

Complaint Investigation Report
v. Scarborough Public Schools
October 30, 2020

Complaint # 21.008C
Complaint Investigator: Julia N. Pothen, Esq.
Date of Appointment: September 4, 2020

IDENTIFYING INFORMATION

Complainant: Parent

Respondent: Scarborough Public Schools
Sanford Prince IV, Superintendent
P.O. Box 370
Scarborough, ME 04074

Alison Marchese, Director of Special Education

Student:
DOB

SUMMARY OF COMPLAINT INVESTIGATION ACTIVITIES

On September 1, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on September 4, 2020. Therefore, the current investigation covers the period of September 1, 2019 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 861 pages of documents from Scarborough Public Schools and 299 pages of additional documents and audio recordings of seven meetings between various IEP Team members (approximately 7 hours of audio files in total) from the Student’s parent. Interviews were conducted with the following individuals between September 28, 2020 and October 6, 2020: the Student’s parent; the Director of Special Services for Scarborough Public Schools; the Interim Director of the Day Treatment Program; a Supervisor from Maine Behavioral Healthcare; two Special Education Teachers; a Speech Therapist; a Social Worker; a Board-Certified Behavioral Analyst (“BCBA”); and a Occupational Therapist (“OT”).¹

¹As per the standards of practice for conducting complaint investigations, the Complaint Investigator used her discretion with regards to witnesses interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation.

PRELIMINARY STATEMENT

The Student is years old. She resides with her parents in , Maine, and she is currently enrolled at the School as an student. The Student previously attended the Day Treatment Program in South Portland, Maine.

This complaint was filed by the Student's parent ("Parent") alleging that the Scarborough Public Schools ("District") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the Parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on September 8, 2020, alleging seven violations of the MUSER. A telephonic Complaint Investigation Meeting was held on September 10, 2020. A revised Allegations Letter was sent to the parties on September 17, 2020, detailing nine total alleged violations of the MUSER.

Although the regulatory time frame for the present complaint investigation extends from September 1, 2019 to present, the scope of this investigation is somewhat limited by the procedural history of the Parent's prior due process complaint. Back on March 16, 2020, the Parent filed a prior complaint on behalf of the Student with the Maine Department of Education against the District, alleging twelve violations of the MUSER. See Complaint Investigation Report #20.074C. On May 12, 2020, the Maine Department of Education published a Complaint Investigation Report, finding non-compliance on the part of the District with respect to one of the twelve alleged violations. The previous complaint was investigated by complaint investigator, Rebekah J. Smith, Esq. The present complaint investigator has reviewed the documentation from Complaint Investigation #20.074C in order to ascertain which of the present allegations, if any, were previously addressed. One of the allegations in the present complaint investigation overlaps with the allegations from the previous complaint, and with respect to the repeated issue, the complaint investigator has only considered the District's conduct from the date of the previous determination (May 12, 2020) to the present. With respect to new allegations that were not addressed in the prior complaint investigation, the regulatory time frame of September 1, 2019 to present remains applicable.

ALLEGATIONS

The Parent alleged that the District did not provide a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because of the following nine alleged violations:

1. The District did not adequately involve the Parents as equal participants in the IEP decision-making process because: (a) IEP meetings were held on July 23, 2020 and August 3, 2020 without parental participation; and (b) the IEP Team

- made a placement decision without properly considering the Parents' concerns. MUSER VI(2)(I); MUSER IX(3)(C)(1)(b); MUSER X(2)(B); 34 CFR 300.501(c).
2. The District did not ensure that the Student's educational placement decision was made by a group of persons, including the parents, and other persons knowledgeable about the child. MUSER X(2)(B). More specifically, (a) the District did not properly excuse necessary IEP Team members who were absent from meetings. MUSER VI(2)(F); and (b) the membership of the IEP Team during meetings on August 14, 2020 and August 21, 2020 did not satisfy regulatory requirements because the IEP Team did not include a special education teacher or special education provider who was knowledgeable about the child. MUSER VI(2)(B)(3); MUSER X(2)(B).
 3. The IEP Team did not revise the Student's IEP to address her lack of expected progress toward annual goals and her anticipated needs. MUSER IX(3)(D)(1)(b). Specifically, the District did not ensure that data was collected about the Student's progress. Without sufficient data tracking the Student's gains and/or regressions, the IEP Team did not revise the Student's IEP as appropriate to address the Student's needs. MUSER IX(3)(D)(1)(b).
 4. The District did not fully implement the Student's IEP regarding her transition plan. MUSER IX(3)(B)(3); MUSER IX(3)(E).
 5. The District did not provide the Parents with access to the Student's education records, particularly behavior tracking data, prior to IEP meetings on August 14, 2020 and August 21, 2020. MUSER XIV(3).
 6. The District did not notify the Parents of the IEP Team Meeting on July 23, 2020 at least seven days prior to the meeting to ensure that the Parents would have an opportunity to attend. MUSER VI(2)(A); MUSER VI(2)(H)(1)(a).
 7. The District did not provide sufficient written notice to the Parents at least 7 days prior to a proposed change in the provision of the Student's free appropriate public education. 34 CFR 300.503(a)(1); MUSER App. At 220. Specifically, the District did not provide written notice that the Student's board-certified behavior analyst (BCBA) services would be terminated on April 28, 2020.
 8. Since the start of the 2020-2021 school year, the District has not implemented the Student's IEP because the Student is not receiving educational services. MUSER IX(3)(B)(3).
 9. The District did not maintain the Student's last agreed upon educational placement ("stay-put") during the pendency of this State complaint investigation. MUSER XVI(20)(A).

FACTUAL FINDINGS

1. The Student is _____ old, and she resides at home with her parents in _____, Maine. The Student is currently enrolled as an _____ student at _____ School. Due to the Parent's concerns about the COVID-19 pandemic as well as other concerns about the Student's transition to in-person learning at _____ School, the Student is currently participating in remote education from home.
2. The Student previously attended the _____ a private, day treatment program and special purpose private school, from February 13, 2018 until August 31, 2020.
3. Scarborough Public Schools has maintained educational responsibility for the Student during all relevant time periods of this complaint investigation.
4. The Student has been diagnosed with Autism, and she is eligible for special education services.
5. The most recent evaluations conducted by the District, dated August/September 2019, consisted of educational, speech and language, functional living skills, and occupational therapy assessments. The Student's performance on WISC-V showed extremely low in verbal comprehension, visual spatial, fluid reasoning, working memory, processing memory, processing speed, general ability, and full-scale IQ. The Student's performance across multiple assessments demonstrated severe developmental disabilities, consist with her diagnosis of Autism Spectrum Disorder. For example, her communication skills were rated below the first percentile.
6. The most recent Functional Behavioral Assessment ("FBA") was completed in September 2018. Based on the recommendations of the FBA, the IEP team updated the Student's behavior plan in September 2018 to add components of differential reinforcement of other behaviors ("DRO"), time-out from reinforcement, and backward chaining for classroom groups.
7. The Student's most recent Individualized Education Program ("IEP"), dated September 15, 2020, requires 24 hours per week of Specially Designed Instruction, 60 minutes per week of Speech/Language Services, 60 minutes per week of Occupational Therapy Group, 30 minutes per week of Occupational Therapy Services, 30 minutes per week of Social Work Services, 30 minutes per week of Speech and Social Work Group, 30 minutes per week of consultation with a Board-Certified Behavioral Analyst (BCBA), and special transportation. Her IEP currently specifies that the Student spends 0% of her educational time with non-disabled children as a result of her placement in the academic life skills classroom for content area instruction and therapies.

8. Due to the COVID-19 pandemic, the Student is currently receiving her educational services through an Individualized Remote Learning Plan (“IRLP”). According to Written Notice from the IEP Team Meeting on September 15, 2020, the Student’s IRLP includes 30 minutes per day of Specially Designed Instruction, 30 minutes per week of Speech Services, 30 minutes per week of Social Work Services, 30 minutes per week of Occupational Therapy Services, and 30 minutes per week of BCBA consultation.
9. Back on February 13, 2018, the IEP Team met and agreed to place the Student at Day Treatment Program due to the nature and severity of the Student’s emotional regulation and behavioral needs. Specifically, the Student’s most severe emotional regulation and behavioral obstacles included aggressions, disrobing, property destruction, bolting, self-injurious behaviors, emotional outbursts due to being denied a preferred activity or presented with a new expectation, and disruptive vocal scripting. The IEP Team agreed that a private, day treatment setting was the Least Restrictive Environment (“LRE”) for the Student to access her educational needs. Written notice dated on February 13, 2018 indicates that the IEP team considered, but rejected, placement in a public school setting.
10. Over the course of the next two years, the Student progressed significantly in her emotional regulation and behavioral goals, and the Student’s IEP Team concluded on December 5, 2019 that the Student no longer required a day treatment program and the transition back to public school should begin. Notably, the full IEP Team agreed that was no longer the Student’s LRE, but the IEP Team also agreed that a careful transition would be necessary to facilitate the Student’s continued success in public school. See Written Notice from IEP Team Meeting on December 5, 2019.
11. According to written notices, the Student’s IEP Team reconvened again on January 9, 2020 and February 27, 2020 to make more specific decisions about the Student’s placement in public school and to develop a comprehensive plan for transitioning the Student from . After conducting site observations and engaging in detailed discussions, the IEP Team concluded that the Student’s needs would be best served by a hybrid program approach at School that combined the academic instruction and peer opportunities from the Academic Life Skills program with the hands-on programming from the Functional Life Skills program. See Written Notices from IEP Meetings on January 9, 2020 & February 27, 2020.
12. The IEP Team developed a comprehensive plan for the Student’s transition to School, calling for a two-week transition period, beginning on Monday, March 2, 2020. On that day, the Student started by attending a partial day of school at School, along with staff to support her. The transition plan called for the Student to spend increasing amounts of time each day at School, with the educational technicians slowly allowing the School educational technicians to take over the

student support roles. The final day of the transition was scheduled to occur on Friday, March 13, 2020, and the IEP Team planned this would be the first day where the Student attended School without staff present. See Transition Plan for [Student], as updated on February 28, 2020.

13. During interviews with the complaint investigator, a number of IEP Team members expressed that the Student's transition plan was the most comprehensive, collaborative, and thoughtful plan they had ever developed for a student. The Parent also expressed satisfaction with the planning for the Student's transition to School.
14. Also during the February 27, 2020 IEP Meeting, the Team officially determined that the Student would be eligible for six weeks of ESY services. Each week would include 14 hours of Specially Designed Instruction, 60 minutes per week of OT, 60 minutes per week of Speech Services, 30 minutes per week of BCBA consultation, and specialized transportation. See Written Notice from IEP Meeting on February 27, 2020.
15. During the two-week transition period, beginning on March 2, 2020, staff from both School and reported back that the Student was progressing extremely well through the transition process.
16. On Wednesday, March 11, 2020, after the Student had been successfully visiting School for eight school days, the teacher in the Academic Life Skills classroom informed the Parent and staff that one of the District's educational technicians had resigned to accept a BCBA position at another school. Fortunately, the District was able to quickly shift another educational technician from elsewhere in the District to School, in an effort to avoid disrupting the Student's carefully planned transition. As a result of this change in staffing, the Academic Life Skills teacher proposed a two-day extension of the Student's transition through Tuesday, March 17, 2020. The extension would have allowed staff to continue working with the educational technicians at School for two additional days (Friday, March 13, 2020 and Monday, March 16, 2020), and Tuesday, March 17, 2020 would have been the Student's first day at School without Staff present. See Emails from the Academic Life Skills teacher & Director, dated March 11, 2020.
17. The Parent strongly objected to an extension of the Student's transition plan, expressing distrust about the reasons for the staffing changes at . The Parent believed that, by proposing a last-minute change to the schedule, the District was failing to honor the IEP Team's transition planning. See Email from Parent, dated March 11, 2020 & Parent's interview with the complaint investigator.

18. In the midst of this disagreement regarding the transition plan, on Thursday, March 12, 2020, the Student's IEP was amended to reflect the Student's transition to School.
19. However, on Monday, March 16, 2020, School concluded in-person education for the 2019-2020 school year due to the COVID-19 pandemic.
20. Although the Student's IEP reflected a transition to School, both and the Academic Life Skills classroom at School developed remote learning packets for the Student. The Student initially completed remote learning schoolwork sent from both and School, and it was unclear how long remote learning would last due to uncertainty created by the pandemic.
21. On April 27, 2020, the District issued an amended IEP and a Written Notice for an agreement to amend the IEP without a team meeting. The IEP Team determined that, "given the interruption in the transition plan due to the COVID-19 school closure, [the Student's] programming will return to the out of district setting, This will include the remote learning plan services and ESY. The team will reconvene when schools are reopened to discuss the development of the transition plan back to Scarborough Schools."
22. The Written Notice, dated April 27, 2020, also detailed the specifics of the Student's remote learning plan at including one 30 minute session of academic instruction per day (to be increased as appropriate), two 30-minute sessions per week of Speech Services, two 30 minute sessions per week of Social Work, and up to two 30 minute sessions per week of OT services (to begin after new OT connected with the family to discuss the best method to integrate OT into the Student's remote learning schedule). Written Notice further explained, "Given the length of the continued school closure, team felt that it would be in [the Student's] best interest to work with the staff and routine that she knows well. Given any potential regression, the IEP team will review transition plans once schools are reopened." See Written Notice, dated April 27, 2020.
23. Finally, the Written Notice stated, "The goal is still to transition [the Student] to a less restrictive environment when it is appropriate given her needs. See Written Notice, dated April 27, 2020.
24. On June 29, 2020, the IEP Team met to discuss OT goals and services.² No changes were made to the Student's IEP goals at this time.

² The Parent had expressed frustration to about OT services, and the Student had stopped accessing her OT sessions. Additionally, the Parent sought clarification from the District about who was responsible for delivering OT services – or School. The District confirmed that was responsible for delivering OT services, although School initially sent home OT materials beginning on the week of March 23, 2020 because had a vacancy in their OT position at the time. The Parent refused OT services from School on April 9, 2020. When the

25. On July 15, 2020, the Parent was observing and assisting the Student during an ESY remote learning session with the Student’s Special Education teacher at the time. According to interviews with both the Parent and the teacher, the Parent felt that the special education teacher inappropriately and prematurely introduced a new math skill involving money to the Student. The Parent openly expressed frustration with the teacher, and the Parent eventually left the remote learning session early. The teacher felt that the Parent’s behavior was disrespectful, and the teacher brought the situation to the Interim Director of [redacted]. The Interim Director made the decision to assign a new Special Education teacher to the Student going forward.
26. Later the same day, on July 15, 2020, the Parent emailed the Director of Special Services, requesting testing of the Student’s “actual current educational levels.” The Parent felt strongly that the Student was mimicking teaching and memorizing content, rather than attaining new skills during remote learning sessions. The Parent expressed concerns about “false data collection” by the Student’s special education teacher, educational technicians, and related services providers. The Parent also reported concerns about the instructional methods used by the Student’s Special Education teacher; the Parent felt that the teacher was prematurely adding “additional complexity...in an area where the underlying skills had not been achieved.” See Parent’s Emails to Director of Special Services, dated July 15, 2020.
27. The Director of Special Services immediately responded to the Parent, offering to set up an IEP meeting to resolve the Parent’s concerns. She also spoke with the Interim Director at [redacted] about opportunities for progress monitoring and assessment tools that could be utilized during remote learning. The Parent informed the Director of Special Services that she did not believe an IEP Team meeting was necessary because she had given [redacted] plenty of opportunities to address her concerns with their staff. The Parent argued that the concerns she passed along constituted administrative issues that should have been handled by the Interim Director at [redacted] without necessitating another IEP meeting.³ Id.
28. After the session on July 15, 2020, the Student stopped accessing synchronous remote education sessions and all related service sessions for her ESY services with [redacted]. The Interim Director of [redacted] and the Director of Special Services both

new OT started at [redacted] on April 13, 2020, services were offered to the Parent on May 14, 2020. However, the Parent declined services between May 28, 2020 and June 29, 2020.

³ In the Parent’s complaint, the issue was raised that the District improperly allowed the discussion of administrative issues and teaching techniques during IEP meetings. First, there is no special education law or regulation preventing the discussion of these issues at IEP meetings. Rather, 34 CFR 300.501(b)(3) explains that parental participation is not required during school meetings that address administrative issues and teaching techniques. However, if an IEP Team feels the need to discuss administrative issues or teaching techniques, an IEP Team is legally permitted to do so. Nevertheless, in the present case, the Parent’s concerns about potential academic testing, the implementation of the Student’s IEP, and the monitoring of the Student’s progress towards her IEP goals falls squarely within the purview of the IEP team’s role.

attempted to contact the Parent about missed sessions, but the Parent either did not respond to their emails or sent back unresponsive information about whether or not the Student would continue to access remote learning opportunities.⁴ staff, including the Student's related service providers, continued to log onto daily, synchronous, online learning sessions for more than three additional weeks, but the Parent chose not to access ESY services for the Student.⁵

29. On July 20, 2020, Advanced Written Notice (AWN) was sent to the Parents for a proposed IEP Team meeting on Thursday, July 23, 2020. The District has acknowledged that this AWN did not provide the required seven days of notice to ensure that the Parents would have an opportunity to attend the IEP Meeting. The Director of Special Services explained during an interview with the complaint investigator that she attempted to schedule the meeting as quickly as possible because the Parent expressed concerns about the implementation of the Student's IEP and because the Parent was suddenly no longer accessing online sessions for her Student with ; the Director of Special Services aimed to get these pressing issues resolved as quickly as possible. The Director of Special Services emailed the Parent on July 20, 2020 and on July 21, 2020, attempting to determine if the Parent was able to attend the online IEP Meeting on July 23, 2020.
30. On July 23, 2020, the IEP Team conveyed via Google Meets, but the Parents were not in attendance. After waiting for fifteen minutes, the IEP Team declined to meet without a parent present, and instead, a new AWN was drafted and sent to the Parents on July 23, 2020 for a new proposed IEP Team meeting time on August 3, 2020 at 10:30am via Google Meets. See Advanced Written Notice, dated July 23, 2020. The Director of Special Education also emailed the Parent on July 23, 2020 to inform the Parent that the meeting had been rescheduled to allow for a full seven days advanced written notice. See Email from Director of Special Services to Parent, dated July 23, 2020.
31. On August 3, 2020, the IEP Team conveyed again via Google Meets, and the Parents were again not in attendance. The stated purpose of the meeting, according to Written Notice, was to address the Parent's possible request for achievement testing and to address the Parent's frustration about the implementation of the Student's IEP goals. The IEP Team discussed the Parents concerns that were raised by email, but no changes were made without input from the Parents. The IEP Team agreed to seek more information from the Parent about her requests and concerns.
32. On August 5, 2020, the Director of Special Services mailed the Parents a letter asking whether or not the Student would be accessing educational services at

⁴ Mom emailed the Interim Director on July 27, 2020, stating, "Time's up and ho-humm. (This is where you should seek out advice of others who do in fact have a background in educational administrative duties)."

⁵ The Parent has since articulated that she was aiming to force the District to submit a truancy claim against the Parent. The District declined to file for truancy, and instead understood the Parent's actions as an effort to decline ESY services.

going forward. The Parent responded by email on August 6, 2020 with more details about her request to proceed with academic testing and her feelings that an IEP Team meeting was unnecessary.

33. Based on those email communications, on August 7, 2020, the District issued a Written Notice for an agreement for an amendment without an IEP Team meeting, noting the Parent's specific request for reading and math academic testing "once given CDC guidelines and school protocols can safely conduct in-person testing." See Written Notice, dated August 7, 2020.
34. Even after the IEP Team agreed to conduct reading and math academic testing, the Parent did not access the Student's ESY services.
35. Finally, on August 14, 2020, the IEP Team met via Google Meets, and the Parent was in attendance. According to Written Notice for the IEP Team Meeting on August 14, 2020, administrators informed the Parent that they were "discharging [the Student] beginning at the start of the 2020-2021 school year" because felt that the Student was ready for a less restrictive placement. staff determined that the Student's referral behaviors⁶ were no longer present and that the Student's transition to School had been nearly complete prior to the COVID-19 pandemic. As such, the Student's placement at would become unavailable after the conclusion of ESY on August 31, 2020.
36. decision to discharge the Student was made by the special purpose private school, outside of the IEP Team process, without input from the District or the Parent. In addition to determination that the Student no longer required services from a locked, day treatment facility, the Interim Director of also cited concerns that the relationship between and the Parent was no longer collaborative. Specifically, the Interim Director explained that the Parent's communications were unclear, non-existent at times, and frequently disrespectful. See Written Notice from the IEP Team Meeting on August 14, 2020; Audio Recording of the IEP Team Meeting on August 14, 2020. In response to decision, the Parent adamantly disagreed with assessment of the Student, raising concerns about the Student's behavioral regressions during remote learning, including the Student's tendencies to leave the table, ignore staff, and engage in increased chatter during remote learning sessions. Id. The Parent also raised concerns about a lack of accurate data tracking and a lack of academic progress during remote learning. Id.
37. At the conclusion of the August 14, 2020 IEP Team Meeting, the Parent agreed to access remote related services for ESY again beginning on August 17, 2020, and agreed to send academic work home for the Student to complete. The IEP

⁶ According to interviews with the Interim Director, the BCBA, and other staff members, definition of 'referral behaviors' for the Student included aggression, disrobing, property destruction, bolting, self-injurious behaviors, prolonged emotional outbursts, and disruptive vocal scripting.

Team agreed to meet again on August 21, 2020 to review additional data and assessments before making any further determinations about placement. See Written Notice from IEP Team Meeting on August 14, 2020; Audio Recording of the IEP Team Meeting on August 14, 2020.

38. During the August 14, 2020 IEP Team Meeting, the Student's Special Education teacher⁷ was not present. Instead, another Special Education teacher from attended the meeting. The teacher who attended the meeting had worked with the Student previously (and for an extended period of time) as an educational technician. When asked why the Student's teacher was not present, the Interim Director of explained that, after the final remote learning session on July 15, 2020, a new Special Education teacher had been assigned to work with the Student. The new Special Education teacher who attended the August 14, 2020 meeting had not worked directly with the Student during the 2020-2021 school year, in person or remotely, but the teacher had attempted to work with the Student remotely in late July and early August 2020, when the Parent declined to access remote learning sessions after July 15, 2020.
39. During an interview with the complaint investigator, the new Special Education teacher explained that she was extremely familiar with the Student from her work as an educational technician during the prior school year. Further, since is such a small school, often serving fewer than 16 children, the new teacher had regular, informal contacts with the Student during the 2020-2021 school year, even after the teacher concluded her role as an educational technician for the Student. Additionally, the new teacher reported to the complaint investigator that she took over all teaching responsibilities in July 2020, when asked to do so by the Interim Director of , which included accessing all teaching notes from the Student's prior special education teacher, reviewing the Student's academic work that was submitted by the Parent during remote learning, and considering data about the Student's progress towards her IEP goals. The new teacher reported to the complaint investigator that she was highly confident about her ability to contribute meaningfully to the IEP Team process on behalf of the Student. Additionally, the Student's new teacher agreed with staff's conclusion that the Student had largely maintained her academic skills during the period of remote learning, without any observable or reported behavioral regressions during the remote learning process.
40. By listening to the audio recording of the August 14, 2020 IEP Team Meeting, the complaint investigator reviewed the details of a lengthy IEP Team conversation about data. Around 48 mins and 30 seconds into the audio recording of the August 14, 2020 IEP Team Meeting, the Parent expressed frustration about the lack of

⁷ The Special Education teacher who was absent from the August 14, 2020 IEP Team Meeting worked with the Student for the majority of the 2019-2020 school year (prior to her transition to School). The same teacher worked with the Student between the start of remote learning due to the COVID-19 pandemic in March 2020 until the Student's last academic remote learning ESY session on July 15, 2020.

educational data provided by . The Interim Director of responded that she would be happy to share any data requested by the Parent, but the Interim Director explicitly requested clarification about what specific data was being sought by the Parent. In reply, the Parent specifically asked to supply all documentation regarding the Student's school work between the start of remote learning and July 15, 2020, when the Student stopped accessing ESY services. The Parent also specifically requested both data from the sessions where the Student worked remotely with staff as well as assessment data about the remote learning work packets that were turned into by the Parent. The IEP Team scheduled another meeting to review the specifically requested data, and near the end of the meeting, around 1 hour and 9 minutes into the audio recording, the Director of Special Services again summarizes the kind of data being sought from . She stated, "So, we are going to be reviewing academic data since March 16th." The Parent confirmed this and added clarification that data was needed from all the academic packets that were submitted to during remote learning (including packets that were provided to the Student by School).

41. On August 21, 2020, the IEP Team met again. During the meeting, shared academic data with the Parent and the District about the Student's current progress on grade level standards in English-language arts and math, as well as academic data about the Student's progress towards her IEP goals.⁸
42. Around the 25-minute mark of the audio recording of the August 21, 2020 meeting, the Parent asked to see behavioral data. The Interim Director for pointed out that the Parent did not previously request behavioral data during the August 14, 2020 meeting, but the Interim Director also confirmed that behavioral data had been collected on a daily basis throughout the school year and throughout remote learning. The Interim Director offered to work with BCBA to turn the Student's data into a behavioral graph, and she offered to provide behavioral data to the Parent within 3 business days. In the absence of actual behavioral data, the Interim Director then offered her best understanding/summary of the Student's behavioral progress; "I know there was not a lot of target behavior observed during those [remote learning] sessions." See Audio for IEP Team Meeting on August 21, 2020.
43. The Parent again expressed frustration that the Student was being discharged from due to a decision that occurred outside the IEP process and without any ability to restart the Student's transition plan to School. The

⁸The audio recording from the IEP Team Meeting on August 21, 2020 indicates that the academic data requested by the Parent on August 14, 2020 was sent to the District by prior to the IEP meeting. However, due to miscommunication about who was going to share the data with the Parent, the Parent was not provided with the academic data until it was emailed to her directly during the IEP Team meeting. The IEP Team then proceeded to analyze the academic data line-by-line, providing the Parent with an opportunity to question or comment upon each component of the data. Although she was given multiple opportunities to do so by the Director of Special Services, the Parent did not raise any specific concerns or disagreements with the academic data that was reported by on August 21, 2020.

Parent felt that the Student's termination was contrary to the IEP Team decision on April 27, 2020, where the IEP Team agreed to reconsider the Student's possible transition to a less restrictive environment upon the reopening of schools after the COVID-19 pandemic. The Parent also felt that [redacted] was improperly discharging the Student without sufficient consideration of the Student's behavioral data or involvement from the BCBA. The Director of Special Services also asked [redacted] staff to reconsider whether they would participate in the Student's transition to a less restrictive environment. The Interim Director, on behalf of [redacted] staff, expressed a willingness to communicate with new staff at [redacted] School about the Student, but remained unwilling to delay the Student's discharge date past the conclusion of ESY on August 31, 2020. The Interim Director also stated that it would be best to minimize the number of transitions for the Student. See Written Notice from the IEP Team Meeting on August 21, 2020; Audio for IEP Team Meeting on August 21, 2020.

44. The complaint investigator also interviewed [redacted] Board-Certified Behavioral Analyst (BCBA), who reported that she works for [redacted] full-time to provide BCBA consultation services for all [redacted] students. The BCBA explained that [redacted] staff collect daily behavior data on every student, and she confirmed that the Student's behavioral data was consistently collected throughout the Student's enrollment at [redacted], except for the time periods when [redacted] staff was unable to physically observe the Student due to the COVID-19 pandemic or due to the Parent's decision not to access ESY services between July 15, 2020 and August 17, 2020. According to the BCBA, behavioral data was collected and analyzed about the Student during online remote learning sessions between May and July 2020, with a focus on behavioral "outbursts." The BCBA concluded that no behavior outbursts were observed or reported for the Student during remote learning. While the Student may have displayed other interfering behaviors during remote learning sessions, such as inattention, chatter, walking away from the computer, or hiding under the table, those behaviors would not be considered "outbursts" or behavior regressions for the purposes of behavioral data collection. Instead, the BCBA considers those kinds of behaviors as common for many students engaging in online learning programs. Rather, the Student's behavior notations would only reflect the types of disruptive behaviors that initially qualified the Student for [redacted] services, such as aggression, disrobing, physical destruction of property, bolting, etc.
45. The Director of Special Services and the Parent agreed to meet on August 24, 2020 to discuss placement options and additional behavioral data to be collected from [redacted]. While the requested data was provided to the Parent and the District, the Parent maintains that [redacted] behavioral data is not an accurate reflection of the Student's behavior during remote learning sessions and is not a reliable indication that the Student's needs can be met by a less restrictive environment.
46. The Student's ESY services with [redacted] concluded on August 31, 2020.

47. On September 1, 2020, the Parent’s present complaint was received by the Department of Education.
48. September 10, 2020 was the start of the Scarborough School District’s academic calendar for 2020-2021. See Response to Complaint Investigation #21.008C, submitted by the District on September 22, 2020; see also, Scarborough School District’s Amended School Calendar for 2020-2021. The District concedes that the Student was not receiving educational services at this time due to delays in scheduling the Student’s IEP Team meeting, as well as efforts by the District to reinstate the Student’s “stay-put” placement at . See Response to Complaint Investigation #21.008C, submitted by the District on September 22, 2020
49. On September 15, 2020, the Student’s IEP Team reconvened, and based on discharge of the Student, the Team agreed that the Student’s LRE was School. The Team agreed to reinstitute services from the Student’s transition plan in March 2020, and a remote learning plan with School was developed as part of the new transition plan. See Written Notice for IEP Team Meeting on September 15, 2020.
50. More specifically, the IEP Team determined that the Student was entitled to 24 hours per week of Specially Designed Instruction, 60 minutes per week of Speech Services, 30 minutes per week of Social Work Services, 30 minutes per week of Speech/Social Work Co-treatment, 90 minutes per week of Occupational Therapy Services, 30 minutes per week of BCBA consultation services, and special transportation services.⁹
51. The IEP team also determined that the Student’s Individualized Remote Learning Plan (“IRLP”) as administered by School would include 30 minutes per day of Specially Designed remote instruction, 30 minutes per week of Speech Services, 30 minutes per week of Social Work Services, 30 minutes per week of OT, and 30 minutes of BCBA consultation services.
52. Notably, the Student’s IRLP adopted by the IEP Team on September 15, 2020 is similar, but not identical, to the remote learning plan previously administered by that was adopted by agreement of the IEP Team on April 27, 2020. That remote learning plan also included 30 minutes per day of Specially Designed Instruction. However, the previous plan included more Speech Services (2 x 30 minutes per week) and more Social Work Services (2 x 30 minutes per week). The previous plan also included the possibility of OT Services up to 2 x 30 minutes per week, depending on the availability of the family. Although BCBA services were not specifically outlined in the previous plan, the Student was receiving BCBA consultation services at because all students benefit from consultation services with full-time BCBA.

⁹ This was the same level of Special Education services established in the Student’s IEP amendment effective on March 12, 2020 to support the Student’s transition from to School.

53. According to the Student's IEP, dated September 15, 2020, the Student's IRLP with School took effect on September 23, 2020. Accordingly, the Student missed nine academic days of remote learning between September 10, 2020 and September 23, 2020.
54. According to both Written Notice and the Parent's interview with the complaint investigator, the Parent felt strongly that a fully-remote learning plan with School would be the least disruptive way to transition the Student into a regular school routine at School. Additionally, the Parent expressed to the complaint investigator a number of personal concerns about in-person learning at School, which is why the Parent opted for a fully-remote learning plan, rather than a hybrid or in-person plan during the COVID-19 pandemic.
55. On September 21, 2020, the District issued a Written Notice for an agreement to amend the Student's IEP without a team meeting. The notice corrected an error on the IEP amendment from April 2020. Although the Student's IEP was amended in April 2020 to reflect the Student's change in educational placement back to , the Behavioral Specialist Consultation Services with the Student's Board-Certified Behavioral Analyst (BCBA) were not reverted back to previous the out-of-district placement times. The Written Notice from September 21, 2020 states that the Parent raised a concern about this issue on August 31, 2020, and the Parent also raised this issue in the present complaint, filed with the Department of Education on September 1, 2020.

DETERMINATIONS

Allegation #1: The District did not adequately involve the Parents as equal participants in the IEP decision-making process because: (a) IEP meetings were held on July 23, 2020 and August 3, 2020 without parental participation; and (b) the IEP Team made a placement decision without properly considering the Parents' concerns. MUSER VI(2)(I); MUSER IX(3)(C)(1)(b); MUSER X(2)(B); 34 CFR 300.501(c).

COMPLIANCE FOUND.

Parents are key players in the IEP Team process. MUSER VI(2)(I) outlines the IEP decision making process as follows:

“The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding: (1) the children's needs and appropriate goals; (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) the services needed to support that involvement and participation and to achieve agreed-upon goals. **Parents are considered equal partners** with school personnel in making these decisions, and the IEP Team must consider the parents’

concerns and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.” Id. (emphasis added); see also MUSER VI(2)(B)(I).

Additionally, MUSER IX(3)(C)(1)(b), states that the IEP Team must consider “the concerns of the parents for enhancing the education of their child.”

It is abundantly clear from all documentation involving the Student’s special education services that the Parent was a key member of the Student’s IEP Team. The Parent’s perspective is carefully documented in all Written Notices, and the decisions made by the IEP Team were largely informed by the Parent’s concerns and perspectives. Almost every member of the IEP Team who was interviewed by the complaint investigator described the Parent as being incredibly knowledgeable about the Student’s educational needs and exceptionally thoughtful and creative about how the Student’s providers might be able to better communicate with the Student. The Parent’s interview with the complaint investigator have further confirmed those sentiments about the Parent’s value to the IEP Team process.

After the Parent emailed her concerns to Director of Special Services on July 15, 2020 about the delivery of the Student’s remote educational services, the District acted quickly to schedule an IEP Meeting on July 23, 2020. When the Parent did not attend the scheduled meeting on July 23, 2020, the IEP meeting was not held in the Parent’s absence.¹⁰ Instead, the District scheduled another IEP Team meeting for August 3, 2020, providing sufficient advanced written notice to the Parent for the new meeting date, in hopes that the Parent would attend the meeting and further describe her concerns and/or proposed solutions to the Team.

According to Written Notice from the August 3, 2020 IEP Team meeting, when the Parent did not attend the rescheduled meeting, the IEP Team discussed the concerns raised by the Parent via email, and the IEP Team declined to make any decisions impacting the Student’s educational services in the Parent’s absence on August 3, 2020. Instead, after the August 3, 2020 meeting, the Director of Special Services contacted the Parent again via email and mail, seeking clarification about the types of academic testing

¹⁰ See Allegation #6 below for discussion about the District’s obligation to comply with the seven-day advanced written notice requirement for scheduling IEP Team Meetings.

that the Parent was requesting. The Director of Special Services was eventually able to reach the Parent by email on August 6, 2020. Once the Parent clarified the changes she sought, the District issued a Written Notice without an IEP Team meeting, dated August 7, 2020, noting the Parent's specific request for reading and math academic testing "once given CDC guidelines and school protocols can safely conduct in-person testing." The IEP Team meetings on July 23, 2020 and August 3, 2020 were conveyed by the District to address the Parent's concerns and elevate the Parent's voice in the IEP decision-making process, not to exclude the Parent.

With respect to placement decisions, MUSER further emphasizes the critical nature of parental participation. "In determining the educational placement of a child with a disability...each SAU must ensure that the placement decision is made by a group of persons, **including the parents**, and other persons knowledgeable about the child..." See MUSER X(2)(B) (emphasis added); see also 34 CFR 300.501(c) ("Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.").

In the present case, the Student's placement change did not occur in the normal course. Rather, _____, as a special purpose private school, determined outside the IEP process that the Student was no longer eligible for services in her current educational program after August 31, 2020. During IEP Team Meetings on August 14, 2020 and August 21, 2020, the Parent and the Director of Special Services, on behalf of the District, both attempted to persuade _____ staff members to reconsider inflexible position about the Student's discharge from the program. _____ refused to reconsider their decision, citing _____ conclusion that the Student did not require the high-level of services provided at a locked day-treatment facility, their on-going communication difficulties with the Parent, and their belief that discharge from _____ would minimize the number of educational transitions for the Student.

Although MUSER has no specific provision limiting the ability of a special purpose private school to discharge special education students outside the IEP process, best practices would certainly dictate that determinations about placement for current students at all schools, even special purpose private schools, be conducted within the intentionally collaborative and highly-structured IEP Team process. Here, as a result of

independent decision to discharge the Student, the IEP Team was forced to make a placement change because _____ became unavailable to the Student after August 31, 2020. _____ decision to discharge the Student also limited the IEP Team’s ability to craft a thoughtful transition plan of the same quality as the Student’s transition plan to _____ School in March 2020.

However, despite these frustrating circumstances, the District took every opportunity to facilitate equal parental participation in the ensuing placement decision; the District convened three additional meetings of the IEP Team (on August 21, 2020, August 24, 2020, and September 15, 2020) to review academic and behavioral data requested by the Parent, to consider a full-range of placement options for the Student, and to develop an appropriate remote learning plan for the Student. While the Parent was not afforded input into _____ independent decision to discharge the Student from her educational placement, the Parent was adequately involved as an equal participant in the IEP decision-making process that occurred subsequently. As such, the District had not violated MUSER X(2)(B).

Allegation #2: The District did not ensure that the Student’s educational placement decision was made by a group of persons, including the parents, and other persons knowledgeable about the child. MUSER X(2)(B). More specifically, (a) the District did not properly excuse necessary IEP Team members who were absent from meetings. MUSER VI(2)(F); and (b) the membership of the IEP Team during meetings on August 14, 2020 and August 21, 2020 did not satisfy regulatory requirements because the IEP Team did not include a special education teacher or special education provider who was knowledgeable about the child. MUSER VI(2)(B)(3); MUSER X(2)(B).
COMPLIANCE FOUND.

The IEP Team must include, “not less than one special education teacher or, where appropriate, not less than one special education provider (licensed or certified special education provider). See MUSER VI(2)(B)(3). Additionally, MUSER X(2)(B) states that, “In determining the educational placement of a child with a disability...each SAU must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child...” Id. MUSER VI(2)(F) outlines the proper procedure for excusing a member of the IEP Team who is unavailable to attend a scheduled meeting (with parental consent).

The IEP Team Meetings on August 14, 2020 and August 21, 2020 included a special education teacher from . The teacher in attendance had not worked with the Student during the 2019-2020 school year or during remote learning sessions during the COVID-19 pandemic. However, the teacher was familiar with the Student, having served as her educational technician during the previous school year. Additionally, the teacher had been assigned to take over the role of special education teacher for the Student in mid-July. While the Student did not access her remote learning ESY services after July 15, 2020, her new special education teacher had taken over the Student's files, prepared for remote learning sessions (that the Student never attended), and conferred with the Student's prior special education teacher. Because this new teacher was a special education teacher with knowledge about the Student, there was no violation of MUSER VI(2)(B)(3) or MUSER X(2)(B). Additionally, there was no need for the Student's former special education teacher to be excused in accordance with MUSER VI(2)(F).

Allegation #3: The IEP Team did not revise the Student's IEP to address her lack of expected progress toward annual goals and her anticipated needs. MUSER IX(3)(D)(1)(b). Specifically, the District did not ensure that data was collected about the Student's progress. Without sufficient tracking data about the Student's gains and/or regressions, the IEP Team did not revise the Student's IEP as appropriate to address the Student's needs. MUSER IX(3)(D)(1)(b). **COMPLIANCE FOUND.**

A free appropriate public education ("FAPE") is an education "specially designed to meet the unique needs of the handicapped child, support by such services as are necessary to permit the child the benefit from the instruction." *Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist., Westchester Cty v. Rowley*, 458 U.S. 176, 188-89 (1982). In *Andrew F. v. Douglas Cty. Scho. Dist.*, 137 S.Ct. 988 (2017), the Court emphasized that IEPs for children with disabilities must take into account the individual and "unique circumstances" of the child. *Id.* at 999 (citing *Rowley*, 458 U.S. at 207). IEPs must be reasonably calculated to enable the child to receive education benefits. *Id.*

Andrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988 (2017) held that each child's educational program must be appropriately ambitious in light of the child's unique circumstances. *Id.* at 999.

In conjunction with _____, the District provided the Parent (and the IEP Team) with consistently collected academic and behavioral data regarding the Student's progress towards her annual goals. Although the Parent has expressed significant, ongoing concerns about the accuracy of _____ academic and behavioral data about the Student, this disagreement is not about whether _____ was collecting and sharing data with the IEP Team about the Student's academic or behavioral progress, but about whether or not the Parent agreed with the judgments made by _____ staff members who interpreted the Student's day-to-day academic performance and made behavioral observations about the Student's emotional regulation capabilities. The documentation provided by the District for this complaint investigation demonstrates a steady commitment by the servicing school to collect and analyze data for the purposes of measuring the Student's gains and possible regressions. The documentation also demonstrates consistent efforts on the part of the District to seek out additional information from the servicing school to address the Parent's concerns as directly as possible.

Whenever the Parent raised an issue about whether the Student was making true progress towards her IEP goal, the District, the servicing school, and the IEP Team all displayed a willingness to adjust the Student's IEP goals, reconsider the implementation approach, collect/provide more specific data about the Student, and/or conduct additional assessments to measure progress. Oftentimes, however, the IEP Team or the staff at the servicing school struggled to understand the specific concerns of the Parent, even when the Parent felt that her critique was clear.

The IEP Team Meeting that occurred on August 21, 2020 is an example of the thorough process that was repeatedly utilized by the Student's IEP Team to analyze academic data to measure the Student's expected progress toward her goals (or lack thereof). First, on August 14, 2020, the Parent requested specific academic data between March 2020 and July 2020 regarding the Student's progress towards her goals. The District and _____ provided that information during the meeting on August 21, 2020. The Director of Special Services then took the time during the IEP Meeting to review each component of the academic performance summary, seeking input from the Parent or other IEP Team members about whether the data reflected the views and experiences of the Parent and/or other IEP Team member's understanding of the Student's present levels

of academic performance or current progress towards her measurable goals. When the Director of Special Services reviewed each component of the Student's progress one-by-one, the IEP Team, including the Parent, appeared to be in largely in agreement about the accuracy of the information collected and the conclusions being drawn about the Student's progress (or lack thereof) from that information.

Because the IEP Team did regularly consider the Student's academic and behavioral data to assess whether the Student was making expected progress towards her annual goals, the District is found to be in compliance with respect to Allegation #3.

Allegation #4: The District did not fully implement the Student's IEP regarding her transition plan. MUSER IX(3)(B)(3); MUSER IX(3)(E). **NO FINDING ISSUED.**

The Parent expressed frustration and disappointment because the Student's transition plan from March 2020 from _____ to _____ School was not completed as originally planned, first due to staffing changes when an educational technician unexpectedly resigned at _____ School and then due to the untimely, state-wide termination of in-person instruction due to the COVID-19 pandemic. However, this allegation by the Parent was previously addressed in full by Complaint Investigation #20.074C. The prior investigation determined, "The School District did not disregard the IEP Team consensus, the Parent's concern, or the transition timeline, by proposing an extension of two days to the Student's transition." See Complaint Investigation Report #20.074C, dated May 12, 2020.

Additionally, MUSER IX(3)(E) refers to secondary transition plans, and therefore, this regulation is inapplicable to the Student. As such, no finding is issued regarding Allegation #4.

Allegation #5: The District did not provide the Parents with access to the Student's education records, particularly behavior tracking data, prior to IEP meetings on August 14, 2020 and August 21, 2020. MUSER XIV(3). **COMPLIANCE FOUND.**

MUSER XIV(3) provides that each school administrative unit must "permit parents to inspect and review any education records relating to their child which are collected, maintained, or used" by the District in connection with the special education regulations. The regulation further provides that the District must comply with a request

without unnecessary delay, “before any meeting regarding an IEP”, and in no case more than 45 days after the original request was made. Id.

The Parent alleged that [redacted] did not provide her with access to specific, additional behavioral tracking data for the Student prior to IEP meetings on August 14, 2020 and August 21, 2020. However, there was no indication from documents and/or audio files submitted during this complaint investigation that the Parent requested additional behavior tracking data for the Student prior to the IEP meetings on August 14, 2020 and August 21, 2020. At the August 14, 2020 IEP Team Meeting, after learning that [redacted] had made an independent decision to discharge the Student, the Parent requested additional data to aid the IEP Team in making an alternative placement determination. The Parent specifically requested academic data and assessments related to work the Student completed between March 2020 and July 2020. The Interim Director of [redacted] clarified the type of data the Parent sought, and the Director of Special Services confirmed at the conclusion of the IEP meeting that the Parent was seeking academic data. It was not until the meeting on August 21, 2020 that the Parent requested additional behavioral data collected by [redacted]. This data was later provided by [redacted] in a timely fashion. As a result, there is no finding of non-compliance with respect to Allegation #5.

Allegation #6: The District did not notify the Parents of the IEP Team Meeting on July 23, 2020 at least seven days prior to the meeting to ensure that the Parents would have an opportunity to attend. MUSER VI(2)(A); MUSER VI(2)(H)(1)(a). **COMPLIANCE FOUND.**

MUSER VI(2)(A) requires the SAU to provide that “one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including, notifying parents of the meeting early enough, *at least 7 days prior to the meeting*, to ensure that they will have an opportunity to attend.” Id. Parents may waive the requirement for seven days notice if they choose to participate in an IEP meeting that is scheduled quickly or that was not properly noticed.

Although the District admits that the Parent was not provided with seven days prior notice of the IEP Team Meeting on July 23, 2020, the District rescheduled the meeting upon realizing that the Parent was not in attendance. This is precisely the

response required by MUSER upon the District's realization that the Parent is absent and therefore cannot waive the requirement for seven days advanced notice. The rescheduled IEP Team meeting occurred on August 3, 2020, and documentation confirms that the Parent was provided with seven days advanced notice of the August 3, 2020 meeting.

Allegation #7: The District did not provide sufficient written notice to the Parents at least 7 days prior to a proposed change in the provision of the Student's free appropriate public education. 34 CFR 300.503(a)(1); MUSER App. At 220. Specifically, the District did not provide written notice that the Student's board-certified behavior analyst (BCBA) services would be terminated on April 28, 2020. **COMPLIANCE FOUND.**

The IDEA requires advanced written notice any time a District proposes to change the provision of educational programming for a child. See 34 CFR 300.503(a)(1). Maine requires that parents be informed "at least 7 days prior" to a proposed change in the provision of the Student's free appropriate public education. See MUSER App. at 220.

On April 27, 2020, the Student's IEP Team determined by agreement that the Student's IEP and programming "should return to the out of district setting, . ." See Written Notice, dated April 27, 2020. All students who attend receive BCBA consultation services as needed through full-time BCBA. Although the Student's IEP was not specifically amended to reflect a change in BCBA consult services, it was merely a clerical failure to not adjust the Student's IEP and programming as it had previously been established by the Student's IEP dated September 26, 2019.

During an interview with the complaint investigator, BCBA confirmed that the Student's BCBA consultation services were never terminated or interrupted when the Student returned to . Rather, the BCBA continued to consult with the teachers who worked with the Student remotely and continued to collect behavioral data about the Student's progress towards her goals. Where no termination in services occurred, there was no need for advanced written notice of a termination of BCBA services. Instead, the District simply made a clerical error on the Student's IEP. A Written Notice was eventually issued on September 21, 2020 to correct the error and clarify that no BCBA consultation services were disrupted. Therefore, the District did not fail to provide

advanced written notice about a proposed change in the provision of the Student's free appropriate public education, and compliance is found with respect to Allegation #7.

Allegation #8: Since the start of the 2020-2021 school year, the District has not implemented the Student's IEP because the Student is not receiving educational services. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND.**

Children in Maine, ages birth to twenty who have disabilities, may not be excluded from the benefits of services to which they are entitled under the IDEA. 34 CFR 300.34; MUSER XI. The Department of Education shall ensure the provision of appropriate services regardless of the nature and severity of the child's disability of developmental delay. MUSER I(2).

Federal and State law provide that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. See 34 CFR 300.101; 34 CFR 300.531; MUSER I. A failure to implement a student's individualized education plan can result in a denial of FAPE. See *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (2017). However, not every deviation from an IEP results in a denial of FAPE. See *L.C. and K.C. v. Utah State Bd. Of Ed. et al.*, 43 IDELR 29 (10th Cir. 2005).

MUSER IX(3)(B)(3) provides, "All identified children with disabilities shall have a current Individualized Education Program in effect at the start of each school year. If a school unit is unable to hire or contract with the professional staff necessary to implement a child's Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options."

The District concedes that the Student's ESY program ended on August 31, 2020, and the first day of school in the District was September 10, 2020. Due to delays in scheduling, the Student's IEP Team did not convene until September 15, 2020, and her Individualized Remote Learning Plan ("IRLP") was not implemented until September 23, 2020. As such, the Student missed nine academic school days in her remote learning program between September 10, 2020 and September 23, 2020.

Allegation #9: The District did not maintain the Student’s last agreed upon educational placement (“stay-put”) during the pendency of this State complaint investigation. MUSER XVI(20)(A). **COMPENSATORY RELATED SERVICES REQUIRED.**

MUSER XVI(20) sets forth: During the pendency of any...state complaint investigation request...unless the Department or SAU and the parent of the child agree otherwise, the child involved in the hearing request must remain in his or her current educational placement.” As interpreted by *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1 (1999), the school district must continue to implement the last placement “that the parents and the educational authority agreed to be appropriate.” *Id.* at 10.

In the present case, the last agreed-upon educational placement for the Student became effective on April 27, 2020. Written Notice issued on April 27, 2020 detailed as follows: “given the interruption in the transition plan due to the COVID-19 school closure, [the Student’s] programming will return to the out of district setting, . This will include the remote learning plan services and ESY. The team will reconvene when schools are reopened to discuss the development of the transition plan back to Scarborough Schools.”

The Written Notice, dated April 27, 2020, also set forth the Student’s remote learning plan, including one 30-minute session of academic instruction per day (to be increased as appropriate), two 30-minute sessions per week of Speech Services, two 30-minute sessions per week of Social Work Services, and the possibility of two 30-minute sessions per week of OT services once new OT reached out to the family and discussed the best method to integrate OT into the Student’s remote learning schedule. See Written Notice, dated April 27, 2020.

There is no question that was the last agreed upon educational placement for the Student at the time the Parent filed the present complaint on September 1, 2020. The Student’s IEP Team never reached an agreement that the Student was ready to be transitioned from to a less restrictive environment, rather the need for a new educational placement was dictated by independent determination to discharge the Student from their program.

Importantly, the District made great efforts to re-implement the Student’s “stay-put” placement at by seeking advice from the Department of Education, by asking

to reconsider the provision of remote learning services, and by initiating discussions with the IEP Team regarding the possibility of another comparable program option for the Student when [redacted] became unavailable. Due to the fact that [redacted] is a special purpose private school, and because MUSER does not compel special purpose private schools to comply with “stay-put” regulations, the District’s efforts to re-establish the Student’s stay-put placement were unsuccessful. Of course, the District’s efforts regarding “stay-put” were fully sufficient in this regard.

However, the next best alternative to reinstating the Student’s placement at [redacted] would have been for the District to ensure that the Student’s Individualized Remote Learning Plan (“IRLP”) at her new educational placement (as determined to be [redacted] School by her IEP Team on September 15, 2020) reflected the same level of special education and related services as her previous remote learning plan. Considering that the Student was engaged in remote learning in her “stay-put” placement at [redacted], the District should have ensured that the Student had access to similar remote learning opportunities. The Student’s remote instruction plan at [redacted] offered more related services, including an additional 30 minutes per week of Speech, Social Work, and OT Services. These services are owed to the Student as they would have been provided by her “stay-put” placement.

CORRECTIVE ACTION

As a result of the nine-day gap in the provision of the Student's education services at the start of the 2020-2021 school year, as well as the reduction in the Student's related services in her Individualized Remote Learning Plan ("IRLP") at School (despite "stay-put" regulations), the District must provide a total of 4.5 hours of compensatory Specially Designed Instruction to the Student, 2.5 hours of compensatory Speech Services, 2.5 hours of compensatory Social Work Services, and 2.5 hours of compensatory OT Services. The District must provide compensatory education instructional hours that address the Student's academic, functional, and behavioral goals. The compensatory services must be provided in addition to the Student's existing educational program. Specially Designed Instruction must be provided by a certified special educator or an educational technician with oversight by a certified special educator specifically for these services. **The District will choose the providers and provide documentation of the provision of these services to the Department by January 31, 2021.**

Dated: October 30, 2020

Julia N. Pothen, Esq.
Complaint Investigator