

Complaint Investigation Report
Parent v. Cape Elizabeth School District
Complaint 18.021C
Complaint Investigator: Jeannette Sedgwick
November 6, 2017

The Department of Education received this complaint on September 8, 2017. After receiving the finalized allegations on October 11, 2017, the complaint investigator reviewed all documents, information, and responses from the parties which were received by October 23, 2017. The complaint investigator also interviewed the complainant, the complainant's advocate Ms. Susan Parks, the Student's general education teacher (science and social studies), the District's Director of Special Services and the District's psychologist who conducted evaluations of the student.

The complaint alleged violations of the Maine Unified Special Education Regulations (MUSER) that occurred two years prior to the date of filing and requested compensatory services from the District. Therefore, information two years prior to the time of filing, from September 8, 2015, was considered in this investigation.

Children who are enrolled in home instruction programs do not have an individual right to receive some or all of the special education and related services that they would receive if enrolled in a public school. MUSER IV(4)(H). Findings as a result of this complaint evaluation are restricted to the time period the Student attended the District.

Corrective Action to be Completed by the District:

1. The District must provide individual, rules-based reading instruction 3x45 minutes/week for a period of three months. This service will begin when the Student reenrolls in the District, and will occur no later than the 2017-2018 school year if the Student is enrolled before March 2018. The District will arrange for provision and scheduling of this compensatory education.
2. The District must provide the OT provider's records from occupational therapy (OT) to the complainant upon receipt of this Report.

FACTUAL FINDINGS

When enrolled in the District, the Student qualified for special education and related services with the disability of a specific learning disability and other health impairment (OHI). Certain chronological facts relevant to the allegations and findings are as follows:

2015-2016 school year

1. During the 2015-2016 school year, Student was enrolled in the District from September 2015 – November 30, 2015 (52 school days). Student was homeschooled from November, 2015 – the end of the 2015-2016 school year.

2. During the time the Student attended school during the 2015-2016 school year, the Student qualified for special education and related services based on the category of OHI based on the Student's ADHD and anxiety. The IEP in place during this time period is dated 4/29/2015.
3. The IEP in place during the time Student attended school during the 2015-2016 school year, contained special education and related services based on evaluations conducted in March 2014. This IEP states that the WISC-IV; WRAML-2; CTOPP-2; NEPSY-II, and WJ-III demonstrated average results on most subtests and showed low or below average in subtests of those tests that involve rapid symbolic naming, visual memory, visual recognition, working memory, processing speed; oral reading rate, and reading comprehension written responses, as discussed in the NEEDS section of the Student's IEP. This IEP also shows test results in the clinically significant areas of functional performance in the working memory, planning/organizing, and metacognitive subtests in the BRIEF as well as depression and learning problems in the subtests of the BASC-2.
4. The IEP in place during the time the Student attended school during the 2015-2016 school year provides special education services of Reading 45 minutes per day or 225/minutes per week and writing 30 minutes per day/150 minutes/week to be provided by a Special Educator in the special and regular education classroom settings. The Student received instruction in the general education classroom and was provided specialized instruction both as a "push in" and "pull out" method over the course of this school year and the 2016-2017 school year.
5. The Student's IEP Team met for an annual review on April 26, 2016.
6. The notice for the April 26, 2016 Team meeting states that the Specific Learning Disabled Form and process were discussed at this meeting. The written notice for this meeting states that the District evaluator did not see the discrepancy in scores that would warrant a finding of disability based on Specific Learning Disability.
7. The District received the consent for re-evaluations on April 26, 2016. Evaluations were conducted in May and June 2016.
8. The Student's IEP Team met on June 16, 2017. Among other things, an educational evaluation (dated 6/7/2016) and a psychoeducational evaluation (dated 6/13/16) were conducted by District staff and discussed at the IEP meeting on June 16, 2017. Evaluations referred to in the Student's June 2016 IEP¹ include the following:
 - TOWL-4
 - WRMT-II
 - KeyMath 3
 - Beery-Buktenica Developmental Test of Visual-Motor Integration, 6th E.
 - BASC-3 (Developmental history)
 - BASC-3 (Parent)
 - Comprehensive Tests of phonological processing, 2nd Ed.

¹ For the purposes of this report, IEPs are referred to as the date the IEP was given to the complainant. For instance, the IEP presented to the complainant on October 12, 2016 is called the October 2016 IEP.

- D-KEFS
 - Rapid Automatized Naming and Rapid Alternating Stimulus Tests
 - WISC-V
 - WRAML – II
9. An IEP was developed for the Student based on the evaluations and determinations by the Team at the meeting in June 2016. The Team determined that the Student was eligible for special education services based on the disability of Specific Learning Disability (SLD) in June 2016.
 10. The IEP developed in June 2016 went into effect on the first day of school in September 2016.

2016-2017 school year

11. During the 2016-2017 school year, the Student attended the District from September 2016-May 2017 and attended fifth grade in the District's middle school.
12. The Student's social studies and science teacher reported that the Student enjoyed school, was a valuable participant in class, and enjoyed the time with classmates.
13. The complainant communicated with District staff through email nearly every day in September 2016. On October 27, 2016, the District created a communication plan with the complainant that set a single person as a point person to contact with concerns.
14. The District held frequent communication meetings with the complainant, including October 6, 2016; October 20, 2016; December 8 and 9, 2016; February 6, 2017. The complainant often communicated with District personnel prior to these meetings with a list of concerns. One example of this type of communication is a list dated October 25, 2016 with over 60 separate concerns related to the Student's IEP.
15. Several IEP Team meetings occurred during 2016-2017 school year. Details regarding these meetings are included with the allegation findings below. Around October 14, 2016, the District established timelines and goals for each meeting. For example, the IEP Team meeting on October 14, 2016 was set to discuss evaluation results and discussions about the IEP goals were set for another meeting date.
16. The Student's IEP was amended on October 26, 2016, November 22, 2016, February 10, 2017, and March 22, 2017. Details regarding each of these IEPs and amendments are included with the findings below.
17. Multiple evaluations were requested, completed, and reviewed by the Team during this school year, including the following:
 - A reading evaluation (10/24/2017)
 - An evaluation for occupational therapy (11/08/2016)
 - A psychoeducational evaluation (11/19/17) and (4/3/2017)
 - An educational observation (11/8/2016)
 - An evaluation for assistive technology (1/25/2017)

18. On March 18, 2017, the District created a Behavior Support plan for the purpose of increasing the Student's ability to ask for and accept assistance when needed by raising his hand, independently requesting a break if needed, and increasing work output.
19. The complainant and District entered into a mediated agreement for an independent educational evaluation. That evaluation was reviewed by the Team at an IEP Team meeting on April 26, 2017.
20. The Team proposed an IEP after the IEP Team meeting on April 26, 2017. (May 2017 IEP) This IEP provides for 35 mins/3x week for Language Arts instruction, 30 minutes, 3x week for Math instruction, and 30 mins/month of consultation with a literacy specialist. Related Services on the IEP included 45 mins/week for executive functioning and monitoring progress in typing program; 2 hours/month consultation regarding executive functioning and typing program; and 45 minutes of direct social work services across all settings. There is no indication that this IEP was shared with the complainant.
21. The Student's Progress Reports at the end of the 2016-2017 school year, particularly the progress report dated April 27, 2017 states that objective regarding reading fluency rate were met; that there was limited progress in the objective regarding capitalization; that work had not yet begun for three writing objectives; that there was limited progress in addition math facts objective; and that the Student had not met his objective in subtraction math facts.
22. The Student has been educated at home since May 1, 2017 and has joined classmates on some field trips and school activities. The complainant and District report that they believe the Student should attend public school.

DETERMINATIONS

1. *(a) The complainant alleges that the District did not follow regulatory procedures when it considered whether the student needed specially designed instruction and related services in Math from September 2015-April 2016 and (b) that this lack of procedures resulted in a denial of FAPE for the student. MUSER V(2); MUSER VI (2)(I-J).* **COMPLIANCE FOUND.**

Regulatory procedures under MUSER V(2) and MUSER VI(2)(J) proscribe the mechanisms and procedures for special education evaluations and reevaluations, determinations of eligibility and educational need, the necessity of reviewing existing data, and conducting evaluations before changes in eligibility, as well as the responsibilities of the IEP Team.

From September 2015 - April 2016, the District conducted multiple evaluations, met as a Team multiple times to review evaluations, parent concerns, and revised the Student's IEP to address new information brought to light by the evaluations. The Team met on 9/12/2016; 10/14/2016; 10/26/2016;

11/22/2016; 2/10/2017; and 4/26/2017. At the IEP Team meeting on 10/14/2017, the Team discussed how low scores on certain subtests of assessments, such as rapid naming and working memory, would impact mathematics.

The IEP proposed in October 2016 contains a measurable goal for Math. Special Education Services provided in the October IEP include Math and Writing Across Content Areas for 45 minutes each day, 4 of every 6 days.

The IEP proposed in November 2016 also addresses the Student's needs in mathematics through measurable goals. The PLEP in this IEP states that the Student's overall Math scores fall in the average range. Written notice for this IEP shows that the Student's IEP Team discussed addressing math fluency in great detail. For instance, District personnel stated that the Student needed to build his fluency in mathematics because he "really struggles with the basic operations, how to apply them, and basic math facts;" and that computation is difficult for the Student.

The IEPs proposed in April 2017, March 2017, and May 2017 contain measurable goals in Mathematics and provide specially designed instruction in Mathematics 3x/week for 30 mins/session.

The District considered evaluations and present levels of performance, discussed mathematics needs during IEP Team meetings, and used a variety of assessment tools and strategies when creating goals for the Student in mathematics. The Team considered evaluations when it proposed IEPs implementing specialized mathematics instruction from September 2015-April 2016.²

2. (a) *The complainant alleges that the District did not follow regulatory procedures of administering reading and writing assessments in accordance with the instructions provided by the producer of such assessments when assessing the student and (b) that this pattern of nonconformance with instructions in the reading and writing assessments cumulatively resulted in a denial of FAPE for the student. MUSER V(2)(C); MUSER VI(2)(I); MUSER VI(2)(J).* **COMPLIANCE FOUND.**

The District conducted numerous assessments of the Student during the time specified in this complaint. Two individuals from the District were primarily responsible for conducting those assessments. The Student's special education teacher administered standardized testing to the Student from September 8, 2015 to May, 2017. Two psychologists employed by the District completed psychoeducation evaluations during this time period. (PA-84).

When interviewed for this complaint, the complainant discussed an aspect of reading assessment that she believed did not fully represent the Student's abilities in reading because the administrator of that assessment had allowed the Student to repeat or correct his responses in contravention of the

² The complainant requested an evaluation in mathematics in April 2016. On April 27, 2016, District personnel communicated to the complainant that mathematics testing would be completed on June 1, 2016. Mathematics testing was completed as part of educational evaluation conducted in June 2016. At this time the Student was not enrolled in the District.

instructions. The complainant's concern is connected to the allegation and findings in Allegation 19 of this Report.

The District asserts that all its staff are properly qualified to administer assessments. When interviewed, one of the District assessors, who has twenty years of experience in this field, stated she performed all assessments according to the manufacturer's instructions.

3. *(a) The complainant alleges that the District did not follow regulatory procedures when it did not include specially designed instruction in reading and/or reading accommodations on IEPs that resulted from the June and September 2016 IEP Team meetings and (b) that not following regulatory procedures resulted in a denial of FAPE for the student. MUSER V(1)(B); MUSER V(2)(B-F); MUSER V(3)(A-F) MUSER VI(2)(J). COMPLIANCE FOUND.*

Regulatory procedures under MUSER V(2)(B-F); MUSER V(3)(A-F) MUSER VI(2)(J) proscribe the mechanisms and procedures for special education evaluations and reevaluations, determinations of eligibility and educational need, the necessity of reviewing existing data, and conducting evaluations before changes in eligibility, as well as the responsibilities of the IEP Team.

The April 2016 (annual review) and June 2016 IEP meeting (reconvene) occurred at the end of the year the Student had been homeschooled. At that IEP Team meeting, the Team discussed the academic evaluation and psychoeducational evaluations that had been conducted in June 2016. The Team agreed that the Student would receive specialized instruction for writing across academic areas 4 times every 6 days. Based on the documentation, the Team based its determinations for the provision of reading and writing instruction according to regulatory procedures, which mandate consideration of evaluation data and present needs.

The September 2016 IEP meeting occurred a few weeks after the Student had started school. At this meeting, the Team discussed the IEP that had been developed the previous June, particularly the lack of individualized reading support. Written notice from the annual review conducted in April 2016 state that the Student's decoding improved and that he recently read a level 30 on the DRA, which is mid-third grade level. The Team determined that because there was no new assessment data and because there was no evidence that the Student required direct instruction in reading, the Student would remain in the general education classroom for reading. The Team established written notice noting the Parent's concerns and the District's response. Reading remained a goal on the IEP after September 2016.

Documentation and information regarding this allegation shows that the District followed regulatory procedures during the June 2016 and September 2016 IEP Team meetings and resulting IEPs.

4. *The complainant alleges that the District did not conduct testing and did not use a variety of assessment tools and strategies to gather relevant functional and academic information before determining to discontinue specially designed instruction in reading in 2015-2016 and 2016-2017 school years. MUSER V(2)(B)(1)(2). COMPLIANCE FOUND.*

During the 2015-2016 school year, the IEP was not amended during the time the Student was attending school. The IEP in place during the beginning of the 2015-2016 school year (dated 4/29/2015) contains measurable goals in reading instruction. This IEP specified 45 minutes/day or 225 minutes/week. This IEP was in place during the two months the Student was in school during the 2015-2016 school year.

The written notice for the meetings that resulted in the June 2016³ and October 2016⁴ IEPs demonstrates that the Team relied heavily on assessment data, but also used a variety of assessment tools and strategies to determine whether reading goals were necessary for the Student to obtain an educational benefit in the general education classroom.

In September, 2016, the Team met to discuss the complainant's concerns with the June 2016 IEP. In October, the complainant and District met twice, once on Oct. 14, 2017 and once on October 26, 2016. The IEP presented to the complainant on October 12, 2016 specifies that the Student has a specific learning disability. These evaluations showed strengths in reading comprehension. This IEP did not include a reading goal or specialized instruction in reading.

On October 14, 2016 District personnel discussed the Student's difficulties in reading (coding, visual matching, and processing speed) based on previous evaluations. On October 14, 2016, the complainant requested reading goals on the IEP. The Team recommended performing the GORT-V assessment, which was completed by the end of October 2016.

The psychoeducational assessment dated October 24, 2016 shows the student performed below benchmark in the DRA2 assessment and was in the intervention range. The District's IEP proposed in October 2016 does not address these weaknesses in reading.

The District proposed another IEP for the Student on November 2, 2016. At this meeting, the Team determined the Student would receive direct instruction in reading fluency, 20 minutes 3x/week. On November 7, 2017, the complainant requested an independent evaluation. On November 18, another psychoeducational evaluation was completed by the District. In April 2016, a revised psychoeducational evaluation was completed by the District and another IEP was developed. All of these evaluations address the Student's strengths and weaknesses that could cause difficulties in reading.

The documentation from the meetings, evaluations, and amended IEPs between September 2016 and May 2016 show that the District conducted testing and used a variety of assessment tools and strategies to gather relevant functional and academic information regarding reading goals. Written notice from the IEP meetings during the rest of the school year shows discussion of the Student's strengths and needs.

³ This IEP takes into account the District's educational evaluation dated 6/7/2016 and the District's psychoeducational evaluation dated 6/13/2016.

⁴ This IEP takes into account the District's reading evaluation dated 10/20/2016 and the District's revised psychoeducational evaluation dated 10/24/2016.

5. (a) *The complainant alleges that the District did not include the specially designed instruction or goals of learning keyboarding on the student's IEPs during the 2015-2016 and 2016-2017 school years and (b) and that the lack of this specially designed instruction on these IEPs resulted in a denial of FAPE for the student. MUSER V(1)(B); MUSER V(2)(B-F); MUSER 5(3)(A-F).* **COMPLIANCE FOUND.**

District must write Standards-based goals.⁵ An IEP Team may decide to incorporate keyboarding on a Student's IEP in order to access the general education curriculum; however, keyboarding would not be a goal on a student's IEP because it is not a Maine learning standard. Access to a keyboard was written into the Student's IEPs as accommodations from the October 2016 IEP through all IEPs developed that school year.

6. (a) *The complainant alleges that the District did not implement the services of utilizing technology or keyboarding that were listed on the student's Written Notice and IEPs during the 2015-2016 and 2016-2017 school years and (b) that the lack of implementation of this service resulted in a denial of FAPE for the student. MUSER IX(3)(B)(2)(b); MUSER XI.* **NO DETERMINATION MADE.**

The Student's IEPs during the times relevant to this complaint that include technology and keyboarding are the following:

- October 2016 – “offer keyboard when appropriate” for writing
- November 2016 – “Provide access to technology for typing written responses”
- March 2017 – During classroom instruction in regular and special education settings “Offer keyboard when appropriate” for writing; “Provide access to technology for typing written responses.
- April 2017 – “Offer keyboard when appropriate” and “Provide access to technology for typing writing responses” and provide access to technology for typing written responses.”
- May 2017 – “Speech to text and text to speech available at all times” and Provide access to technology for typing written responses” and “Offer keyboard when appropriate.”

These accommodations were to be provided during classroom instruction in general and special education settings.

In its Response, the District stated that the Student had access to technology and a keyboard in his classes. The Response also indicated that the Student's motivation to use technology may have been a factor in his in-school decisions to use the keyboard while writing. In its Response, the District did not

⁵ See Departmental Guidance *Policy on Standards-Based IEP Goals* at <https://www1.maine.gov/doe/proficiency/standards/policystandardsbasedIEPgoals.pdf>.

provide specific examples of how keyboarding or technology was implemented during the Student's day.

The Student's teacher stated that there were laptops accessible to the Student at all times in the Student's history and social studies classes. The Student's teacher described a project for which the teacher scribed while the Student explained that portion of the project to him. The Student's teacher did not elaborate about whether the student knew how to use or when to use the laptop.

The Complainant's advocate stated that there was confusion about the Student's use of a District-issued IPAD device, specifically, whether the student could bring it home to use on his homework. She stated that the Student was expected to use his own device at home while during homework at home. The complainant and advocate stated that while the Student may have had access to technology, the Student and some District personnel did not provide the adequate training in using the speech-to-text technology, with the result that the technology was not an accommodation. The complainant stated that the Student's keyboarding skills were not good enough for him to keep up taking notes in class or writing assignments. The complainant expressed concern that although the Student had access to technological devices, those devices were not always installed correctly and that the Student was not instructed how to use those technologies.

A formal educational evaluation that occurred in November 2016 showed that the Student, who had access to Google docs to write during class, was able to use Google docs with teacher assistance. There are reports in the educational evaluations and written notices about the Student's unwillingness to utilize the IPAD, keyboard, and speech-to-text technology. There is not enough information in the record to establish whether the District implemented technology or keyboarding.

7. (a) *The complainant alleges that the District did not assess the student in the area of assistive technology from September 2015-October 2016 and that (b) the lack of testing in the area of assistive technology resulted in a denial of FAPE for the student. MUSER IX(3)(C)(2)(e); MUSER V(2)(C)(4). NONCOMPLIANCE FOUND; NO DENIAL OF FAPE FOUND.*

Assistive technology is "any item, piece of equipment, or product system... that is used to increase, maintain, or improve functional capabilities of a child with a disability." MUSER XI.

(a) According to the Written Notice for that IEP Team meeting, the complainant requested an evaluation in assistive technology on October 14, 2017. At that time, District personnel told the complainant that "there is not an assistive technology assessment." The Student was assessed in the area of assistive technology in January 2017 and the assessor's report was completed on January 25, 2017, approximately three months later. This late response does not comply with regulatory requirements.

(b) No single test exists to determine whether a Student's education program is adequate to provide a free appropriate public education. Recently, the United States Supreme Court has established that a "student's educational program must be reasonably calculated to enable a child to make progress

appropriate in light of the child's circumstances."⁶ (See findings for #19 for further discussion of FAPE). A lack of particular recommended technologies did not result in a denial of FAPE to the Student.

The evaluator who conducted the AT evaluation of the Student reviewed the Student's IEP, LD determination, the June 2016 educational evaluation, an eye exam performed by a medical doctor, and the June 2016 psychoeducational evaluation. He reported on areas of strengths and weaknesses and made recommendations based on Student trial with certain AT devices and programs. Recommendations included considering providing the Student with digital text, using a device with word prediction for writing, expanding use of the voice-to-text technology, and providing technology in the areas of notetaking and graphic organizers and math. After the AT evaluation was completed, changes were made to the Student's IEP in the accommodations section.

The IEPs in place during September 2015-November 2015, when the Student was eligible for special education and related services based on OHI, and the IEPs in place from September 2016 – April 2016, contain one of the accommodations recommended by the AT evaluator such as access to laptops in the classroom, which the Student's teacher reported to have observed the Student to use.⁷ As discussed in this Report, keyboarding was an accommodation in all IEPs in place during the 2016-2017 school year.

Although the recommendations for AT would have been in place approximately four months prior to their inclusion into the Student's IEP, the documentation does not show that the lack of technology resulted in the Student's lack of access to general education curriculum. The lack of the particular recommended technologies did not result in a denial of FAPE to the Student.

8. (a) *The complainant alleges that from September 2015-April 26, 2017, the District did not include specially designed instruction, services or goals in the area of assistive technology for the student for use throughout the day and training on the assistive technology for the student's teachers and support staff and (b) that this lack of instruction, services and training resulted in a denial of FAPE for the student. MUSER V(1)(B); MUSER VI(2)(I-J); MUSER IX(3)(C)(2)(e). NONCOMPLIANCE FOUND; NO DENIAL OF FAPE FOUND.*

Federal regulations mandate a District's responsibility regarding teacher and student training and technical assistance regarding the use of assistive technology. The Maine Unified Special Education Regulations mirror those requirements.⁸ When the assistive technology device or service is specified with in the Student's IEP, the District must provide the device, customize it, and train the Student.

⁶ *Andrew F. v. Douglas Cnty. School Dist.* 137 S. Ct. 988, 999 (2017).

⁷ The complainant requested audiobooks for the student in October 2016. That accommodation does not appear to have been included as part of the Student's accommodations on any IEPs developed this year.

⁸ "Assistive technology device means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes... selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices... training or technical assistance for a child with a disability or, if appropriate, that child's family; and training or technical

(a) The IEPs from June 2016-May 2017 specified keyboarding. Speech-to-text assistive technology was utilized at some points in the year and was included in the May 2017 IEP as an accommodation. The District's response to the allegations regarding AT lack detailed information about the training provided to the Student or the Student's teachers in the areas of assistive technology. Please see related findings for Allegations 5 and 7.

The complainant's concerns in this area were that the Student did not know how to use a keyboard and that his skills on the keyboard did not allow him to keep up with notetaking in class because of his processing speed. The complainant also expressed concern that that the speech-to-text technology was not being utilized because neither the teacher nor the Student was able to access that program. The District's assertion is that the Student had access to keyboarding but chose not to utilize it.

A formal observation of the Student in class during November 2016 demonstrates that at times the Student required assistance in understanding the assignment and how to use technology in the assignment. Once the Student understood or was given a prompt about how to work, the Student was able to complete the assigned task.

(b) The Student's IEPs during this time period were reasonably calculated to provide educational benefit with regard to technology and AT. Lack of training and technical assistance on assistive technology devices did not result in a denial of a FAPE for the Student.

9. *The complainant alleges that the District did not follow the regulatory procedures regarding amendment of a written notice dated 6/16/2016, specifically regarding amending the notice regarding student's evaluation data. MUSER XIV(8). COMPLIANCE FOUND.*

Requirements under these regulations state that the parent, when believing that information in the education records are inaccurate or misleading, may request the District to amend the information. After the receipt of such a request, the District must decide whether to amend the record in a reasonable time and if it does not amend the record, must inform the parent of the refusal and advise the parent of the right for a hearing. MUSER XIV(8).

The Student's IEP Team met in April 2016 and again after a reevaluation in June 2016. On June 17, 2017, the complainant wrote to District personnel and asked to add several accommodations. The complainant also wrote "discussion about reading should be added" and listed multiple detailed points such as physical details about the Student when reading. The complainant's request for exceedingly detailed information was recorded in the written notice.

The District's response to this allegation was that the District did not receive information from the complainant about a request to amend the notice. In its Response, the District offered an opportunity for a hearing under FERPA.

Review of the material regarding the June 2016 meeting does not reveal that the District omitted the complainant's concern that was discussed during the June 2016 meeting. The written notice accurately reflects the general discussions and concerns presented at the IEP Team meeting.

10. (a) *The complainant alleges that during the 2015-2016 and 2016-2017 school years, the District did not identify the student with a reading disability who required accessible education materials, (b) did not provide accessible education materials and supplementary aids and services sufficient to enable the student to make progress in the general education curriculum and (c) that this lack of diagnosis resulted in a denial of FAPE for the student.* **MUSER IX(3)(A)(1)(d); MUSER IX(3)(C). COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND.**

During the first two months of the 2015-2016 school year, the Student was receiving instruction for deficits in reading and writing even though the Student did not qualify for special education as a student with a specific learning disability. The student was identified as qualifying for special education because of a specific learning disability in June 2016. In June 2016 and throughout the following school year, the Team did not find that the Student had a print disability and needed accessible educational materials (AIM).

In May 2017, after the evaluation results of the mutually agreed-upon independent evaluator, the Team determined that the student has a print disability that requires accessible instructional materials to access the curriculum. There is no documentation that this IEP was presented to the complainant.

The written notice in October 2016 shows certain District personnel were not familiar with a print disability. At the October Team meetings, the Team determined to conduct more testing to learn more about the Student's needs, even though testing had taken place in the previous spring. The determinations to conduct further assessments were often initiated at the request of the complainant who also wanted more data in order to determine what services could be provided to best assist the Student.

During discussions, the Team considered all results in the context of the Student's low cognitive proficiency and low average FSIQ as measured by the 2016 WISC-V, as well as the Student's diagnosis of ADHD. The IEP Team had enough information about the Student's deficits in reading and writing by November 2016 to determine that accessible educational materials, such as audiobooks, should have been offered as an accommodation necessary for the Student to access the curriculum. The information available to the District by November 2016 includes the following:

- Substantial previous poor performance in reading and writing in school prior to homeschooling in November 2016.⁹
- Previous testing scores documented in IEP which was in place from September 2015- November 2015, including the following:
 - o Low average performance in the subtests of rapid symbolic naming on the 2014 CTOPP-2; low average performance on the subtests of visual memory and visual recognition on

⁹ The material related to this allegation that is outside of the timeframe of this complaint was not considered during this investigation.

- o the 2014 WRAML-2; and below average performance in working memory and processing speed subtests on the 2014 WISC-IV.
 - o Description in District assessments of the Student's skills in phonological awareness as unevenly developed.
- Results from educational assessments conducted during Spring 2016 that include the following:
 - o Results from the GORT-V that include below average in rate of reading and showing struggles with reading fluency.
 - o Below average scores in vocabulary, spelling, punctuation and poor performance in sentence combining and contextual conventions on the 2016 TOWL-4.
 - o Below average in word identification and oral reading fluency on the 2016 WRMT-III
 - o Below average in mental computation, addition and subtraction, and multiplication and division subtests of the KeyMath-3.
 - Repeated discussions at IEP Team meetings about coding and visual scanning difficulties.
 - Current (Grade 5) performance as Below Benchmark in reading assessments (DAR).
 - Current (Grade 5) performance as Intervention Range in reading assessments (STAR).

The District created IEPs for the student that were reasonably calculated to provide educational benefit, even though they did not contain provision of accessible educational materials. The lack of accessible materials aiding this Student did not prevent the Student from accessing the general curriculum.

(b) The lack of identification of the Student as a child with a print disability and the lack of providing accessible instructional materials did not result in a denial of FAPE for the Student. Please see findings for allegation 19 regarding further findings.

11. The complainant alleges that from January 2017 to April 2017, the District did not implement the student's IEP by not providing 45 minutes of specialized instruction during 4 of every 6 days. MUSER IX(3)(B)(3). COMPLIANCE FOUND.

The complainant expressed concern that because of the rotating schedule, the Student's specialized instruction did not occur as it appears on the IEP. From January 2017 to April 2017, the Student's IEPs do not state that he should receive 45 minutes of specialized instruction during 4 of every 6 days. The IEPs beginning in November 2017 state that the Student will receive the following:

- 3x/week (20 minutes/session) of specially designed instruction in reading by a special educator;
- 3x/week (15 minutes/session) specially designed instruction in writing by a special educator;
- 3x/week (20 minutes/session) of specially designed instruction in math by a special educator.

The Student's schedules from January 2017-April 2017 show that the Student was receiving academic support by a special education teacher for Period 3. There are 9 rotating periods which alternate every 6 days. The Student's Language Arts and Math instruction by a special education teacher is scheduled on all days. The schedule demonstrates that despite a rotating schedule, the Student's special education instructor provided direct instruction each day. The teacher's schedule for this time period also shows direct instruction to the Student in Language Arts and Math each day.

12. (a) *The complainant alleges that the District did not evaluate the student in all areas of disability, particularly with respect to occupational therapy, during the 2016-2017 school year, and (b) that the occupational therapy evaluation was not sufficiently comprehensive to identify all of the child's special education and related services needs. MUSER V(2)(C)(4); MUSER V(2)(C)(6-7); MUSER VI(2)(I); MUSER IX(3)(C-D). COMPLIANCE FOUND.*

Regarding the Student's OT evaluation, the District evaluated in all areas of disability on November 11, 2016. The evaluator used five methods of evaluation in occupational therapy for his OT evaluation. The Report was revised on April 3, 2017 to include orthographic competency.

District personnel who conducted the evaluation, a registered and licensed occupational therapist with an advanced clinical doctorate in OT, possesses the expertise and experience to determine which OT evaluations were sufficiently comprehensive to assess the Student in occupational therapy.

13. *The complainant alleges that the District did not provide the parent with access to the student's education records, particularly evaluation data; evaluation response booklets; scoring booklets; classroom assessments; local assessments; samples of work; audio recordings; RTI information about the student's medial, social work, and occupational therapy; and billing, after parental requests during the 2016-2017 school year. MUSER XIV(3). COMPLIANCE FOUND.*

See response to allegation 15.

14. *The complainant alleges that the District did not provide a list of the types and locations of the student's educational records collected, maintained, or used by the District after the parent requested them in April 2017. MUSER XIV(6). NONCOMPLIANCE FOUND.*

Documentation shows that the District did not provide a list of the types and locations of the student's educational records after a request by the complainant in an email in April 2016.

15. *The complainant alleges that (a) the District did not comply with the parent's request to inspect and review the student's educational records, including but not limited to periodic reports, before meetings regarding an IEP during the 2016-2017 school year and (b) the*

District did not comply with the parent's request to inspect and review the student's educational records no more than 10 days after the parent made the request during the 2016-2017 school year. MUSER XIV(3). COMPLIANCE FOUND.

In its Response, the District correctly asserted that there is no obligation for the District to permit review and inspection within 10 days. Districts must permit parents to inspect and review education records relating to their child which are collected, maintained, or used by the District “without unnecessary delay and before any meeting regarding an IEP... in no case more than 45 days after the request has been made under Part B.” The question here is whether the District allowed access to the Student's record within 45 days of the request. The complainant requested records multiple times during the time period of this complaint.¹⁰ A synopsis of records requests and responses to those requests are as follows:

9/7/16 Complaint request for “complete set” of student records.

9/9/16 Complainant request for copies of educational records.

District response on 9/9/16 stating records are available on 9/9/16.

9/19/16 Complainant request for evaluation records, OT records, and math assessments.

District response on 9/30/2016 requesting clarification of records request and offering an on-site review of records.

10/2/2016 and 10/12/16 Complainant request for all 5th grade tests to date; notes from September 2016 IEP meeting, evaluations of the student from 2nd and 4th grade; folder of teacher notes and assessments; and a repeat of the request for records requested on 9/19/2016.

District response on 10/12/16 stated that the documents requested had been provided to the complainant. Also during this time period, the District sent a letter to the complainant requesting that all communication be funneled through one person at the District.

10/12/16 Complainant request for documents that had been requested on 9/19/16.

10/18/16 Complainant request for all OT records, a clarification to District personnel of what OT records were requested, and a request for an appointment to see evaluations that were requested on 9/19/16.

District response on 10/18/16 stating there was no formal evaluation done in OT and that District personnel was working on a date for review. District response from OT provider included a description of OT services to the Student. District response on 10/19/16 indicated that review of documents would take place on 10/21/16.

10/21/17 Complainant request to see one additional test from the current school year and OT files.

10/21/16 District response about regular education records request to certain District personnel.

¹⁰ Also during this time, especially in the first weeks of the 2016-2018 school year, the complainant was regularly communicating with District staff about the goals on the Student's IEP, her concerns about assignments, and the Student's experiences in the classroom.

10/25/17 and 11/7/16 Complainant sent the District a list of over 60 concerns she had about the Student's education. Some of these concerns included student records, particularly the testing protocols for certain evaluations.

The District responded to the requests and concerns in late November. This response was a thorough, 10-page detailed chart listing all the complainant's concerns, requesting clarification of some concerns, and explaining the District's responses to each of those concerns. In this chart, the District stated that the complainant was provided assessment results, was allowed to view the assessment results, and that some testing protocols were not copied but had already been reviewed.

4/10/17 Complainant request for opportunity to review "all of []'s records".

E-mail response from District personnel stating that the complainant reviewed records numerous times and that a full review could be scheduled during April vacation. The District also responded on 4/13/17 regarding a review of records to occur on 4/20/17. A letter from the District explained that email correspondence totaled over 24,000 documents and would be available within a few weeks after internal review of those documents.

On 4/25/16 District personnel confirmed that a certain record did not exist and that other evaluation data requested would be reviewed at the IEP Team meeting on 4/26/17. On 6/5/17, the District responded that files would be available to review during the week of 6/5/17-6/9/17.

In an email of June 12, 2017, District personnel contacted the complainant to state that she had access to records on 6/7/17 and 6/8/17.

6/8/17 Complainant request to see the Student's educational records.

The District responded to clarify the records request and told the complainant that those records would be made available during the next few weeks. The complainant reviewed the records in June 2016.

The documentation shows that the District provided access to all records except one within the regulatory timeframe. The one set of records that was not provided was the OT information from the District Elementary School. The District should be provided to the complainant as soon as possible, and within 45 days, after receipt of these findings. In sum, the District provided multiple opportunities to review assessments and records to the complainant.

16. The complainant alleges (a) that the District did not provide periodic reports on the progress the student made toward annual goals during the 2016-2017 school year and (b) that this lack of reporting preventing the IEP team from addressing lack of progress toward the annual goals and in the general curriculum, resulting in a denial of FAPE for the student. MUSER IX(3)(A)(1)(c); MUSER VI(2)(J)(5). COMPLIANCE FOUND.

The school runs on a trimester schedule, so progress reports are issued three times a year. From September 2015 – November 2015, no progress reports were provided. From September – May 2015 Progress Reports that were provided to the complainant are dated 12/5/16, 3/21/17, and 4/27/17. The IEP meetings that occurred during this time period, as reflected in the written notice, reflect that during many meetings, including those early in the 2016-2017 school year, the IEP Team discussed the Student's progress.

17. (a) *The complainant alleges that the District did not consider the student's strengths and the results of the initial evaluation or most recent evaluation of the student in developing the student's IEPs dated 6/16/2016, 10/7/2016, 10/12/2016, 10/26/2016, 11/22/2016, 1/6/2017, 2/10/2017, and 3/22/2017, and (b) that this lack of information on the IEPs resulted in a denial of FAPE for the student. MUSER IX(3)(C). COMPLIANCE FOUND.*

Written notes, communication meetings, and careful review of all evaluations (both at IEP meetings and individually with the assessors) demonstrate that the Team considered all evaluations and results when creating and amending the many IEPs developed for the student from June 2016-May 2017. A meeting was held after each evaluation to discuss the evaluation and changes were made to accommodations as a result of those evaluations and Team discussions. Significant is the addition of AT after an independent evaluation in late spring 2016. The Team was thorough in its discussions of evaluations and of the unique needs of the Student.

18. *The complainant alleges that she was not afforded the opportunity to participate in IEP Team meetings for the student during the 2016-2017 school year, specifically because the District set a time limit on discussions at IEP Team meetings and set a limit for topics of discussion. MUSER VI(2)(H); MUSER VI(VI)(2)(I). COMPLIANCE FOUND.*

Federal and State regulations mandate that a Student's IEP Team meet once a year. Here, the IEP Team met approximately every two to three months over nine months. The complainant was present at each meeting, sent lists of concerns prior to each meeting, and communicated to District personnel via email after IEP Team meetings with additional concerns. The District and complainant also participated in "communication meetings" that included the complainant, District special education personnel, and the Student's teachers. In all, meetings occurred on 4/28/15, 6/16/16, 9/12/16, 10/14/16, 10/26/16, 11/22/16, 3/22/17, and 4/26/17.

Evaluations became the focus of most Team meetings and the complainant, who wished to discuss goals at each meeting, did not feel that she had fully communicated about the goals on the Student's IEP. There were occasions when the complainant presented new concerns a few days prior to the IEP Team meeting and was told that the goal of the meeting was to review the most recent evaluation but that another meeting would be arranged.

The IEP Team meetings and communication meetings usually lasted at least an hour and often exceeded an hour and a half and the complainant presented concerns and information at each of these meetings. The end result of these meetings is that continuous reevaluation of the Student's IEPs took place each time the IEP Team discussed a new District assessment or IEE.¹¹ Written notices reflect that the complainant had considerable opportunity to participate in IEP Team meetings.

¹¹ The Student has been so frequently tested that during an assessment in the spring of 2017 "he almost broke down when he saw the task."

19. *The complainant alleges that compensatory services are owed because the District did not provide FAPE to the student during the times of enrollment during the 2015-2016 and 2016-2017 school years.*

The goal of the federal laws and regulations mandating special education for students with disabilities “is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her ‘unique needs’.”¹² While a tailored IEP does not entitle the child to the maximum educational benefit possible,¹³ the IEP must be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.¹⁴ Even if it is not reasonable for a child to advance from grade to grade, IEPs should contain objectives that are appropriately ambitious.¹⁵

The purpose of the compensatory education remedy is to compensate a disabled child with education that a school district improperly withheld under the IDEA. Compensatory education should “remedy past deprivations by a school district.”¹⁶ It is not an automatic entitlement.¹⁷ The District’s responsibility to educate the Student is limited to the time the Student was enrolled in the District.

There is a discrepancy between the District’s understanding of the Student’s ability to access the general curriculum and the complainant’s understanding of the Student’s ability to access the general curriculum. Yet the parties agree that the parts of the curriculum that involve reading, writing and math provide challenges to the Student. The District has known about these barriers to accessing educational materials for some time.

Based on the record, it is difficult to know whether the Student made meaningful progress during two months in 2015, a very short time to evaluate progress. Evaluation results from June 2016 do not show meaningful progress when compared to the evaluation results in the April 2015 IEP. The Student was homeschooled for much of the time between those assessments.

The eight months the student attended the District school in the 2016-2017 school year presents a similar challenge. The IEPs developed that school year were modified with each new evaluation. Reading assessments show some slow progress in reading levels. The end-of-year progress reports do not show measurable progress in the areas of reading, writing and mathematics.

¹² *Fry v. Napoleon Comm. Sch.*, 137 S. Ct. 743, 755 (2017).

¹³ See *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) (citing *Lessard v. Wilton-Lydeborough Coop. School Dist.*, 518 F.3d 18, 23 (1st Cir. 2008)).

¹⁴ See *Andrew F. v. Douglas Cnty. School Dist.* 137 S. Ct. at 999 (2017).

¹⁵ *Id.*

¹⁶ *Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184, 188 (1st Cir. 1993).

¹⁷ *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 290 (1st Cir. 2008).

The Student's difficulties in accessing the reading and writing components of the curriculum and the resulting lack of progress as shown on the Progress Reports of April 2017 demonstrate that the general and special education interventions provided by the District during those eight months were not sufficient for the Student to meet his goals.

The complainant did not specifically request a rules-based reading program such as Orton-Gillingham or Wilson; however, as discussed in Allegation 10 and above, the District had in its records multiple indicators that a structured rules-based reading program will allow this student to access the general education curriculum.¹⁸ The District also had information from a medical doctor in February 2017 stating that the student may have dyslexia and dysgraphia. The Student is currently reading well below grade level, cannot perform addition and subtraction at grade level and has not reached many of his goals in those areas. Compensatory education for a very short period of time, a portion of the 2016-2017 school year during which the Student did not progress while being educated by the District, is warranted.

The District must provide individual, rules-based reading instruction 3x45 minutes/week for a period of three months.

This service will begin when the Student reenrolls in the District, and will occur no later than June 2018 if the Student is enrolled before March 1, 2018. If the Student is enrolled after March 1, 2018, the District may adjust the compensatory services to 3x/week for the remainder of the school year such that services will end in June 2018. The District will arrange for provision and scheduling of this compensatory education. The May 2017 IEP, will be in effect upon reenrollment.

¹⁸ See *E.G. v. Great Valley Sch. Dist.*, 70 IDELR 3, 8 (May 23, 2017) (Student with severe reading disability, who was provided rules-based Wilson instruction and made progress in that program was determined to have received FAPE because IEP was reasonably calculated for Student to progress in reading).

