

Complaint Investigation Report
Parents v. RSU #40
Complaint 21.022C
Complaint Investigator: David C. Webb, Esq.
December 30, 2020

I. Identifying Information

Complainant: _____, Parents

Respondents: RSU 40; Steve Nolan, Superintendent, RSU #40; Karen Brackett, Special Education Director, RSU #40

Student: _____
DOB _____

II. Summary of Complaint Investigation Activities

On October 29, 2020, the Maine Department of Education received this complaint. The Complaint Investigator was appointed on November 5, 2020.

The Complaint Investigator received 177 pages of documents from the Parents and 88 pages of documents from the District. Interviews were conducted with the following people: _____, Parents; Karen Brackett, Director of Special Services; Casey Lufkin, Assistant Director of Special Services; Carrie Kern, Speech and Language Pathologist (“SLP”); Jan Birk, SLP; Abby Zaid, Board Certified Behavior Analyst (“BCBA”) Sheila Libby, Special Education Teacher, _____ School (“_____”); Marissa Eldridge, Occupational Therapist; Alton Robbins, Board Certified Assistant Behavior Analyst (“BCaBA”); and Jed Schwalm, Executive Director _____, Inc (“_____”).

III. Preliminary Statement

The _____ year-old student (“Student”) resides with his family in _____, Maine. He is the educational responsibility of RSU #40 (“District”) where he qualifies for special education and related services as a student with Autism.

This complaint was filed by the Student’s parents (“Parents”) alleging that the District violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the Parents’ complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on November 6, 2020 alleging seven separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on November 13, 2020.

IV. Allegations

1. The IEP Team has not developed or revised an IEP that allows the Student to make progress in his goals, denying him a free appropriate public education (FAPE). MUSER IX(3)(A) and (C); MUSER §VI.2.J.(4); *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; RE-1, 2017 WL 1066260 (Mar. 22, 2017);
2. Not fully and adequately implementing the Student's IEP in violation of MUSER §IX.3.B(3);
3. Not adequately considering the concerns of or including the Parents in the IEP decision making process in violation of MUSER §§VI.2 (H) and (I) and IX.3.C(1)(b);
4. Not ensuring that a continuum of alternative placements is available to meet the Student's educational needs or that the Student is placed in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I.
5. Not considering existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c);
6. Not considering whether the Student needs assistive technology devices and services, in violation of MUSER §IX.3.C(2)(e); and
7. Not considering the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a).

The Complaint Investigator reviewed all documents, information, and responses from the parties.

V. **FACTUAL FINDINGS**

1. The Student resides with his family in _____ Maine. He is the educational responsibility of RSU #40 where he qualifies for special education and related services as a student with Autism. The Student has been diagnosed with Autism, ADHD, epilepsy, and a sensory processing disorder.
2. Beginning in the Student's eighth grade year (2018-2019 school year), the Student transferred to _____ a special purpose private school located in _____ Maine pursuant to a determination by his IEP team that due to his cognitive disability and diagnosis of autism he required the services and supports of such a school in order to gain access to functional academic and life skills.
3. At an IEP team meeting held on April 22, 2019, the team determined that the Student would repeat his 8th grade year and would attend _____ through the 2019-2020 school year.
4. The IEP developed for the Student April 22, 2019, provided that the Student would spend 0% of his time with non-disabled children and provided the following:

Special Education and related services:

- Specially designed instruction (“SDI”) 5 times per week for 6.25 hours per day within his special purpose private school setting;

- Extended School Year Services for 4 hours per day for 29 days¹;
- Occupational therapy (OT) consultation, two 30-minute sessions per week;
- Social work services, one 60-minute session per week;
- Speech and language services, two 30-minute sessions per week;
- Speech and language consultation, 30-minutes per week; and
- Transportation services.

Classroom supports and services, supplemental aids, and modifications:

- 1:1 Educational Technician (“Ed Tech”) Support in the special education setting, 6 hours and 15 minutes/day;
 - Independent work space;
 - Opportunities for breaks using functional communication; extended time to complete tasks; visual supports; task analysis; small group instruction;
 - Positive behavioral support plan; and,
 - augmentative and alternative communication device;
5. The Written Notice prepared in connection with the April 22, 2019 IEP team meeting stated, in relevant part, as follows:
 - Alton Robbins, BCaBA at _____, noted that the Student has made a lot of progress being with his peers since he has been at _____. The Student’s SIB (self-injurious behaviors) have decreased significantly, his bolting and aggression have decreased and he is not biting others or pulling hair. Concerns about him exposing himself at school and in public have decreased significantly.
 - Carrie Kern, SLP, said that the Student’s use of his device (Picture Exchange Communication System or “PECS” and iPad) has improved and he has made “a lot of progress.”
 - Marissa Eldridge, OT, noted that the Student is very motivated to complete tasks with her. He is making progress, but still needs some prompting.
 - The Parents were thankful for how well he is doing and how amazing the school is for him. Mom is concerned about _____ school and hopefully _____ will become a _____ school “so he can stay here.”
 6. According to the Student’s Quarter 2, 2019-2020 _____ Report Card, he was making either limited or satisfactory progress towards each of his goals. The report also noted that he was having safer and more successful interactions with peers.
 7. _____ closed due to the COVID-19 pandemic on March 13, 2020. _____ developed a remote learning plan for the Student.² This plan provided, in relevant part:

¹ The Student’s ESY services included Occupational therapy (OT) consultation, 30 minutes per week for 6 weeks; Social work services, 30 minutes per week for 6 weeks; Speech and language services, 30 minutes per week for 6 weeks

² The remote learning plan provided to the complaint investigator is undated.

- Academic programming: all academic materials provided, staff will video conference with Student;
 - Activities of Daily Living (ADL): Parents to be provided with current programming, training videos with staff to provide remote instruction;
 - Behavior IEP Goals: Check in with family three times per day, modified data collection including BCBA several times per week, a supervisor (BCBA, assistant behavior analyst, teacher, Dir Ed.) will monitor BET/BHP³ sessions and provide feedback and plan alterations as necessary. Additionally, an supervisor will check in briefly with Parents as often as practicable for family members, outside direct service provision time on targets and provision of comments;
 - Independent leisure: Provide support to the family regarding schedules of reinforcement for switching from preferred to non-preferred activities, kits sent home each week with novel leisure activities identified as preferred for the Student.
8. An IEP team meeting was held on April 9, 2020 as part of the Student’s annual review and other IEP program/placement changes due to the COVID-19 school closure. At this meeting, the team determined as follows:
- The Student will no longer attend and will transfer to RSU #40 effective immediately;
 - Services will remain the same: SDI 6.25 hours, 5 days/week; OT Services 30 minutes, twice/week for 56 sessions; SLP Services 30 minutes twice/week for 56 sessions; SLP consultation 30 minutes/week; social work services 60 minutes per week for 28 sessions; ESY and BCBA support/consultation;
 - Supplementary Aids, Services and Supports: Day Treatment Setting 6.25 hours/day, 5 days/week; 1:1; LRE 0%
 - Ed. Tech. Support 6.25 hours/day, 5 days/week; independent work space: opportunities for breaks;
 - Academic and functional goals will be updated to reflect his current level skills;
 - Use of functional communication; extended time to complete tasks; visual supports; task analysis; small group instruction; PBSP⁴ & Crisis Plan; AAC⁵ Device.
9. The Written Notice from the April 9, 2020 IEP team meeting noted that the Student “requires the above services and supports in a Special Purpose Private School in order to gain access to functional academic and functional life skills.” It also noted that due the Covid-19 pandemic, “a new IEP will be developed to reflect the Student’s program at [RSU 40]. [The Student] would have finished his 8th grade at but will age out as does not provide educational services for students above 8th

³ Behavior Education Technology/Behavior Health Professional

⁴ Positive Behavior Support Plan

⁵ Augmentative and Alternative Communication

grade. ... He will remain at home for the remainder of the year due to school closures, and the RSU #40 team will develop a home-based program for [the Student] when schools reopen.” The April 9, 2020 Written Notice further stated:

- Carrie Kern, SLP, reported that he's a nonverbal communicator, and communicates mostly through alternative means.
- The OT report stated “he has needs in sensory and motor breaks, in bilateral skills, functional fine motor skills and writing skills.”
- The BCBA stated that “the general curriculum is not a good fit for [the Student] because he is not performing at the regular education academic domains. He is working on managing leisure time, following directions, participating in the community safely, hygiene, and daily living skills.”
- The parents reported that “he is doing well at home while the school is shut down” as a result of the pandemic. The Student “is using his PECS books and working on leisure and functional skills at home.”

10. In an e mail to the Parents dated July 9, 2020, Marissa Eldridge, OT, offered virtual OT services for the Student until ‘in person’ services could be offered. In this e-mail, she said that she could offer “25 minutes over google hangouts where I would walk you and [the Student] through some bodywork, or some fine motor/gross motor games, as long as he can tolerate, as well as consulting with you about any concerns.” In an e-mail dated July 13, 2020, the Parents declined Ms. Eldridge’s offer.

11. An IEP team meeting that was held on August 24, 2020 for the purpose of “periodic review/program development.” At this meeting the team accepted the special education programming provided in the April 2020 IEP, but made the following added determinations:

- The Student’s IEP will “begin as mostly home-based, but with the goal of moving towards an education in the public school setting.”
- The Student will continue to receive SDI daily in the form of 1:1 instructional support which will be abbreviated to begin the school year, with social work services being removed from his IEP; The Student 's educational program will start with sessions spanning in length from 1-2 hours daily, with the intention to slowly build his tolerance for instructional time with new staff members and increasing time at the school; BCBA consultation services (will be provided as needed).
- The Student 's program will work towards opportunities during the week for socialization and/or desensitization in the outdoor, school setting;
- Formalized transition planning services will continue to be solidified at subsequent meetings when deemed appropriate and safe and staffing is secured.
- The Student's program is considered a modified day program and the team will meet within 20 days to discuss his progress and to develop continued opportunities to expand his educational time.

12. At the IEP team meeting was held on August 24, 2020, it was noted in the Written Notice:

- From March-June 2020 remote services were offered for the Student. The family declined as they did not feel that this fit his needs. Consult continued with Speech and the BCBA. During ESY, remote services were offered and the family declined but continued consult with Speech and BCBA.
- The Team agreed that a slow and concerted move to start as a home-based program with parent present on premises, with an eventual goal for the Student to be included into the school.
- The family expressed reservation in moving [the Student] from an educational setting containing one other student to a setting with more students; they indicated that this would be too quick of a move since he has never been matriculated into a public school program and they favored a slow and concerted hybrid program that will develop gradually over time. The family indicated that they do not want the majority of programming to be based on mask protocols and that they would like to maintain [the Student's] low exposure to COVID-19 due to his compromised immune system.
- The team rejected the “exclusive home-based program” in favor of a hybrid model to start so that the Student could get exposure to peers within his community with the goal to attend the school.
- The was rejected in favor of considering another educational model because the parents noted that data did not support progress for the Student in this setting, because of the long commute time, and because it would not allow for the Student to participate in opportunities in his home community.

13. An IEP team meeting was held on September 16, 2020 as part of a periodic review. At this meeting, it was noted as follows:

- The plan was to very slowly work towards having the Student start joining the program⁶ at for specific activities. This plan would start out with the Student receiving in-home programming from a BHP and a supervising Special Education teacher. The Student will also be getting OT services in the home from Marissa. Mrs. Kern will provide Speech services in the home until the end of the month. At that point Jan Birk, SLP, can take over providing the speech services to the Student. Karen Brackett stated that she felt the least restrictive environment would not be a 100% in home program for the Student.

⁶ According to Sheila Libby, the program refers to all special ed programming at the school, which comprises two separate groups-One group is more life skills, more “intensive and functionally based” and the other group involves students have less intensive needs and focuses more on resource level skills to help students in their classes.

- The team proposed and rejected the option for the Student to attend school in person full time at . They also proposed and rejected the option for the Student to enroll in an out of district placement. Both of those options were rejected due to the team agreeing that neither one of those options fit the Student's unique needs. The Occupational Therapist and Carrie Kern, Speech Therapist, will start meeting with the Student soon for services.
- The Student is currently unable to wear a mask due to behavioral and medical reasons, per [the Parents'] report. If he were to attend in person, he would be asked to wear a mask in the classroom. The Student also has a history of trying to pull masks off of other people. These two factors were included in the discussion the team had relating to his programming.
- Karen Brackett voiced that she feels a program that is 100% in the Student's home would not be the least restrictive environment. She would like to work very slowly towards having the Student do some sort of a hybrid schedule.
- The team proposed and approved the idea of hiring a BHP specific for in-home services. Due to the unique needs of the Student and the current proposed plan, a specially trained BHP would be required to adequately meet his needs. A BHP has been hired but cannot start until October.
- The Parents stated that remote services have not been successful nor did they feel they are appropriate for him. They expressed that the work that was sent was not designed with his unique needs in mind.
- Jan Birk, SLP, is able to provide Speech and Language teletherapy to the Student and see him once a week at if the family agrees. Abigail Zaid, BCBA has recently joined the district and will fill the vacant specialist spot on the Student 's team.
- The Parents requested to have the district contract with Carrie Kern and Alton Robbins. Karen Brackett stated that the district has qualified employees to provide Speech and BCBA services so RSU40 will not be contracting with Carrie and Alton.
- Ms. Brackett indicated that Ms. Kern would continue to work with the Student until she left the District's employ, but then speech services would be transitioned to Ms. Birk, the SLP who works with students in the program. Additionally, she offered to work with the Student individually at the school should the Parents prefer in person services.

14. An IEP team meeting was held on October 16, 2020 as part of a periodic review. At this meeting, it was determined as follows:

- The amount of SDI will be adjusted from "Slow duration to increase to 4 hrs/day" to "6 hours per day."
- The special education setting in section 7 of the IEP will be amended to "a home/special education setting."

- BCBA consultation will be amended to 60 minutes per week.
 - Occupational therapy goals will be adjusted to include occupational therapist support with toileting, teeth brushing, meal skills, washing dishes, and preparing preferred/non-preferred food. The OT handwriting goal will be discharged from the plan.
 - Compensatory services will be reviewed and discussed on or after June 21, 2021.
15. In the Written Notice prepared in connection with the October 16, 2020 IEP team meeting it was noted that the Parents “were happy with how the Student has been seeming to be interested in learning and that things are starting to be put into place to have an intensive in-home educational program.” However, it was noted that the Parents felt that a “lot more time needs to be put into developing a program for him.”
16. In an e-mail to members of the Student’s IEP team dated November 3, 2020, the Student’s mother shared that she was pleased that the Student was making progress with regard to his relationship and comfort level with Brian, his BHP.
17. An IEP team meeting was held on November 6, 2020 as part of a periodic review. At this meeting, it was noted in relevant part as follows:
- The District hired its own BCBA (Abigail Zaid) to provide services to students in grades 7-12 across the District. Ms. Zaid informed the District on November 12 that her last day was November 13. The District is currently exploring all avenues to fill this position but does not presently have anyone to provide BCBA consultation.
 - An educational technician/BHP is working with the Student for three hours a day. The special education teacher from the _____ program, Ms. Libby, works directly with the Student in his home for two hours a week on Wednesday.
18. In an interview with the Complaint Investigator, the Parents stated:
- The Student’s mother is currently the Assistant Superintendent at RSU #40 and a former special education teacher; the Student’s father is a lobsterman and has also been very active in the Student’s care and education;
 - The family moved to _____ Maine in 2017 and the Student transferred to _____ in the spring of 2018. Both parents stated that they have been “really pleased” with the programming and services offered by _____.
 - At an IEP team meeting in April 2020, the Parents agreed that the Student would return to RSU #40 in light of the COVID-19 school closure and the Student’s entry into the ninth grade during the 2020-2021 school year. The Parents understood that the team had determined that the Student would have an “at-home” placement to deliver services, which they feel is the most appropriate for him in light of his circumstances and challenges. They have a good physical space for the Student at their home, with a separate apartment which can be used for meeting with the Student for instruction and support.

- They do not dispute the level of specially designed instruction or supports for the Student within his IEP, rather, their concern is focused on where the services are provided to the Student. Additionally, they have concerns with regard to the provision of some of the Student’s services and supports since he returned to RSU #40 last spring. They were especially taken aback at the August 2020 IEP team meeting when the IEP team modified the Student’s placement goals to have the Student return to in-person classes at the school.
- They are not opposed to having the Student physically attend the school in person at some point, however they disagree with the District’s timetable for his attendance.
- They “don’t believe” they saw the remote plan prepared by in the spring of 2020⁷. In any event, they feel that a remote learning plan wouldn’t work as the Student doesn’t have ability to take part in such a plan.
- They understand that some staff were not willing to work at home, but they don’t feel that the District took sufficient steps to find staff that would be willing to work with the Student at the family home. They contend that it is not safe for the Student to wear a mask due to his sensory processing issues and epilepsy. They do not feel that it is a risk for staff to work in the home as the family has been in quarantine and isolated from others for many weeks and is very low risk for spreading the virus.
- They feel that the Student should receive compensatory educational services to make up for his lost time with programming and supports since last spring.

19. In an interview with the Complaint Investigator, Jed Schwalm, BCBA and Executive Director of , stated as follows:

- The Student attended from March 2018 to March 2020.⁸ While developed a remote learning plan for the Student, he doesn’t believe that the Student can benefit from a remote program due to his complex deficits. However, he believes that the Student did benefit from the virtual consultative services provided to the Parents to help them with exercises and programs that they could use with the Student.
- While provided some “in-person” services during the summer of 2020, he was not asked by the District or Parents about whether the Student could return in order to obtain services. For any student attending in person, there is a strict policy that all students and staff wear masks and practice social distancing.
- He believes that while ideally the Student would benefit most from a special purpose private school setting, he would be able to receive an appropriate

⁷ Included with District documents “exhibit E.”

⁸ , located in Maine, has been in operation for four years and has approximately 10 students. The Student was scheduled to conclude his placement at at the end of the 2019-2020 school year in June, but was transferred back to RSU #40 in March due to the COVID-19 school closure.

program at a public school provided he received at least 20 hours per week of BCBA support, along with the other supports identified in his IEP.

- He agrees that the discontinuation of the Student’s social work services was appropriate, and that the Student could receive his social work skills through his work with his BCBA.
- The District’s current “home school” approach of gradually increasing the number of hours that the Student obtains his services is the “right approach” at this point, especially in terms of the Student’s tolerance to receiving instruction.

20. In an interview with the Complaint Investigator, Carrie Kern, a former Speech Language Pathologist (SLP) with the District, stated as follows:

- She has 25 years of experience, including certification as a special education teacher. She has particular expertise and experience working with children with autism.
- She started working with the Student in November 2018, and resigned her position with the District at the end of September 2020 to work in a neighboring school district.
- She provided services to the Student while he attended . She feels that the services the Student received while he attended were “spectacular.”
- When she started working with the Student, he was using an assistive technology device on his iPad called a Language Acquisition through Motor Planning program (LAMP). She learned that the Student had trouble with using the computer, so he switched to the Picture Exchange Communication System (PECS) which did not involve a computer and was easier for the Student to use. She said that she coordinated with another BCBA at regarding these changes and the District responded in a timely basis with providing the new system for the Student.
- After the COVID-19 school closures in the spring of 2020, she provided a consultation to family over video every week. While these consultations were for the Parents, she does not feel that the Student is a good candidate for video services.
- During the summer of 2020, she and the Student’s BCBA tried to piecemeal an effective program for the Student, but that she did not provide in-person services for summer. She said that she provided in-person services to the Student at his home for approximately two weeks in September, before she resigned.
- While she is not sure if anything could have been done differently during the spring of 2020, she felt that it would have been appropriate for the District to reconsider in-person services at for summer services as he had not received direct services in the spring and his program at was so effective. Even though she understands that there were no other local options, she feels that the District could have done more to plan and investigate alternatives.
- The Student’s low ABLLS⁹ scores are unrelated to the Student’s lack of receiving programming in the Spring and Summer of 2020.

⁹ Assessment of Basic Language and Learning Skills

- She agrees that the changes made by the IEP team at the meeting in August 2020 constituted a “change” in the District’s position regarding the Student’s placement goals. While she doesn’t think that the Student is sufficiently prepared to attend the school program in person at this time, she does not think it is “wrong” to consider where he could be served within the least restrictive environment.
21. In an interview with the Complaint Investigator, Jan Birk, the District’s Speech Language Pathologist assigned to the Student, stated as follows:
- She previously worked with the Student while he attended in October 2018, before Carrie Kern took over as his SLP. She was then reassigned to the Student when Carrie Kern resigned at the end of September 2020.
 - She was chosen to serve as his SLP in light of her experience working with older autistic students and those with more fundamental speech and language issues. She noted that while the District employs two other SLPs, they are assigned to the elementary schools and have experience primarily with students needing language skills for academic work, rather than more functional skills that the Student needs.
 - She understands that the Student’s teacher, OT, BCaBA, and BHP go to the Student’s home; however, she is not willing to provide in-person at home services as she is 66 years old and is within the at risk population for contracting the coronavirus.
 - She has offered to provide teletherapy and feels that the Student could benefit and access his SLP services via video conference by arranging sessions while the Student’s teacher is present. In this model, she would provide coaching and direction to the teacher to provide exercises for the Student, and to help the Student orient himself to the computer.
 - She has offered and remains willing to provide in-person SLP services for the Student at the school. She said that she has suitable private space and she feels that the location at the school is more secure in light of it being a controlled environment with regular professional cleaning and air filtration.
22. In an interview with the Complaint Investigator, Sheila Libby, the Student’s special education teacher, stated as follows:
- Although the 2020-2021 school year started on September 14, 2020, she did not start providing direct services for the Student until October 7, 2020 due to a lack of staff at the school and the needs of other students. On a weekly basis, she provides two hours of direct instruction to the Student at his home with the Student’s BHP, and also does a daily check-in/supervision with the BHP. The Student’s BHP provides three hours of direct services for the Student at his home five days per week. Both she and the BHP wear masks in the home, however neither the student nor the Parents wear masks during their sessions in the home.
 - Activities with the Student include functional skills, such as preparing snacks, tied with academics.

- Despite the challenges posed by the pandemic, she has noted that the Student has made some progress during the time that she has worked with him. For example, he has a better awareness and understanding that the “apartment” space at his home is “school.” At the start of the year, he “wasn’t sure” about the exercises and things that she and the BHP were working on with him, but she has noted that he has become more “ready to work” and familiar with the routines and things he has to do as part of his day. She noted that he effectively uses his PECs program for communication and is receiving verbal cues well.
- The Student is not ready to participate in direct remote learning due to his inability to sit still for more than one or two minutes at a time.
- She supports the idea of the Student attending school in person and feels that can provide an appropriate learning environment for him. She noted, however, that there will need to be a lot of planning to make sure that his experience is successful.

23. In an interview with the Complaint Investigator, Marissa Eldridge, the District’s Occupational Therapist, stated as follows:

- She previously worked with the Student in 2018 when he attended for several months and started with him again in September of 2020. She offered to provide remote services to the Parents during the summer of 2020. She said that she explained to the Parents that she could provide coaching and the Parents would be doing the in-person exercises with the Student, however the Parents declined this offer.
- Her work with the Student has focused on functional skills and she is able to effectively use the PECs system to help him communicate his needs. She said that his “progress is tricky”, but that she has seen him become more tolerant of the work she is doing with him and becoming more independent with his toileting and asking for what he needs.
- She noted that he does get overstimulated at times and is not sure how he would tolerate receiving his OT services in school. She noted that the Student has never tried to remove her mask, and that the Parents do not wear masks when they are present with her in the home.

24. In an interview with the Complaint Investigator, Karen Brackett, the District’s director of special education, stated as follows:

- Schools in the District closed due to COVID on March 16, 2020, the same day that closed. Following this closure and for the duration of the spring of 2020, the District did not offer in-person learning, but offered remote learning to all general and special education students. Currently, the school is fully remote, with only a small number of special education students coming in on a weekly basis.

- Both she and Courtney McCormick, the Student’s case manager during the 2019-2020 school year, verbally offered a remote plan to the Parents, however they declined to take part in this plan.¹⁰
- Although the April 2020 Written Notice stated that the Student required a special purpose private school setting to access his education, she stated that the notice “could have been more clear” as she believes that Student can receive a FAPE in the public school setting.
- She did not consider _____ for ESY as he had “aged out” and was no longer a student there. Additionally, the Student had already remained for a second year of eighth grade at _____.
- School started at _____ on September 14, 2020. The IEP team agreed to a “phased in” approach, gradually increasing his programming time in order to build up the Student’s tolerance to at-home learning. All of the staff working with the Student, except for Jan Birk, agreed to provide services to the Student at his home.
- She understood that Jan Birk was concerned as she was a member of an at-risk population as a 66 year-old woman, especially since the Student and Parents did not wear masks when teachers were present. She said that consulting teletherapy services with the Parents or the Student’s teacher or BHP can be set up to help students make progress and understands that the Parents have refused any teletherapy services.
- Although there are two other SLPs working for the District, she did not consider asking another of her SLPs on staff to fill in for Ms. Birk. She said that both of her other SLPs have full caseloads and are assigned to elementary aged children and neither has experience working with students with autism.
- The Student only received limited services in September due to not having sufficient staff at the _____ school. The District currently has six BHP openings and has been actively trying to fill the positions with postings on national and regional job search sites as well as the District’s website.¹¹ She noted that while there have been several interviews, no hires have been made. She said that the COVID-19 pandemic has impacted the availability of school staff nationally and in the state, especially for staff willing to provide in-home services.
- The District discontinued social work services for the Student at the Parents’ request during the August 20, 2020 IEP team meeting. Ms. Brackett felt that social work services could be incorporated through the Student’s work with his BCBA/BHP. She also believes that the Student will gain opportunities to interact with his peers when he starts his program at the _____ school, which is one of the reasons why she has recommended moving towards an education in the public school setting.

¹⁰ Ms. Brackett stated that she does not believe that this offer was put in writing to the Parents since she understood that the Parents were declining any remote learning. The District provided no documents evidencing this offer or the details of the District’s remote learning plan for the Student.

¹¹ A review of the District’s job openings as of the date of this report confirms the openings identified by Ms. Brackett. https://www.msad40.org/files/Postings_11_13_20.pdf

- She said that the setting would be appropriate for the Student, with proper planning and timing, insofar as it offers small classrooms with 2-3 other students and private rooms if needed. Eventually, the Student could expand his social connections through a socially interactive “lunch bunch” with other students, participating in community programs, working in the greenhouse, being outside and learning on the school’s nature trails.
- She believes that the Student could learn to wear a mask or face shield. She has not seen any medical documentation regarding the Student’s inability to wear a mask or other face covering.

25. In an interview with the Complaint Investigator, Alton Robbins, BCaBA, stated as follows:

- He is employed by and works under the supervision of Jed Schwalm, BCBA.
- He provided virtual consultation with the Parents in the spring of the 2019-2020 school year after the COVID-19 school closures, meeting once a week with the Parents for approximately one hour, along with Carrie Kern, SLP. He worked another one to two hours per week to prepare for his work with the Student. He developed a four-page document to outline behavior protocols and goals for the Student for remote learning, which he used in connection with his work with the Student. He discontinued his work with the Student at the end of the 2019-2020 school year.
- He worked closely with Carrie Kern to create an in-home program for the Parents to work on with the Student, including chores, working in the garden and addressing safety concerns.
- By the end of his time with the Student, he witnessed progress with the Student. For example, he observed the Student developing greater patience with his tasks and being more responsive to requests. He said that he was able to effectively use the PECs communication system with the Student. Overall, he was impressed with his ability to learn and to pick up new skills. Based on reports from the Parents, he believed that the Student overall was responding “fairly well” to this program.
- While did do some in-person work with other students in the summer of 2020, they had a policy requiring all students and staff to wear masks, so he didn’t believe that the Student could attend, or that his Parents would allow him to do so.

26. In an interview with the Complaint Investigator, Abby Zaid, BCBA, stated as follows:

- She started working with the Student on September 14, 2020 and provided about 13 hours of BCBA direct services for the Student in his home, including work on the Student’s Positive Behavior Support Plan, along with supervision for the Student’s BHP. She didn’t do any direct remote work with the Student due to his inability to concentrate on a computer.
- She provided services to the Student in an ‘in law’ apartment next to the Student’s home. The Student would “frequently attempt to leave” and it was sometimes difficult to have him staying at the table to do a structured activity. The Parents were helpful in reducing his tendency to try to leave.

- She believes that the Student did make some progress, but it was very difficult in his home setting. While she understands the roadblocks to going to school, including the Parents' desire to have the Student at home, she feels it would be good to start planning for his return to school. She believes that the RSU #40 public school or a special purpose private school can provide an appropriate program for him. She noted that the school has suitable space and he could have had his own classroom, especially since other students are only present at the school on a part time basis.
 - The Student has difficulty with other peers and she feels that the parents could challenge him a bit more. She does not believe, however, that he is a good candidate for social work services at this time given his profile.
 - She resigned from her position at the District on November 20, 2020 due to health and personal issues. She currently works as a BCBA at .
27. In an interview with the Complaint Investigator, Casey Lufkin, Assistant Director of Special Services for the District, stated as follows:
- She started working with the Student and his Parents starting on July 1, 2020, although she worked in an administrative capacity for the District prior to this time.
 - She had verbal discussions with the Student's mother, who had an office close to hers, about providing remote services for the Student. The Student's mother made clear to her that she was not interested in having the Student participate in remote learning. She does not believe that the District's remote learning plan was presented to the Parents in writing.
 - She feels that the Student could benefit from gradually transitioning into the program at the school. She currently "has kids who have a lot of needs who are coming in, and now, with similar level of disability, with a 1:1." who are making progress with that program. She said that the Student could wear a plastic shield if the Parents were concerned about the possibility of the Student choking on a mask.

VI. DETERMINATIONS

- 1. Not properly developing or revising an IEP that is reasonably calculated to enable the Student to make progress in light of his circumstances, in violation of MUSER §§ IX(3)(A), §IX.3.(D), VI.2.J.(4) and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; *RE-1*, 2017 WL 1066260 (Mar. 22, 2017);**
- 2. Not fully and adequately implementing the Student's IEP in violation of MUSER §IX.3.B(3);**
- 4. Not ensuring that a continuum of alternative placements is available to meet the Student's educational needs and that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;**

5. Not considering existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c);¹²

COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND

MUSER §VI.2.J.(4) provides that one of the major IEP Team Responsibilities is to develop or revise an Individualized Education Program to provide each identified child with a disability a free appropriate public education.

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

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

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

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

There is a two-part standard for determining the appropriateness of an IEP and placement. First, was the IEP developed in accordance with the Act’s extensive procedural requirements? Second, was the IEP reasonably calculated to enable the child to receive

¹² MUSER §IX.3.C (1)(c) provides that in developing each child's IEP, the IEP Team must consider the results of the initial evaluation or most recent evaluation of the child. There is no evidence that the IEP team did not consider the Student’s evaluation results when developing his IEP. In their interview with the Complaint Investigator, the Parents confirmed that they do not dispute the level of specially designed instruction or supports for the Student within his IEP, rather, their concern is focused on *where* the services are provided to the Student. Additionally, they have concerns with regard to the lack of some of the Student’s services and supports during the period covered by this complaint investigation.

“educational benefits”? See *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley* (“*Rowley*”), 458 U.S. 176, 206 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27 (1st Cir. 2008). “Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 205.

The Supreme Court recently explained its *Rowley* standard by noting that educational programming must be “appropriately ambitious in light of a student’s circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Andrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

In the present case, there appears to be no dispute about the adequacy of the services and supports offered in the Student’s IEP¹³. The threshold question in this case revolves around the District’s provision of FAPE for the Student following the onset of the COVID-19 pandemic in March 2020. Specifically, the Parents disagree with the District about the timing of the Student’s return to in-person learning. In addition, the Parents contend that the Student has been denied FAPE due to the lapse of some of the Student’s services and supports since he returned to RSU #40.¹⁴

While there is an absence of legal precedent addressing a school district’s obligations to provide FAPE following the COVID-19 pandemic, OSEP¹⁵ published two reports in March, 2020, addressing the provision of services to children with disabilities during this unprecedented coronavirus outbreak.¹⁶ These reports state, in relevant part:

¹³ Despite the challenges posed by the pandemic and the delivery of the Student’s programming, a number of witnesses noted that the Student had made progress towards his goals during the time period covered by this complaint investigation:

- Sheila Libby noted that the “Student has a better awareness and understanding that the “apartment” space at his home is “school.” She has noted that he has become more “ready to work.”
- Marissa Eldridge noted that while progress is “tricky”, she has seen him become more tolerant of the work she is doing with him and becoming more independent with his toileting and asking for what he needs.
- Alton Robbins said that he observed the Student developing greater patience with his tasks and being more responsive to requests... he was impressed with his ability to learn and to pick up new skills.
- Abby Zaid said that the Student did make some progress, although it was very difficult in his home setting.
- At the October 16, 2020 IEP team meeting the Parents reported that they “were happy with how the Student has been seeming to be interested in learning and that things are starting to be put into place to have an intensive in-home educational program.

¹⁴ While the Parents would prefer a special purpose private school placement for the Student like _____, they realize that there are no appropriate schools for him within their geographic area. Accordingly, they have accepted his placement within RSU #40.

¹⁵ Office of Special Education Programs, U.S. Department of Education.

¹⁶ Referenced on the Maine Department of Education website:
<https://www.maine.gov/doe/learning/specialed/covid19/Administrators>

The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease. If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP)...

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.¹⁷ In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible....the Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided.¹⁸

On September 28, 2020, OSEP published an additional report addressing the provision of services to children with disabilities during the coronavirus outbreak, stating in relevant part:

As public agencies and officials grapple with challenging decisions, administrators, educators, and parents may need to consider multiple options for delivering instruction, including special education and related services to children with disabilities. Those options could include remote/distance instruction, in-person attendance, or a combination of both remote/distance instruction and in-person attendance (hybrid model). However, OSEP reminds SEAs and LEAs that no matter what primary instructional delivery approach is chosen, SEAs, LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities. If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA...

For example, IEP Teams can discuss how a child's IEP will be implemented with traditional in-person instruction and how services also could be provided through

¹⁷ *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, dated March 12, 2020, Office of Special Education Programs, available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

¹⁸ Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, Office of Special Education and Rehabilitative Services, March 21, 2020.

remote/distance instruction if circumstances require a change to distance learning or a hybrid model. In making these determinations, IEP Teams should consider alternate available instructional methodologies or delivery, such as online instruction, teleconference, direct instruction via telephone or videoconferencing, or consultative services to the parent (if feasible).¹⁹

The March 2020 OSEP guidance further provides that “If a child does not receive services after an extended period of time, a school must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.”²⁰

The Maine Department of Education, Office of Special Services “COVID-19 Communication” noted that if a parent chooses to keep a child home during the outbreak, even though instructional services are provided by the SAU, then the SAU’s FAPE duty is met. In such instances, the SAU should follow its guidelines and policies regarding student attendance for all students.²¹

While the District was able to institute a remote learning plan for its other students in the spring of 2020, this plan was not available to the Student as he is not able to participate in direct remote learning.²² At the April 9, 2020 IEP team meeting, the team retained the Student’s level of services and instruction from his previous IEP, while determining that the team would develop a home-based program for him.

Both Alton Robbins BCaBA and Carrie Kern, SLP provided virtual consultation with the Parents in the spring of the 2019-2020 school year, with Ms. Kern’s consultations continuing in the summer and through September of 2020. When Karen Bracket and Casey Lufkin verbally offered a remote learning plan to the Parents, they declined. In addition, Marissa Eldridge offered to provide remote occupational therapy services to the Parents during the summer of 2020, clarifying that she could provide coaching to the Parents who would provide in-person exercises with the Student. The Parents declined offers for any expansion of the remote learning plans, even if it was offered in a consultive manner.²³

¹⁹ Question and Answer document in response to inquiries concerning implementation of the Individuals with Disabilities Education Act (IDEA) Part B provision of services in the current COVID-19 environment. OFFICE OF SPECIAL EDUCATION PROGRAMS, OSEP QA 20-01, September 28, 2020.

²⁰ Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, *Id.*

²¹ <https://www.maine.gov/doe/learning/specialed/director>

²² While the Student is currently unable to access direct remote learning, the families experience with Alton Robbins and Carrie Kern in the spring and summer demonstrates that he has benefited from “consultive remote services” provided to a parent or another staff person who can be given instruction to work with the Student with certain tasks and exercises.

²³ The August 24, 2020 Written Notice confirmed the Parent’s denial of remote services, including ESY, except for continued consult with Speech and BCBA.

The guidance from OCR and OSERS recognizes the “exceptional circumstances” of this pandemic and that “schools may not be able to provide all services in the same manner they are typically provided.” *Id.* Of course, OSEP recognizes that schools “must make an individualized determination whether and to what extent compensatory services may be needed to make up for any skills that may have been lost” during the applicable time periods. It is advised that the District take appropriate steps at its next IEP team meeting to review any skills lost by the Student during the relevant time periods and to provide appropriate compensatory services to make up for any such lost skills.

The Student’s IEP team convened on August 24, 2020 to plan for the delivery of the Student’s services and supports during the 2020-2021 school year. At that time, the District was planning on re-opening for in-person learning. At this meeting, the Team rejected the “exclusive home-based program” that was determined at the April, 2020 IEP team meeting in favor of a hybrid model “so that the Student could get exposure to peers within his community [and] with the goal to attend the school.” The Team also determined that the Student’s educational program would start with staff working with the Student in his home environment, gradually increasing session times, with the intention to slowly build his tolerance for instructional time with new staff members and increasing time at the school.

As noted in the Written Notice, the Parents objected to this approach, as they understood that the team had determined at the April 2020 IEP team meeting that the Student would have an “at-home” placement, which they feel is the most appropriate for him in light of his circumstances. While the Parents don’t object to the Student attending the school in person at some point, they are concerned that the District is moving too quickly to return the Student to in-person learning, especially since he has never been matriculated into a public school program.

MUSER §VI.2.I provides that the SAU has ultimate responsibility to ensure that the child’s placement is in the least restrictive environment. MUSER §X.2.B further defines the criteria for the determination of the least restrictive environment and provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services.

[20 USC 1412(a)(5) and 34 CFR 300.114]

See 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). MUSER §X.2.B. further provides:

Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. The continuum required must include the alternative placements in the definition of special education under 34 CFR 300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with the regular class placement. [34 CFR 300.115]

The First Circuit Court of Appeals has declared that determinations about least restrictive programming are unavoidably part of the determination of an “appropriate” program for a student. See *Lenn v. Portland School Committee*, 998 F. 2d 1083, 1090 n.7 (1st Cir. 1993). The educational benefit and least restrictive environment requirements operate in tandem to create a continuum of educational possibilities. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 928, 993 (1st Cir. 1990). Supplementary aids and services must be provided within the regular classroom and placement in a more restrictive setting should only be considered when those services cannot be achieved satisfactorily. MUSER §X.2.B.

In the present case, the approach offered by the IEP team is a reasonable and consistent with the above stated principles of LRE. The IEP team has determined to implement the in-home programming and to develop, over time, a hybrid placement model so that the Student could get exposure to peers within his community. No specific deadline has been set for the Student to start in-person attendance.²⁴ Rather, the team noted a “goal to work towards having the Student start joining the program at for specific activities.” The record does not support the Parents’ contention that the District’s approach regarding the Student’s return to in-person learning is inappropriate.²⁵

MUSER §IX.3.B(3), which addresses the District’s obligation to implementing the Student's IEP, provides in relevant part:

.... 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

²⁴ Based on the current COVID-19 outbreak, RSU #40 is currently closed for all in-person instruction, with several exceptions for certain students and staff.

²⁵ Parents also requested to have the District contract with Carrie Kern and Alton Robbins. The District refused in light of its having qualified employees to provide Speech and BCBA services. MUSER §X.2.A(5) provides that Special education and/or related services provided to a child with a disability shall be considered as a part of the child's special education program, shall be specified in the child's IFSP/IEP and shall be provided by appropriately certified education personnel, or licensed contractors. Provided these qualifications are met, there is no requirement that a district contract with outside providers to provide services within a student’s IEP.

alternative service options. This IEP Meeting shall occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP. The IEP Team shall determine any amendments to the IEP necessary to reflect the inability to commence services as originally anticipated by the IEP Team.

In the present case, the District was unable to commence the Student's "at home" BHP support due for approximately three weeks after school started on September 14, 2020. Karen Brackett provided credible statements regarding the District's staffing challenges, and efforts to try to fill these positions with postings on national and regional job search sites. Although a suitable BHP was located to work with the Student beginning on October 6, 2020, the District still has a number of BHP openings and has been actively trying to fill the positions.²⁶

The Parents are also concerned about the Student's lack of SLP services due to Jan Birk's refusal to work in the home and the District refusal to consider contracting with another SLP provider. Specifically, the Parents believe that the District could have contracted with Carrie Kern, or another SLP who is willing to work in their home. Ms. Birks, however, is a qualified SLP and the only SLP on staff with the appropriate autism experience to address the Student's challenges. While she has understandably refused to provide in-person learning at the Student's home due to her being in an "at risk" population,²⁷ she has offered to provide teletherapy for the Student by arranging sessions while the Student's teacher or BHP is present. In this model, she would provide coaching and direction to the teacher/BHP who would then provide exercises for the Student. She noted that over time, this approach could help the Student orient himself to the computer. She also remains willing to provide in-person SLP services for the Student at the school and has suitable private and sanitized space at the school. The Parents, however, have refused to have the Student participate in consultative therapy sessions and contend that it is not safe for the Student to return to school where he would be required to wear a mask.

The record supports a finding that the District has complied with the COVID-19 guidelines with regard to the offering of SLP services to the Student. As noted, the OSEP guidance makes clear that schools "may not be able to provide all services in the same manner they are typically provided." This guidance also outlines steps, including the alternate available instructional methodologies such as videoconferencing or consultative services to the parent or teacher, that while not perfect, have proven effective for the Student.

In light of guidance clarifying the need for these modified instructional methodologies, the record supports a finding that the District met its FAPE obligations to the Student regarding his SLP services when it offered to provide either in-in person SLP services at school with

²⁶ Ms. Brackett stated that some of the difficulties filling the positions may be coming from the District asking applicants if they are willing to work in a student's home setting.

²⁷ She also expressed concern about providing home services in light of the history of Student and Parents not wearing masks in the home.

appropriate precautions or teletherapy for the Student by arranging sessions while the Student's teacher or BHP is present.²⁸

3. Not adequately considering the concerns of the parents in the IEP decision making process in violation of MUSER §VI.2 (H) and (I) and MUSER §IX.3.C(1)(b).

COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND

MUSER §IX.3.C provides that an IEP Team must consider the concerns of the parents when developing each child's IEP. MUSER §§VI (2) (H) and (I) provide, in relevant part, that the IEP team must include the child's parents who must be afforded the opportunity to participate in all IEP team meetings.

The record in this case reveals that at least one of the Parents participated in each of the IEP team meetings held during the Spring of the 2019-2020 school year and the fall of the 2020-2020 school year. The Written Notices prepared in connection with these meetings document the Parents' active involvement in these meetings and with his educational programming, including areas of disagreement. For example, the Written Notice from the August 24, 2020 meeting noted that the Parents "expressed reservation in moving [the Student] from an educational setting containing one other student to a setting with more students; they indicated that this would be too quick of a move."

As noted in MUSER VI(2)(I), the IEP Team should work toward consensus, but the SAU [District] has ultimate responsibility to ensure that ... the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive environment.

6. Not considering whether the Student needs an assistive technology devices and services, in violation of MUSER §IX.3.C(2)(e); and

7. Not considering the use of positive behavioral interventions and supports in violation of MUSER §IX.3.C(2)(a).

COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND

MUSER §IX.3.C(2)(e) provides that in developing a child's IEP, the IEP Team shall consider whether the child needs assistive technology devices and services. In the present case, the record supports a finding that the District complied with this requirement. The Student's April 2020 IEP included the use of an AAC Device in connection with his SLP services. Carrie Kern, SLP, said that after it became clear that the Student had trouble with using the computer

²⁸ Maine Department of Education, Office of Special Services COVID-19 Communication, <https://www.maine.gov/doe/learning/specialed/director> *id.*

for his assistive communication technology, she recommended that he switched to the Picture Exchange Communication System (PECS) which did not involve a computer and was easier for the Student to use with the District. She said that District responded in a timely basis and provided a new system for the Student, which was used by other staff working with the Student in his home during the 2020-2021 school year.

With regard to the Student's programming to address his behavior, MUSER §IX.3.C (2)(a); provides that the IEP Team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. MUSER §II.21 defines "positive reinforcement interventions and supports" as "the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors."

The record in this case supports a finding that the District complied with its obligations to develop and implement programming to address the Student's behavior, consistent with the Student's IEP. First, the District arranged for Alton Robbins to virtually consult with the Parents in the spring of the 2019-2020 school year after the COVID-19 school closures. Mr. Robbins met once a week with the Parents for approximately one hour, along with Carrie Kern, SLP. Mr. Robbins developed a behavior protocols and goals outline for the Student for remote learning, which he used in connection with his work with the Student. At the start of the 2020-2021 school year, Abby Zaid, BCBA, developed a Positive Behavioral Support Plan ("PBSP") for the Student. The plan identified behaviors specific to the Student, recording protocols, and proactive strategies. Ms. Zaid regularly supervised the BHP providing daily support to the Student and provided 13 hours of direct BCBA services for the Student in his home.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

As this complaint investigation found no violations of MUSER, no corrective action is required.