes stated that the Student "continues to exhibit a bilateral, minimal to mild, sensorineural hearing loss. This is an educationally significant hearing loss which can cause [the Student] to miss 25-40% of the speech signal. A child with a minimal to mild hearing loss may seem to hear but often misses fragments of speech. [The Student] should continue to wear his personal hearing aids full time. Additionally, he should be provided with an FM signal to both ears to optimize his listening environment for improved access to learning."

7. Ms. Ahmann returned to the School on January 24, 2012 and again observed the Student and consulted with staff. Ms. Ahmann observed that the Student reported to his teacher that his FM system was not working, and that the Student's teacher wore the FM microphone appropriately. When the teacher said she would give the FM to Mr. Shields, the Student said that "[The Legal Guardian] doesn't want him to touch it." Ms. Ahmann checked the FM system and found that it was sending out a signal. Ms. Ahmann then asked the Student if she could check his hearing aids, and the Student responded "Who cares? It keeps shutting off." The Student gave the right hearing aid to Ms. Ahmann, and she noted that it was full of wax. Ms. Ahmann asked the Student if the hearing aid battery was dying and the Student

responded: "Who cares? It worked yesterday." The Student did not allow Ms. Ahmann to replace the batteries in his hearing aids.

7. Ms. Ahmann made several recommendations for the Student's learning environment, such as a quiet classroom, clear expectations, modeling activities when possible and providing visuals for lessons, and noted that many of them were already occurring. Ms. Ahmann recommended that the Student's hearing aids and the FM system be checked on a daily basis.

8. During the period from the start of the current school year until January 23, 2012, the Student's classroom teacher, Ms. Pellerin, received weekly reports from Mr. Shields regarding the Student and sent home weekly reports to the Legal Guardian with the Student. After the Legal Guardian complained that she was not getting the weekly reports, on January 23, 2012, Mr. Shields began e-mailing weekly reports directly to the Legal Guardian, and continued to do so until the Student stopped coming to school. In addition to weekly reports, School staff also contacted the Legal Guardian when there were incidents of concern involving the Student.

9. During an interview conducted by the Complaint Investigator with Sue Pellerin, Ms. Pellerin stated the following: She is the grade xx-xx teacher at the School, and had the Student in her class this year. The Student had been doing really well at the point that he stopped coming to school. At first, the Student was having a hard time socially, and one of the big goals for him was for him to see himself as a member of the classroom group. He was coming around to seeing himself this way, although he still had a long way to go, and he seemed to be happy.

At the beginning of the school year, there were problems with the FM system - the Legal Guardian needed to get something repaired - and the Student didn't have it for a while. Once the repair was made and the FM system was available, the Student used it every day. She would check it every hour, so often that it became a sort of joke between them. She wore the microphone at all times. Just before the Student left school, he was reporting that the FM was bothering him, hurting his ears, and he didn't want to use it. She called the Legal Guardian, and someone came in to check the hearing aids. It turned out that the hearing aids were old and the Student was going to get new ones. The last week that the Student was at school, the Student turned the hearing aids off because they were bothering him. The Student could always hear her when he wasn't using the hearing aids; the FM system has more to do with the background noise.

All this year she has sent home every week with every student, including the Student, a page-long description of what the class has been working on, what book the students are reading and any special events that are occurring. The reports are mostly the same for each student, but are individualized in certain respects. She would give each student a grade for effort, and would write about any behavior issues that had come up during the week. If there was a major problem with behavior, she would call the parents. She called the Legal Guardian three or four times this year, generally because the Student was refusing to do work. Once or twice the Student had been banging his head, and she called to report this to the Parent. If she saw that the Student was moving towards banging his head, she would tell him that she would have to call home, and that usually got the Student to refrain from head banging. The Student

had a teddy bear that he used to control the head banging, but he didn't need to use it as much later in the year. No one ever told her that she couldn't call the Legal Guardian.

The Student brought his own lunch to school. She regularly offered to let the Student try other things on the lunch menu, and the Student would let her know if he wanted to try it. Once in a while he would try something, and sometimes he liked it, but some times he didn't.

The Legal Guardian had always been willing to talk with her and has been pleasant. She knows, however, that the Legal Guardian gets angry at Mr. Shields, and recalls that the Legal Guardian walked out of the last IEP Team meeting.

10. During an interview conducted by the Complaint Investigator with Stacey Shields, Mr. Shields stated the following: He is a resource room teacher at the School, starting last school year, and has had the Student in his room both last year and this year. Enrollment at the School is only about 60 students; there is a very low student/teacher ratio. Everyone knows the Student and his situation. Since the mediation with the Legal Guardian last year, he has been extremely diligent in getting the Legal Guardian what she asked for. He spent his lunchtimes in his classroom with the Student, and thought he had a good working relationship with him. Unfortunately, The Student made comments that led him to believe that the Legal Guardian was vilifying him. Communication with the Legal Guardian was poor; she often wouldn't answer the phone, or else would hang up during the conversation.

The FM system includes a microphone that the teachers wear which brings their voice right into the Student's ear through a receiver which attaches to a "boot" that attaches to the hearing aid. Both the receiver and the boot are very small. The Student has a mild hearing loss, but he hears pretty much everything. In a setting where the teacher is 24 inches away from the Student, like in the resource room, the Student doesn't need the FM system. The FM system is used everywhere else in the school, however; it is handed from the classroom teacher to the gym teacher to the music teacher and so on.

At one of the first meetings he attended in August or September 2010, he was handed the Student's FM system and was told to bring it to the Student's teacher, Ms. Duperry. He did so, and read to her the IEP section regarding the system. Ms. Duperry said she knew about the system and how to use it - she had used it the year before. In November 2010, he checked in with Ms. Duperry and she told him that the Student had gone home with the boot and receiver and had not returned them. He was upset that Ms. Duperry hadn't notified him as soon as this had happened. The District ordered equipment to replace what was missing; they ordered one receiver and one boot, because that was what had been there before. He recalls reading in the Student's file that a decision had been made earlier, before he started working at the School, that the Student would have one receiver attached to one of his ears. After the Student returned to school (the Legal Guardian removed him from January until the mediation in March 2011), he brought the new equipment to Dr. Barnes to be calibrated, and the system was up and running for the remainder of the school year. At the end of the year, he brought the system back to Dr. Barnes to have her check it over.

When school started this year, he went to pick up the FM system from Dr. Barnes. He found out that the Legal Guardian had cancelled an appointment to bring in the Student's hearing

aids so that the system could be aligned. He picked up the system anyway. Then he found out that one of the Student's hearing aids was broken, and was being held together with tape. This meant that the boot couldn't be attached to that hearing aid. The Student didn't like the boot to work through the other ear, and he respected the Student's wish to not have the boot attached to the other hearing aid. As a result, the Student couldn't use the FM system until the hearing aid was repaired. As soon as it was repaired, he again took the system to Dr. Barnes and then picked it up as soon as it was ready, on January 3, 2012. The hearing aid belongs to the Student, and it was the Legal Guardian's responsibility to keep the hearing aid in good repair. The Legal Guardian was aware that the Student wasn't able to use the FM system until the hearing aid was repaired.

After the system was up and running, he scheduled a time for Ms. Ahmann to come to the School and check the system. When she got there on January 24, 2012, the Student's hearing aid was working only intermittently. Ms. Ahmann inspected the hearing aid and it was very dirty. The Student didn't allow her to clean the hearing aid or to change the batteries. After Ms. Ahmann's visit, he began sending weekly reports to Ms. Jetton documenting the status of the FM system. School staff checks the FM system every day. When they do this, they are also checking the hearing aids, because the system can't work if the hearing aids aren't working.

The Student experiences pain when he is in a room that is too loud or when someone shouts at him. This happened one day with a substitute gym teacher shortly before the Student stopped attending school. He spoke with that substitute teacher to make sure it didn't happen again. He also told Ms. Ahmann that after the Student's hearing aids were cleaned, the Student was reporting that sound was too loud and was hurting him. He asked whether there was a way to turn down the volume on the system. Ms. Ahmann said that the hearing aids were very old and were not noise limiting, and that they couldn't support a newer FM system that was noise limiting. The District was planning to put a newer FM system into place as soon as the Student received new hearing aids. The last day that the Student attended school, he again left school with the boot and receiver attached to the hearing aid. He notified the Legal Guardian about this, but the equipment has not been returned to the School.

During any times when the Student didn't have the FM system, the Student always had preferential seating. Also, teachers were always checking in with the Student to make sure that he heard them.

Last year, the District agreed with the Legal Guardian that there would be regular communication between the School and the Legal Guardian. Ms. Pellerin told him that she sends home weekly reports on her students, and he collected information about the Student each week and gave it to Ms. Pellerin so she could include it in her weekly reports. In January, Ms. Jetton told him to send a weekly e-mail directly to the Legal Guardian, and he did that until the Student stopped attending school.

With regard to head banging, the School developed a protocol for this, and he followed it beyond what was required. He informed all staff, including kitchen staff and itinerant teachers, regarding this protocol. The Student had a stuffed animal, and when he used it to

cushion his head banging, that was acceptable. Anything else was a potential issue and either he, Mr. Houghton or Ms. Pellerin had to be notified so that they could call the Legal Guardian. He made such a call several times this year. Last year, there was an incident that occurred shortly before mediation. He interviewed everyone that could have witnessed the incident, and no one saw the Student hurting himself. He concluded that the Student must have done it when he was out of everyone's sight. The Student typically takes a long time in the bathroom, and he asked the Legal Guardian whether she thought that school personnel should be checking with the Student after a bathroom break. The Legal Guardian became very upset, and said that the Student didn't need a bathroom monitor. The Legal Guardian seemed to misunderstand that he was only making a suggestion; he hadn't been accompanying the Student to the bathroom.

With regard to the Student's dietary needs, the Student is offered new foods to try by Ms. Pellerin and is given foods that he likes regularly. Last year, he spoke to Ms. Massey and asked her what the School was able to do about this. The Legal Guardian had offered to bring in foods from home, but there was a problem with storing it. He believes that Ms. Jetton spoke with Ms. Merrill about the situation.

After the March 31, 2011 IEP Team meeting, he sent the IEP to the Legal Guardian as soon as Ms. Jetton reviewed and approved it - some time in April and within the 21 day time frame. He never heard from the Legal Guardian that she didn't receive it until she filed the complaint, and then he promptly sent her a new one. He also sent the June 16, 2011 amended IEP to the Legal Guardian in early July.

The Student had been making good progress, more progress this year than in all his previous years. The Student was no longer engaged in parallel play. There were no reports that the Student was unhappy until the Legal Guardian took him out of school.

11. During an interview conducted by the Complaint Investigator with Tamara Jetton, Ms. Jetton stated the following: She is the special services director for the District. Each summer, the District sends in the FM system to make sure it's working. At the start of the 2010-2011 school year, the system was complete and in proper working order. Then, in November 2010, she learned that the Student had left school with some of the FM equipment. She spoke with the Legal Guardian about this and the Legal Guardian wouldn't confirm or deny that the equipment was in her home ("I might have it..."), but wanted to know why the School didn't know where the equipment was. She asked the Legal Guardian to please return the equipment to the School. Then the Legal Guardian started withholding the Student from school. The District couldn't order new equipment until it knew exactly which pieces were missing. After the mediation in March 2011, when the Student returned to school, they were able to order new equipment and get it calibrated. The system was complete and working for the remainder of the year. During the current school year, when the Student was attending school, Ms. Pellerin asked the Student throughout the day whether the system was working.

With regard to weekly reports, Mr. Shields was giving weekly reports to Ms. Pellerin, and Ms. Pellerin was sending home weekly reports to the Legal Guardian. Ms. Pellerin also called the Legal Guardian several times. When the Legal Guardian complained to her about

the reports on January 22, 2012, she asked Mr. Shields to go back to sending weekly e-mails directly to the Legal Guardian.

Last year, she made clear to Ms. Morrill what the Student's dietary needs were, and she made sure that there were white hamburger buns and cheese available to the Student. This year, she has checked with Mr. Shields whether there were any food issues, and she was told that everything was fine; there were no complaints about this from the Legal Guardian.

The Student was doing quite well in a regular classroom with resource room support. The District's autism program in Mount View school would not be an appropriate placement for the Student. Three quarters of the students in the program are non-verbal. Many of them have significant behavior issues, while the Student has no behavior issues.

The June 16, 2011 meeting was held at the end of the school day and the teachers had bus duty. Mr. Houghton also had responsibilities that kept him outside during dismissal. They all came to the meeting, but about 10 minutes late. The Legal Guardian, however, left the meeting.

12. During an interview conducted by the Complaint Investigator with Matthew Houghton, Mr. Houghton stated the following: He is the principal at the School, and has known the Student since the Student was in xx grade. With regard to the FM system, Ms. Ahmann comes once a year to check it over. There has been an ongoing struggle with getting parts and pieces for the system and the hearing aids, but the School has been vigilant in keeping up with maintenance of the system. There have also been issues with the Student turning off his hearing aids, and with getting new hearing aids to replace the old ones that he uses.

Communication with the Legal Guardian has been a struggle. The Legal Guardian is verbally aggressive, and it creates a difficult dynamic when one knows that during every conversation with the Legal Guardian she will be raising her voice and making accusations. Ms. Pellerin sends a weekly report home with her students, although he is aware that sometimes the reports don't make it home. With regard to head banging, he established a protocol that whenever there was an incident of head banging, staff would notify either him, Mr. Shields or Ms. Pellerin, and they would contact the Legal Guardian. This year, he believes that the Legal Guardian was notified whenever there was an incident, although there were not that many incidents. He did not make any of those calls this year and doesn't recall doing it last year either. He has never restricted the access of other staff members to the Legal Guardian.

The Student has trouble with some of the textures of food. This year, he put the Legal Guardian in touch with the new cook, Ms. Merkel (neither Ms. Massey nor Ms. Merrill is here this year). Ms. Pellerin has told him that the Student has been trying new foods and expanding what he is willing to eat. He believes that the Student is getting foods that he can eat.

Presently, the Student is considered truant, and he is following truancy protocol. Last year, the Student missed 60 days total, and this year the total is up to about 30 days. With regard to the autism program in Mount View, the students in that program are non-verbal and have

limited academic capabilities. Also, many of the students have behavior issues. That program wouldn't be appropriate for the Student, who can do the work of a regular education classroom. Furthermore, Mount View has a total of 250 students, compared to 60 students at the School, and he thinks that the more crowded hallways, lunchroom, etc. would make it much harder for the Student to be successful.

13. During an interview conducted by the Complaint Investigator with Vanessa McSpadden, Ms. McSpadden stated the following: She is an educational technician in the resource room at the School, and has been working with the Student this year. She also goes into the regular classroom, where the Student is one of several students that she supports, providing help with both math and writing assignments. The Student was very difficult to work with at first, but by the time he left, he was beginning to act like a regular student and was beginning to cooperate. Earlier in the year, he didn't like to correct his work and would wad up his paper and get upset. The Student also had a hard time when his grandfather died this fall. The last few months that the Student was in the School, he was beginning to make friends. The children in the class were nice to him; they liked and accepted him. The Student was starting to do more and to act more like the other children. She doesn't think that the Student needs to be in a specialized autism program.

She has seen four or five incidents of head banging this year. Whenever it happened, either Mr. Shields or Ms. Pellerin called the Legal Guardian.

From the time she became aware that the Student's teachers were supposed to wear a microphone for the FM system when the Student was present, she has never seen the teacher not wearing it. The Legal Guardian said it wasn't working, but the problem was that the hearing aid was dirty; the Legal Guardian is supposed to keep it in working order. Sometimes the Student turned it off, and has said that he doesn't need it. She thinks that the Student can hear what people say to him, but the noises in the room make it difficult for the Student. Sometimes the Student says that it's too noisy in the room. There are tennis balls on the chairs in the resource room, but not in the regular classroom.

In the last few months, Mr. Shields asked her to write a summary of how the Student has been doing every week. She did it before then, but she doesn't recall how often. She never heard anything about any restrictions on communicating with the Legal Guardian.

14. During an interview conducted by the Complaint Investigator with Jane Duperry, Ms. Duperry stated the following: During the 2009-2010 and 2010-2011 school years she was a grade xx-xx teacher at the School and the Student was in her class. She was out on medical leave for much of the 2010-2011 year, however, and the Student was also out for a substantial period of time, so that the only time both she and the Student were in the class that year was from September to December 2010. The Student was generally very helpful and delightful until he came across something that was not to his liking or was very difficult for him, and then he would throw a temper tantrum. The Student could read extremely well and could understand higher level concepts, but he had difficulty with math and writing. The Student's IEP Team decided that the Student was better off in the School, although the Legal Guardian wanted him to be placed in the autism program at Mount View. She told the Legal Guardian

that the Legal Guardian should advocate for that program if the Legal Guardian thought it was best for the Student, but she is not herself familiar with the make-up of that program.

During the period when the Student was not in school, Mr. Houghton asked her to call the Legal Guardian. She had a problem communicating with the Legal Guardian because the Legal Guardian would not answer the phone if she saw that the call came from the School, but she found that the Legal Guardian would answer if she called from her cell phone. She doesn't recall whether Mr. Houghton ever told her that she couldn't contact the Legal Guardian; there were some families where Mr. Houghton said that all communication should go through him.

15. During an interview conducted by the Complaint Investigator with Melissa Sprague, Ms. Sprague stated the following: During the 2009-2010 school year she was a special education teacher at the School and worked with the Student. The Student's problems at the School started before that year and continued while she was there. There were incidents of head banging. On one of those occasions, Ms. Duperry called the Legal Guardian and she came to the School. After that, Mr. Houghton said that only he was to contact the Legal Guardian. She doesn't know whether that policy continued during the following years. She never received training on the use of the Student's hearing aids, but she doesn't know whether there was any training in the years after she left.

16. During an interview conducted by the Complaint Investigator with Paula Massey, Ms. Massey stated the following: During the 2010-2011 school year she was a cook at the School. The Legal Guardian came to the School and talked about the Student's dietary needs. The Legal Guardian wanted the Student to try new foods, but mostly the Student ate a white burger bun with either cheese or jam. The School served wheat burger buns, and the Student didn't like them. The spaghetti and macaroni were wheat also, and the Student wouldn't eat them. The Legal Guardian wanted to bring in food for the Student and have that food be served at the table along with the regular food for the rest of the students, but her supervisor, Ms. Merrill, told her she couldn't serve food that was brought in from a student's home. There have been students at the School with allergies (strawberries and kiwis), and the School agreed to stop serving those items.

17. During an interview conducted by the Complaint Investigator with Michael Barnes Lopez, D. Au., Dr. Barnes stated the following: She has been the Student's audiologist since 2006. She fit the Student with hearing aids and helped the District get its first FM system. She sees the Student periodically for evaluations and hearing aid checks, and annually checks the FM system. Anything having to do with the hearing aids is the family's responsibility, while the FM system is the District's responsibility. The District must make sure that the system is functioning properly, including an annual review by an audiologist, and that the signal coming through is appropriate and meets the guidelines. Someone at the School must do a listening check on a regular basis, ideally once a day but no less than once a week. As the system depends on the hearing aids working properly, someone at the School should be doing a visual and listening check of the hearing aids on a regular basis. If they find that the hearing aid is not working, they should take out the battery and test it. If the battery is losing power, they should replace it. The receiver draws energy from the hearing aid battery, so the

School should have some batteries on hand and be prepared to replace them if necessary; batteries can lose power very suddenly. If the battery is not the problem, they should tell the Legal Guardian that it needs to be checked by an audiologist.

In April 2011, she found out from Ms. Ahmann that the FM receivers were lost or missing, and the School had to order new ones. She spoke to someone at the School (she thinks it was Ms. Howe, the special education secretary) and suggested that they send the system to the supplier and find out what they needed. She told that person to be sure to get updated receivers; the whole unit is very old, and the transmitter for the system is no longer available. She also told that person that the Student continued to need two receivers. After Ms. Ahmann went back to the School in May 2011, she found out that, despite what she had recommended, the District got the old equipment anyway and got only one receiver.

She spoke with Ms. Jetton about this, and again stated that the Student needed two receivers, not one. Ms. Jetton said that the School wasn't sure what they had or what they needed. She also said that there was some concern among the staff members that the Student didn't need the FM system anymore. Ms. Jetton sent in the replacement equipment to her so she could see what they had. The plan was that she would be seeing the Student, look at the whole system and decide what was needed, but the Legal Guardian cancelled the Student's appointment. She had the system in her office over the summer. By September, the Student still had not come in to her office so that she could test the system, and on September 16, 2011, Mr. Shields picked up the system. Mr. Shields told her that he didn't think that the Student needed the system anyway, and told her that the Student's IEP Team had decided earlier in the year that the Student only needed one receiver rather than the two he had previously. She asked Mr. Shields whether there had been an audiologist or other hearing specialist on the Team when that decision had been made.

She finally saw the Student along with the FM system in December 2011. She found that the Student continued to have bilateral mild hearing loss, and again reported that the Student needed two receivers. She received a phone call from Ms. Ahmann in January that the system was not working, that Ms. Ahmann had tried to test the Student's hearing aids but that the Student wouldn't allow her to. The hearing aid and system was brought to her office, and she found that the hearing aid was full of wax, and that the battery was dead. She doesn't know whether wax was the issue, or only the battery. She told Ms. Jetton that someone needed to be assigned to check the hearing aids on a regular basis, and Ms. Jetton said that someone was doing this. Ms. Jetton said that she would get whatever the Student needed, and asked her to send a report stating what was needed. She was in the process of doing this, but put it on hold because the Student decided to get new hearing aids and he needed to be seen by an ear, nose and throat doctor. She told Ms. Jetton to hold off on getting any new equipment until then.

She doesn't know why the Student was reporting that the sound coming through the system was too loud; the settings were the same as they had always been. It is true that the newer transmitters have a noise reduction feature, and they only will work with newer receivers. That newer equipment would have worked fine with the Student's hearing aids, although it is also true that newer hearing aids would have noise reduction capability. She doesn't know anything about the Student's hearing aid being broken and thus not able to be hooked up with

the receiver, although she might have done tubing replacement on one of the Student's hearing aids around that time. She doesn't know anything about the Student wanting the receiver on only one of his ears.

She agrees with Mr. Shields that if his classroom is quiet and he is only 24 inches from the Student when he speaks to him there the FM system would not be necessary. She recommends that Mr. Shields have Ms. Ahmann check out his classroom on this point.

18. During an interview conducted by the Complaint Investigator with the Legal Guardian, the Legal Guardian stated the following: The Student is autistic, wears bi-lateral hearing aids, suffers from depression and has eating issues. About one year ago, Ms. Ahmann came to the School to look at the FM system in place for the Student, and School personnel couldn't find half of the equipment, including the receiver. Also, the Student's teacher wasn't wearing the microphone for the FM system around her neck. Ms. Duperry, the Student's teacher that year, was often out of school around that time, and the substitutes weren't being told about the FM system and weren't using it. The School is supposed to do training on the FM system every year and train any new personnel on the system. They did that training some time last year.

In the past, there were tennis balls on the bottom of students' chairs in the Student's classroom and equipment in the room was covered. Those things aren't in the Student's classroom at the School. The Student has told her this year that the School is not using the FM system, and instead they put the Student's chair in the front row of the classroom. Ms. Pellerin is limited in what she is allowed to do; everything has to be cleared with Mr. Houghton.

The Student was going to get new hearing aids because his were getting old, but it turned out they just needed new batteries. School personnel claim that she told them they were not permitted to touch the Student's hearing aids, but that is not true; she gave the School a kit that contained what they needed to test and change the batteries.

With regard to weekly reports, she only started to receive them some time in January 2012, after she complained to the District. The weekly reports from Ms. Pellerin were the reports that Ms. Pellerin sent to all of her students' parents, and she wasn't even getting most of those because the Student didn't bring them home.

With regard to incidents of head banging, she received no calls about this last school year. This year, Ms. Pellerin has called her, saying that she was told she had to do so; Ms. Duperry was not allowed to call her last year. There have been many times when the Student has had an incident of head banging without her being notified. She knows this because sometimes the Student comes home with bruises on his forehead, or the Student tells her there was an incident, or the Student's brother or one of the other students in the class tells her. She has told people at the School things they can do to stop the head banging, like using his toy, but she feels that they don't listen.

She attended the March 31, 2011 IEP Team meeting, but she didn't receive the IEP until after she filed this complaint. The meeting on June 16, 2011 was schedule to begin at a time that

allowed her to be at the Student's bus stop in time to pick him up after school. When she arrived at the meeting no one was there who should have been there, including Mr. Houghton. She waited for a while and then left the meeting.

The School hasn't been giving the Student foods that he is able to eat. She doesn't go to school functions with the Student because they serve food that the Student can't eat. Mr. Houghton told Ms. Massey not to give the Student special food unless it's in his IEP, and he wouldn't let her bring in food that Ms. Massey could serve to the Student. The Student is entitled to a free lunch, but she has to send lunch with the Student because he can't eat the lunch served at school. Then they told the Student he had to pay for his milk because he wasn't eating the school lunch.

VI. Conclusions

Allegation #1: Failure to fully and adequately implement the Student's IEP with respect to provision of an FM system in violation of MUSER §IX.3.B(3)

NO VIOLATION FOUND

This investigation covers the period beginning one year prior to the date the Legal Guardian filed her Dispute Resolution Request, on February 29, 2012. MUSER §XVI.4.B(3). At that time, the Student was not attending school, and the District was awaiting his return to determine whether the family had pieces of equipment for the FM system in its possession. Ms. Duperry had reported that the Student (prior to the period under investigation) left school with the boot and receiver (which are very small and attach to the hearing aid), and the Legal Guardian had neither returned the equipment nor stated definitively that she didn't have it. Once the Student returned without the equipment, the District proceeded to order replacement parts and to get the system up and running again.

During the summer, the system was in the possession of Dr. Barnes, who was waiting for the Legal Guardian to bring the Student to her office so that she could perform the required maintenance to the system. The Legal Guardian did not keep her appointment, and Dr. Barnes was therefore unable to check the system or the Student's hearing aids. When the school year began, one of the Student's hearing aids was being held together with tape which interfered with the attachment of the boot to the hearing aid. The Student resisted moving the boot and receiver to the other ear, and therefore the Student was unable to use the FM system until the hearing aid was repaired. Maintenance of the hearing aid is the responsibility of the Legal Guardian, not the District.

On the two occasions when Ms. Ahmann came to the School, the batteries in the Student's hearing aids were dead. It is difficult to assess the significance of this given Dr. Barnes' statement that the batteries can lose their power very suddenly, and therefore this fact alone cannot serve as a the basis for a violation. Nevertheless, the presence of dead batteries on the two occasions in the past year that Ms. Ahmann checked them raises a question as to whether the District has been vigilant in fulfilling its obligation to ensure that the FM system is properly functioning. Although, as previously indicated, maintenance of the hearing aids is

the responsibility of the Legal Guardian, the receivers for the FM system run off of those batteries and therefore the District is obligated to regularly check that the batteries are working, and has some obligation to replace them when necessary (Ms. Ahmann suggested that the District provide 1/3 of the batteries). The FM system, including the hearing aids, must be checked at least once a week, although Ms. Ahmann recommended that they be checked on a daily basis. It is not clear whether this was being done in the spring of last year, when there were many days that a substitute teacher was in the Student's classroom. This year, Ms. Pellerin is aware of the need to confirm that the system is working, and recounted that the frequency of her checking in with the Student had become a sort of joke between them. There was a significant period of time at the start of the year when the Student did not have access to the FM system, but as indicated, this was the result of the combination of a damaged hearing aid that could not accommodate the FM equipment and the Student's unwillingness to attach the equipment to the other hearing aid.

With regard to the issue of whether there should be one or two receivers, the decision to have only one was apparently made prior to the period under investigation. When the Student left school with the equipment attached to his hearing aid, the District decided to replace it with the same pieces of equipment that were missing. Dr. Barnes, who thought that the equipment should be upgraded and that a second receiver should be added, gave her recommendation over the telephone to the secretary. When she later spoke to Ms. Jetton about it, Ms. Jetton expressed a willingness to have Dr. Barnes review the entire system and provide her recommendations in a written report. That report was delayed first by the failure of the Legal Guardian to keep her appointment with Dr. Barnes, and then by the Legal Guardian's decision to get new hearing aids for the Student (the Legal Guardian said that she has reversed that decision, but Dr. Barnes was not aware of this).

In all, the District took reasonable steps to implement the provision of the IEP regarding use of the FM system. Although there were occasions when the Student's hearing aid batteries were found to be drained, this is not proof that they were not being checked on a regular basis - the batteries can be working well one moment and then stop working the next. The District's efforts were also hampered by lack of cooperation on the parts of the Legal Guardian and the Student. The District has declared its willingness to address any new technological needs that result from a full system review by Dr. Barnes at such time as the Legal Guardian and Student enable Dr. Barnes to complete that review.

Allegation #2: Failure to fully and adequately implement the Student's IEP with respect to provision of weekly reports to the Legal Guardian in violation of MUSER §IX.3.B(3)
NO VIOLATION FOUND

The Written Notice of the March 31, 2011 IEP Team meeting describes the determination reached with regard to communication with the Legal Guardian as follows: "The Team determined that there would be more frequent communication with the home." The only reference in the IEP dated March 31, 2011 to this communication issue is in Section 3.A (concerns of parents), where it is stated that the Legal Guardian "noted that communication between the school and home needed to be improved, particularly in regard to incidents

involving...headbanging.” Nothing was stated in either document regarding the frequency or mode of communication, or from whom the communication would come. The Legal Guardian did not seek to amend either of those documents.

When the current school year began, Ms. Pellerin explained to the Legal Guardian that she would be sending home weekly reports with the Student, and she regularly gave those reports to the Student to bring home. It is possible that the Student was not bringing the reports home to the Legal Guardian as he was supposed to, but the Legal Guardian did not complain that she was not receiving those reports until January 23, 2012. At that point Mr. Shields began sending out weekly e-mails to the Legal Guardian. In addition to the weekly reports, Ms. Pellerin on several occasions contacted the Legal Guardian to report an incident of concern regarding the Student.

The foregoing efforts on the part of District personnel fulfill the obligation to provide more frequent communication with the Student’s home. It must be noted that the actions of the Legal Guardian in refusing to take phone calls from the School and in frequently being argumentative and accusatory when speaking with School personnel do not encourage the additional communication that the Legal Guardian says she wants.

Allegation #3: Failure to fully and adequately implement the Student’s IEP with respect to notifying the Legal Guardian of incidents of head banging in violation of MUSER §IX.3.B(3)

NO VIOLATION FOUND

The Student’s IEP provides that a School administrator will develop a protocol for response to incidents of head banging and will alert school staff members to the protocol once it is developed. This was carried out by Mr. Houghton and Mr. Shields, and it is clear that the Legal Guardian was notified on at least several occasions. The Legal Guardian asserts that there were occasions when she had reason to believe that the Student had engaged in head banging but she was not notified. As she did not notify the School on those occasions or otherwise document when they occurred, it was not possible to confirm that such incidents occurred during the time frame relevant to the investigation. In the one incident which was documented, just prior to the mediation that took place last year, Mr. Shields was unable to find anyone in the School who had witnessed the Student engaging in head banging. In any event, it appears that the District made a good faith effort to implement this IEP provision, and any occasional omission to follow the protocol did not amount to a “material failure” to implement as required in order to find a violation. *See Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 592 F. 3rd 267 (1st Cir. 2010); *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).

Allegation #4: Failure to include the Legal Guardian as a necessary member of the IEP Team when meeting to develop the March 2011 IEP in violation of MUSER §VI.2.B(1)

NO VIOLATION FOUND

The Legal Guardian was mistaken when she asserted that she had not been present during the March 31, 2011 IEP Team meeting during which meeting the Student's IEP was developed. The Legal Guardian may have been thinking of the subsequent meeting on June 16, 2011, but the Legal Guardian was also present at that meeting and chose to walk out when some of the team members were late to the meeting due to school-related obligations. While the Legal Guardian cannot base this allegation on her own decision to leave the meeting, the District should be careful in the future to not schedule a meeting to begin at a time when some of the team members will not be able to be present.

Allegation #5: Failure to provide a copy of the Student's IEP to the Legal Guardian within 21 days of the March 2011 IEP Team meeting at which the IEP was developed in violation of MUSER §IX.3.G

NO VIOLATION FOUND

Mr. Shields was certain that the IEP was mailed to the Legal Guardian within the regulatory time frame; the Legal Guardian was certain that she did not receive it. It was not until this complaint was filed, however, that the Legal Guardian notified anyone at the District that she had not received it. More importantly, this Department has applied to complaint investigations the ruling of the U.S. Supreme Court that, in the context of a due process hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). Accordingly, it was the Legal Guardian's burden to prove that she had not received a document which the District stated was sent to her. The Legal Guardian's assertion, by itself, cannot overcome the contrary statement of the District, and so does not sustain the Legal Guardian's burden of proof.

VII. Corrective Action Plan

As no violations were found, none is required.