

**Complaint Investigation Report**  
**/MSAD #70 Teacher's Assn. v. MSAD #70**  
**Complaint 21.048CS**  
**Complaint Investigator: David C. Webb, Esq.**  
**May 25, 2021**

## **I. Identifying Information**

Complainant: ; MSAD #70 Teacher's Assn.

Respondents: Sandy Flacke, Special Education Director, Maine School Administrative District No. 70 ("MSAD #70"); Stephen Fitzpatrick, Superintendent MSAD #70.

## **II. Preliminary Statement**

This is a Systemic Complaint involving a group of Students who currently receive special education services from the District. Systemic complaints are those that allege that a school district has a policy, practice, or procedure that has resulted in a violation of the Maine Unified Special Education Regulations ("MUSER") that is, or has the potential to be, applicable to a group of students, named or unnamed.

The students selected for this investigation have Individualized Education Programs ("IEPs") that were changed or modified without a formal IEP team meeting between the period of June 1, 2020 and February 25, 2021 and which modification resulted in a discontinuation of specially designed instruction ("SDI") in the resource room<sup>1</sup> and/or a change in the least restrictive environment ("LRE") for said students in math and/or reading.<sup>2</sup> (This group of students reviewed for purposes of this Complaint Investigation collectively referred to as "Identified Students" or individually by student number, e.g. "Student 1").<sup>3</sup>

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<sup>1</sup> The terms "resource room" and "pull out room" are used interchangeably for purposes of this report.

<sup>2</sup> Programming also includes English language arts "ELA")

<sup>3</sup> This Complaint Investigation reviewed 16 students, hereinafter referred to as "Identified Students." The investigation focused on parental notice and involvement in the IEP process as well as evidence that the IEP team used with regard to the question of LRE with regard to modifications in student programming at the time the amendments were made to student IEPs. Due to the limited scope of this investigation, student progress over the course of the 2020-2021 year was not reviewed, except in limited circumstances, as noted. This investigation initially involved 27 students, however, a number of the students originally identified were removed from consideration based upon identified criteria for the following reasons:

- Student 5: Formal IEP team meeting (annual review) held on October 8, 2020. Parent was not in attendance but there is documented consent to hold the meeting in her absence.
- Student 12: Parent was a participant at formal IEP team meeting (annual review) held on November 12, 2020. No evidence of prior changes made to IEP without a formal IEP team meeting.
- Student 14: Formal IEP team meeting (annual review) held on October 6, 2020. Parent was not in attendance but there is documented consent to continue the meeting in her absence.
- Student 15: IEP remained the same aside from recommended changes in service time due to abbreviated day (pandemic).
- Student 17: Parent was a participant at formal IEP team meeting (annual review) held on September 16, 2020.

### III. Summary of Complaint Investigation Activities

On February 25, 2021, the Maine Department of Education received this complaint. The Complaint Investigator was appointed on February 26, 2021.<sup>4</sup>

After the receipt of the Complainant's systemic complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on March 1, 2021, detailing six alleged systemic violations of the MUSER. The complaint investigator held a telephonic Complaint Investigation Meeting on March 4, 2021.

The Complaint Investigator received 23 pages of documents from the Complainant and 757 pages of documents from the District. Interviews were conducted with the following people: Parents of Students 6, 7, 8, 14, 16, 18, 21, 25 and 27; Sandy Flacke, MSAD 70 Special Education Director; \_\_\_\_\_, Special Education Teacher, \_\_\_\_\_ School; \_\_\_\_\_, special education teacher/case manager for \_\_\_\_\_ School; \_\_\_\_\_, principal of the \_\_\_\_\_ School; \_\_\_\_\_, regular education teacher at the \_\_\_\_\_ School; \_\_\_\_\_, regular education teacher at the \_\_\_\_\_ School; \_\_\_\_\_, special education teacher/case manager for students \_\_\_\_\_ School; \_\_\_\_\_, special education teacher at the \_\_\_\_\_ School; and Erin Frazier, State Director of Special Services for the Maine Department of Education.

### IV. Allegations

1. Having a policy or practice of not utilizing a student's IEP Team, including parents, as the vehicle for determining whether a student's educational placement is in the least restrictive environment and that a continuum of alternative placements is available to meet a student's educational needs in violation of MUSER §X.2.B;
2. Having a policy or practice of not adequately including or considering the concerns of parents in the IEP decision making process in violation of MUSER §VI.2(H), §VI.2(I), §IX.3.C(1)(b), and MUSER App. 1 (34 CFR 300.501(b) and (c));
3. Not obtaining parental agreement or providing appropriate notice for modifying a student's IEP in the absence of convening an IEP team meeting in violation of MUSER §IX.3.C (4).

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- Student 19: Transferred to District in Fall of 2020. Parents were participants at IEP team meetings held October 27, 2020 and notice to parents was sent on October 30, 2020.
  - Student 21: Parents were participants and IEP team meeting held on September 16, 2020 (annual review).
  - Student 23: Parent participant at formal IEP team meeting held on November 17, 2020. No prior changes made to IEP without a formal IEP team meeting.
  - Student 27: Parents active participants and IEP team meetings held on December 1, 2020. Student did not return to in-person learning until the end of October and continued to receive SDI writing, language and math in the resource room as of December 2020 IEP team meeting.

<sup>4</sup> At the request of the District and due to constraints exacerbated by the Covid 19 Pandemic, this Complaint Investigation process was extended by 30 days.

4. Not providing parent(s) with proper prior written notice of the Districts' proposals regarding the students' educational program in violation of MUSER §VI.2.A, MUSER App. I (34 CFR §300.503);
5. Not providing qualified staff in violation of MUSER §X.2(5); and
6. Having a policy or practice of not properly developing or revising IEPs thereby depriving students of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C and 34 CFR 300.101(a).

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

## V. FACTUAL FINDINGS

1. In an interview with the Complaint Investigator, Dr. Sandy Flacke, Director of Special Services for the District, stated as follows:
  - She started working as the Director of Special Services at the District during the 2019-2020 school year. Shortly after she began, she discovered that the District had a practice of placing special education students in pull out rooms without fully considering students' individual needs and abilities. She noted that many special education students, including the identified students, were simply placed in the resource room and provided a lower grade level curriculum without any evidence based interventions in place to address individual student skill deficits. She also noted that in the past, regular and special education teachers didn't communicate well about identified students and it was not a "team effort." As a result, many of the general education teachers were not familiar with children receiving special education services.
  - She started the process of correcting this practice by asking her staff over the spring and summer of 2020 to review individual student skills and needs based upon "demonstrated progress and recent evaluations." During this time, she and her special education staff worked on structuring individual interventions that were more evidence-based, with a goal of providing greater access for these students to the general education setting. Parents were not invited to these meetings and there were no notes or records kept with regard to these meetings.
  - She said that because of the concerns about overly restrictive placements for so many students, the District was looking at changing every student's IEP in the fall of 2020. She noted the difficulty of "rectifying and changing IEPs during a pandemic" with distance learning and abbreviated school days in place as well. She implemented training for her staff about developing more inclusionary practices at the start of the 2020-2021 school year.
  - She instructed her staff to start calling parents of identified students at the beginning of the year to inform them of the changes being made. The initial message to parents was that the District was recommending reduced pull out time

and increased time in the regular education classroom. She said that if students were not scheduled for their annual meeting, then the goal would be to have staff obtain “phone agreements” to make changes without an IEP team meeting. Other instructions to staff were to let parents know that staff had reviewed data about their child in order to make the recommendation and to also talk about the remote learning plan, if that was necessary due to school closures. She said that the case managers kept their own communication records, but she didn’t have any requirements for documenting these calls, other than what was required within the written notice form.

- She noted that at the time the parent calls were made, the District was not sure what the individual student programs would look like. Instead, the plan was to get back to the parents after the specific program details could be worked out and provide parents with a copy of a written notice and new IEP. She acknowledged that she was not able to get out many of the written notices and IEPs to parents before the IEPs were changed and went into effect. Part of this delay was due to issues relating to the pandemic. She said that she had some of her staff ‘in tears’ because of all of the paperwork that was required of them.
- She felt that she had full support for this plan from the Maine Department of Education. She specifically sought guidance from Erin Frazier, State Director of Special Services at the Maine Department of Education. She said that Erin advised her “to not to kill special ed teachers with so many changes due to covid” and that it was not a good use of everyone’s time to sit in hours long zoom meetings-“bite off what we can chew” and make changes to IEPs. She did not say that Erin advised her to disregard the parental notification requirements under MUSER or IDEA, but that she inferred that some of the notice rules would be relaxed due to the urgency of the pandemic and the overly restrictive programming.
- The District cut a few ed tech positions in the 2020-2021 budget, but the cuts were based on the lack of student need and an “overabundance” of ed techs. She noted that the District was able to address “push-in” with staff on hand after the cuts.
- She feels that this complaint is based on regular education teachers being upset about having to provide extra support for special education students in their classrooms-She noted that regular education staff were notified of these changes before the school year and attended a training meeting with Eric Herlan regarding inclusion and LRE at the beginning of the 2020-2021 school year.
- She said that the changes needed to happen quickly because the District was out of compliance with so many students in overly restrictive settings. She noted that the District wasn’t able to get all Written Notices out before changes were made and “in a perfect year, this wouldn’t have been an issue.” In addition to the

changes to the level of student inclusion, the District also had to change every IEP with regard to remote learning and abbreviated day plans.

- While her special education staff reviewed existing evaluation data on students whose placements were changed, she was not clear about student reevaluation needs. She noted that there were an additional 60 students in the district whose LRE was not changed and the only changes to the IEPs for these students was due abbreviated day, “poding” or “cohorting”.<sup>5</sup>
- The initial “data sheet” prepared in connection with the proposed placement changes contained the names and certain data associated with 28 special education students that Dr. Flacke prepared with the school and school assistant principal. The sheet identified the student’s disability, “pull out” services (e.g. for math or ELA), other services (e.g. social skills, OT) and “comments” which typically listed the student’s most recent testing results or whether testing was needed. The list also included case manager assignments and a color coding which stated: “Green=can be in regular education; Red=can be in RR (resource room); Yellow=IDK (I don’t know).<sup>6</sup>
- She said that she did hear from one parent who was concerned that her child was determined to no longer be eligible for special education following an IEP team meeting. She did not hear any concerns from any other parents or comments about any other students identified for this investigation.

2. In an interview with the Complaint Investigator, \_\_\_\_\_, a special education teacher/case manager for \_\_\_\_\_ School, stated as follows:

- Following the school closure in March, 2020 due to the pandemic, she met with Sandy in May, 2020 to review individual student progress/scores to determine whether certain students who were in “full pull out” environments were in overly restrictive placements and to see if they would be better served in a more mainstream setting. She said that these meetings were not documented, but rather the meetings were “just brainstorming.” She said there were no discussions about updating individual student evaluations.
- Beginning in July, 2020, she said that special education staff held additional meetings with all teachers including regular education teachers. She said that they were still brainstorming but continued talking about individual students. She said that no parents were invited to these meetings.

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<sup>5</sup> “Poding” and “cohorting” refers to the practice that the District used to keep students together in smaller groups to reduce the risk of transmission of the coronavirus during in-person learning.

<sup>6</sup> Of the identified Students in this report, the “data sheet” prepared by District staff in the spring and summer of 2020 specified that Students 1, 8, and 16 “can be in regular education.” The data sheet specified Students 7 and 10 as “can be in resource room” and Students 10 and 25 as “I don’t know.” No other students identified for this report were included in the data sheet.

- When the 2020-2021 school year started, the District arranged for professional development to discuss inclusion with Eric Herlan and another “inclusion specialist.”
  - With regard to the process of calling parents of special education students subject to the placement changes, she said that she did not have specific instructions other than to let them know that the District would like to integrate with the mainstream and provide access to grade level instruction. While they didn’t yet know details, their child’s IEP and SDI will change. She said that she told each parent that they could have a meeting but that the District was proposing to make these changes without a formal IEP team meeting and that she would call them back when more information was available with regard to the specific details of their child’s IEP. She said that only one parent requested a meeting. She said that some of the case managers kept notes regarding calls but there was not a formal mechanism for documenting interactions with parents, other than recording on the student’s Written Notice.
  - She noted that Parents were eventually going to get a Written Notice, but that it would take time. In hindsight, there should have been better documentation and notice to the parents.
  - She noted that even after the Written Notices were prepared, there was incomplete information. For example, with regard to one of her students (Student 6), while it noted generally “ed tech support” in classroom, there was no other support documented. She noted that at the beginning, the ed tech support was “more of a help for teacher than for the student” and that the ed techs would provide SDI for reinforcing what the regular education teacher was presenting.
3. In an interview with the Complaint Investigator, \_\_\_\_\_, a special education teacher/case manager for students \_\_\_\_\_ School, stated as follows:
- Throughout summer of 2020, she and other special education staff held meetings with regard to students being placed in overly restrictive LRE, with a particular concern noted where a child would be “passed on to the special education” resource room for their entire day even if the child was below grade level in one area. During these meetings which were conducted via zoom, she and other special education staff looked at student evals, NWEA scores, and “how they were doing with their academic work.” Although the special education staff were not sure what a less restrictive program would look like at this time, they were looking at increasing mainstream programming and giving “specialized intervention” as opposed to specialized instruction. She said that she didn’t document anything at these meetings.

- Direction from Sandy that she had been in contact with “powers above” and while this exercise needed to be done, she “never felt pressured” and that it would be OK if she needed more time.
  - With regard to parent interaction, she and other special education staff began making phone calls to parents before the start of the 2020-2021 school to let them know that the District was proposing to make changes. Initially she characterized these calls as an informal chit chat with the parents, clarifying to them that someone from the District would call back when more formal changes were in place. She noted that when talking to the parents she explained the shortened days due to covid and that the parents “always have the right to ask for a meeting.” She said that no parents wanted a meeting.<sup>7</sup>
  - She said that the District staff was doing “the best we could” and believed that they didn’t need to follow the strict protocol of having individual IEP team meetings as it “wouldn’t be a reality” for the number of students and other concerns relating to the pandemic. She noted that an added concern was that with the “pod” system, where students would stay together in their individual classrooms, due to the pandemic, it was “not possible” to return to the more restrictive placements that were in place for these students prior to the pandemic as it would involve co-mingling with other students outside of each student’s “pod”.
  - She understood that the approach was to “do the best you can” and “we’re all in the same boat” frame of mind. She said that she didn’t hear concerns from parents.
  - She acknowledged that while Written Notices were not going to teachers, the special education staff “did a lot of talking” with regular education teachers about accommodations over the phone or on a 1/1 basis. Some of the regular education teachers had concerns and some were not sure how to go about things, some saying that they didn’t have time.
  - She said that overall she feels the changes have been a success and that the interventions are more targeted. Although it is less overall SDI time, it is a better quality of instruction.
  - She noted that classes have been in person mostly all year, with some remote learning for a couple of days before Thanksgiving and the week before April break.
4. In an interview with the Complaint Investigator, \_\_\_\_\_, a special education teacher/case manager for \_\_\_\_\_ School, stated as follows:
- She noted that the District had a past-practice of automatically placing special education students into the resource room, without carefully looking at whether

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<sup>7</sup> A partial and incomplete record of phone calls to parents and notes taken from those calls was provided to the Complaint Investigator.

their programming or support needs could be met in the general education classroom. She acknowledges that she was involved and responsible for some of these overly restrictive placements in the past.

- She said that in the spring of 2020, Sandy Flacke created a data sheet of special education students with testing scores and progress information, which she gave to her and other case managers to review and provide input on individual students for a possible transfer into a less restrictive setting. She said that over the summer, she and her special education colleagues looked at individual students' scores and progress and gave input on whether certain students who were getting the bulk of their education in the resource room could be brought into the general education classroom with supports. She said that math and ELA were priority subjects and that the general education teachers were consulted during this process.
  - From this process, a list of students recommended for a more inclusive placement was created. From this list of students, she called all of the parents of her students before school started to let them know about the recommended changes. She said that while the District didn't know exactly what each student's program would look like during those initial calls with parents, she said that in her conversations with parents, she discussed more program details that may not have been evident from the written notices. She also said that she made clear to parents that they "have a voice." She noted that only one parent did not want their child moved out of the resource room. As a result, that student remained in his current more restrictive placement. All of the other parents agreed to the recommended placement changes.
5. In an interview with the Complaint Investigator, \_\_\_\_\_, a special education teacher/case manager at the \_\_\_\_\_ School, stated as follows:
- She provided special education services for Students 1 and 8.<sup>8</sup> She said that she was aware that the District was considering a more inclusive policy for special education students, but that she was only contacted briefly by one of her colleagues, \_\_\_\_\_, with regard to her students' level of progress at the end of the 2019-2020 school year. She disagrees that her students should have been more inclusively placed in the fall of 2020. She was not asked by other District staff whether she would recommend more inclusive placements for her students.
  - She believes that the District did not appropriately change the placement of her Students, in particular because the changes were not "data driven." Specifically, she said that the District was not able to accurately measure students' progress due to a lack of testing. Due to the pandemic, the District was not able to administer the MEA's or NWEA tests that would normally have been

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<sup>8</sup> She was identified as a witness for the Complainant but not identified as a witness for the District.



administered during the spring of 2020. As a result, the District relied on old testing data that she felt was not an accurate measure of her students' progress. In addition, the District's conversion to remote learning prevented teachers from giving accurate classroom assessments and progress reports that would inform placement changes for students.

- With regard to progress for this academic year, she notes that many of her students' goals were changed and standards were reduced from their previous IEPs, which led to a false sense of progress being made and that her students were making better progress in their previous, more restrictive placements.
- She was also concerned that the parents were not properly informed or involved in the process of making changes to students' IEPs. In particular, parents were not given sufficient information about their children's programming to make informed "agreements" about their new IEPs.
- She said that while there was a district wide two hour training on inclusion in June of 2020, regular education teachers were not given adequate information about how the more inclusive program would look for their incoming students. She said that there was an attempt to contact some of the regular education teachers during the summer before school started, but the teachers are not on contract to work over the summer and many of the teachers were not available to receive this information. She said that she felt that the district had already made the decision to move these students into the mainstream by August, 2020. She said that there was a brief meeting with Drummond Woodsum representatives.
- With regard to the reduction of special education staff, she said that the District lost one special education teacher at the end of the 2020 school year, who was not replaced. In addition, three ed techs were let go through staffing reductions. She felt that the previous staffing levels were appropriate and even with the placement changes disagreed that the District was overstaffed, and she was not consulted about the staffing needs before the reductions were put in place.

6. In an interview with the Complaint Investigator, \_\_\_\_\_, a regular education teacher at the \_\_\_\_\_ School, stated as follows:

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- When she started the 2020-2021 school year on September 8, 2020, she learned only a few days before classes started that she would have an increase of 10 new special education children in her classroom. She was concerned about this insofar as she did not have IEPs or other documentation with regard to where these students were academically. She was also concerned to learn that one of the Students in her class had significant behavior issues.
- Her initial concerns were related to the skill levels of the new students. One of the students came to class at a \_\_\_\_\_ grade level and two came at \_\_\_\_\_ grade

level.<sup>9</sup> She noted that-unlike other subjects- is a “cumulative skill” and it is very difficult for students who are more than a year or so behind in to keep up with the regular education programming.

- With regard to the student exhibiting behavior issues<sup>10</sup>, she characterized his behavior as “very disruptive” to the extent that other students “can’t sit next to him” and that his behaviors significantly interfered with her teaching other students.<sup>11</sup> She kept a log of behaviors and communicated about this to the assistant principal of the school and to the Student’s case manager.
- She noted that there has been an overall lack of supports offered to her for these students, with very limited push in supports. While she had two ed techs who are available for two of the three classes that she teaches, one of the ed techs, , has limited experience and was issued an “emergency” certification. The other ed tech working with her class, , is often fully occupied with students exhibiting behavior issues and isn’t able to do any teaching. She has noticed the impact on typically developing peers because the ed techs are not available, which interferes with her ability to teach her typically developing peers.
- She said that she has told and the school assistant principal, but she has not received extra help.<sup>12</sup>
- She noted that she has knowledge of previous placements of many of the special education students whose placements were changed at the beginning of the year. In her previous role as she was involved with the process of placing many of the students who were subject to the LRE changes in at the start of the 2020-2021 school year. She said that she was involved with making sure children were placed appropriately in the resource room and worked with an outside consultant to look carefully at every child’s needs. Overall, she said that the District surpassed the state goal to have, on average, special education students attending mainstream classes at least 65% of the time. While she noted that there may have been some children who could have more mainstream settings, it was not a “crisis” situation that justified suddenly thrusting so many children into the regular education classes without a more careful review of programming and supports that could be offered.

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<sup>9</sup> Students 14, 22 and 25, respectively. She noted that these students, as of the time of this report, are failing or close to failing in class and have made little or no progress.

<sup>10</sup> Student 8.

<sup>11</sup> Log entries re behavior since 10/20: (11 total) -eg. Giving other students the finger, kicking chairs, talking loudly, destroying laptops, (he is on his 2nd or 3rd laptop), and leaving the classroom.

<sup>12</sup> In an e mail from to on September 28, 2020 she asked if special education staff could help with retention strategies with her special education students as it was “imperative for them to master their facts.” In an e mail dated October 9, 2020 noted that the special education students “would receive so much more educationally if they were in a resource room where they could get instruction at their academic level...[and] “I wanted to look at each student’s individual skills to see which students would benefit most from being in my classroom...it would be great if the district would hire a part time or full time teacher to instruct students in at this level.” In an e mail from to on December 10, 2020 she said: “...I will still give the students with an IEP a modified because the purpose of the is to back to skill/topics/concepts students have been taught...[students] will need to master these skills to progress in .”

7. In an interview with the Complaint Investigator, \_\_\_\_\_, a regular education teacher at the \_\_\_\_\_ School, stated as follows:
- She has five new special education students in her class this year, all of whom were “pull outs” for \_\_\_\_\_ last year.<sup>13</sup> She noted that Student 26 has a great deal of anxiety which has significantly impacted his ability to perform in his class. She said that he frequently does not attend class and when he does, he is “like a fish out of water.”
  - She said that she did not feel prepared to teach her new students and had no discussions with special education staff over the summer of 2020. She had only minimal ed tech support for her new special education students at the beginning of the year and only increased after the Christmas break when she asked for more help.
  - While she has seen some progress with her special education students, she believes that this is only because of the modifications in the curriculum that are being offered. For example, she said that Student 26’s workload is reduced by less than one half of her regular education students.
8. In an interview with the Complaint Investigator, \_\_\_\_\_, the principal \_\_\_\_\_ School, stated as follows
- Last year, he became aware that special education teachers were expressing concerns about the placements of a group of special education students. When talking with Sandy and his special education staff, he understood that their plan was to look at all kids individually and how best to respond to each student individually, without a “cookie cutter” approach to placement.
  - He had no knowledge of any problems with notice to parents nor was he aware of any concerns with compliance, although he was aware of some concerns from regular education teachers, several of whom came to him with concerns. He noted that the crux of the concerns he heard from them were whether they could effectively work with students with disabilities. He has not heard any complaints from teachers about not having enough supports in class to address student needs. He has not had any complaints from parents or guardians.
  - He noted that the reduction in ed tech staffing this school year was solely because the special education student population has dropped and there is no longer a need for as many ed techs.<sup>14</sup>

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<sup>13</sup> Students 4 and 26 are among the special education students in her class this year.

<sup>14</sup> The ed tech staffing for the 2019-2020 school year: (budget changes voted MSAD #70 Board of Directors, May 11, 2020).

Oct 1st - 74 identified students  
6 requiring 1:1  
16 Ed Techs  
5 SE teachers

2020-2021 school year:

Oct 1st - 61 identified students

9. In an interview with the Complaint Investigator, Erin Frazer, State Director of Special Services for the Maine Department of Education, stated as follows:
- She met with District special education staff on two separate occasions in October, 2020 to address questions relating to the placement of students in the least restrictive environment.
  - She learned from special education staff that the District had a practice of automatically placing identified students in the “pull out room” if the students were below grade level. She understood that this practice was most prevalent for elementary school students who were below grade level in ELA and math.
  - She said that she didn’t review individual cases prior to or during the meeting and gave only very general advice to District staff. She stated that she told District staff that routinely placing students in pull out rooms simply due to being below grade level was not an appropriate way to determine a student’s LRE. Rather, staff should have individualized conversations with regard to each student, and increasing access to main stream programming where possible and appropriate based on individual student needs.
  - She told District staff that special education students are “general education students first” and that general education programming can be added without necessarily changing a student’s IEP.
  - She did not opine on whether the District’s IEP modifications were appropriate either procedurally or substantively for any individual student.
  - If IEPs were changing, the District would either need to have to have meeting or an agreement from the parents to change the IEP without a team meeting. While she was sensitive to the extra burdens placed on staff, especially due to the pandemic, at no time did she endorse an approach that bypassed notice provisions of MUSER or IDEA.
  - She suggested ongoing training for District staff with regard to the issue of inclusivity and furthering the goal of LRE for each student.
10. Student 1 is a \_\_\_\_\_ who qualifies for special education based on the category of a specific learning disability (“SLD”). In \_\_\_\_\_ previous IEP<sup>15</sup>, Student 1 received 890 minutes per week of SDI in math, ELA, Learning Center and Interventions. The September 24, 2020 Written Notice referenced an agreement with the parent for an IEP amendment without a team meeting on September 23, 2020 for a new IEP that went into effect on September 24, 2020. This IEP provided that Student 1 would receive math, ELA and learning center in general education room “with supports as needed” for 45

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4 requiring 1:1 (1 student from 19-20 went to an SPPS, 1 student that required 2:1 went to Houlton with 1 Ed Tech)  
11 total Ed Techs

<sup>15</sup> References in this report to “previous IEPs” in this report refer to IEPs in place prior to modifications that resulted in changes to Student’s LRE between June 1, 2020 and February 25, 2021.

minutes per week. The September 24, 2020 Written Notice based this decision upon a “review of present performance and progress on IEP goals” and Student 1’s 2018 triennial evaluations which “show that [redacted] is performing at the average or above average range in all academics.” There were no additional supplementary aids, modifications or services added to the September 23, 2020 IEP.

11. Student 1’s September 29, 2020 amended IEP states in relevant part:

- NWEA results through winter, 2020 show that Student 1 is in the 23<sup>rd</sup> and 28<sup>th</sup> percentile in math and language however shows declining progress in reading: spring 2019: 35<sup>th</sup> percentile; fall 2019: 14<sup>th</sup> percentile; winter, 2020: 9<sup>th</sup> percentile
- Student 1 ...” often needs prompts to begin his work and he gives up before independently trying to complete a task.”
- “completed minimal work in remote program-passed in less than 25%.”

12. Student 2 is a [redacted] who qualifies for special education based on the category of Other Health Impairment (“OHI”). The September 24, 2020 Written Notice sent to the Parents on October 5, 2020 referenced an agreement for an IEP amendment without a team meeting on September 24, 2020 for a new IEP that went into effect on September 25, 2020. This IEP provided that Student 2 would receive “decoding SDI in the general education room for 60 minutes per week.” The September 24, 2020 Written Notice based this decision upon a “review of present performance.” On November 11, 2020 Student 2’s IEP was amended to add 60 minutes per week of SDI in grammar and 60 minute per week of SDI in executive functioning.<sup>16</sup>

13. Student 2’s October 5 and November 16, 2020 amended IEPs state in relevant part:

- Winter 2020 WISC-V shows average verbal comprehension, reasoning processing speed and working memory scores and a full-scale IQ of 105, (low average)
- Winter 2020 WIAT-III shows reading and math scores in the average range.
- Modifications were added for access to adult support during testing and text to speech for math testing.
- Winter 2020 NWEA math score fell at the 35% which is in the average to low average range. Winter 2020 Reading NWEA score fell at the 33% which is in the low average range.

14. Student 3 is an [redacted] student who qualifies for special education based on the category of a Specific Learning Disability. In [redacted] previous IEP, Student 3 received 400 minutes per week of SDI in language arts. The September 24, 2020 Written Notice referenced an agreement for an IEP amendment without a team meeting on September 24, 2020 for a new IEP that went into effect on September 24, 2020. Notice was sent to the Parents on October 5, 2020. This modified IEP provided that Student 3 would receive “SDI in the general education and special education rooms for

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<sup>16</sup> Student 2’s November 2020 IEP meeting was convened via zoom and the parent attended. The November 2020 IEP modifications appear to be in response to poor student performance at the beginning of the year, as noted by [redacted]’s phone log from October 6, 2020 when the Parent called reporting that the Student was not achieving passing grades and needed extra support.

90 minutes per week.”<sup>17</sup> The September 24, 2020 Written Notice based this decision upon a “review of recent performance and progress on IEP goals.”

15. Student 3’s October 5, 2020 amended IEP states in relevant part:

- December 10, 2019 Rigby Benchmark Reading Assessment level 21 (ending ) and math assessment at 15% (low range).
- NWEA results through winter, 2020 show reading at 7% (low range) and math at 15% (low range).
- April 2018 WISC-V shows low to average in verbal comprehension, reasoning processing speed and working memory scores and a full-scale IQ of 105, (low average).
- Progress reported as “does not meet” for oral fluency, reading memory.<sup>18</sup>

16. Student 4 is an \_\_\_\_\_ and qualifies for special education based on the category of Other Health Impairment. In her previous IEP, Student 4 received 400 minutes per week of SDI in Language Arts. The September 24, 2020 Written Notice referenced an agreement with the parent for an IEP amendment without a team meeting on September 24, 2020 for a new IEP that went into effect on September 24, 2020. Parents were provided a copy of the new IEP on October 15, 2020. The amended IEP provided that Student 4 would receive “90 minutes of direct instruction in the resource room setting and 60 minutes per week push in.” The September 24, 2020 Written Notice did not explain why the above action was taken other than to state that “the parent was choosing to access the remote learning plan...[and] if the parents opt to have [student 4] return to school...the current IEP will be in effect.”<sup>19</sup> On November 18, Student 4’s IEP was amended to add 90 minutes per week of ELA and 150 minutes per week of “push in” support in the classroom. \_\_\_\_\_’s call record notes on September 1, 2020: “talked with [Parent]...explained she will be working with her class for ELA and I will be doing intervention. On November 17, 2020 \_\_\_\_\_’s call record states: “I explained that is struggling...with a high # [of absences]...”

17. Student 4’s October 15, 2020 amended IEP states in relevant part:

- Winter 2020 WIAT-III shows total reading, reading comprehension and fluency and written expression scores in the below average range (77, 69 and 81).
- March 9, 2020 Rigby Benchmark Reading Assessment level 21 (ending \_\_\_\_\_).
- NWEA results through winter, 2020 show reading at 17% (low range).
- Progress reported as of March 2020 as “does not meet” for oral fluency and reading memory.
- Began the year doing remote learning due to parent choice. Participation was inconsistent and \_\_\_\_\_ had many incomplete assignments. \_\_\_\_\_ returned to in-school learning at the end of September. \_\_\_\_\_ has had 14 days of absence which has impacted \_\_\_\_\_ ability to catch up and keep up with the classroom work.

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<sup>17</sup> the specific subject area was not included in IEP although the Written Notice referenced this service as “reading intervention”

<sup>18</sup> “Does not meet” also noted in these areas on IEPs from November 2020 and March of 2021.

<sup>19</sup> Student 4 started the year remotely and rejoined in-person learning at the end of September 2020.

- STAR 360 district wide achievement tests, given in November [2020], placed her at the following percentiles: Reading 10%, Math 37%.
  - Teacher report: “it is difficult to determine if struggles are due to lack of focus and motivation or if really doesn't understand the concepts being presented.”
18. Student 6 is a \_\_\_\_\_ who qualifies for special education based on the category of Multiple Disabilities (OHI and Autism Spectrum Disorder). The Written Notice, sent to the parents on October 22, 2020, referenced an agreement with the Parents for an IEP amendment without a team meeting on October 20, 2020. Student 6’s previous IEP provided 600 minutes/week of ELA SDI in the “special education” (pull out) room. Student 6’s amended IEP that went into effect on October 20, 2020 reduced his SDI in ELA to 200 minutes/week with ed tech support. The October 20, 2020 Written Notice based the decision to change programming upon a “review of recent levels of performance and progress on IEP goals.” No other modifications/supports were added to this IEP.
19. Student 6’s October 22, 2020 amended IEP states in relevant part:
- “Progress towards IEP goals” reveals that progress “has not started” in the areas of writing sequentially, answering questions about details in a text and retelling stories and increasing his focus during instruction time.
  - March 2018 WISC-V shows “significantly below average range” in verbal comprehension.
  - BASC-3 teacher report: “clinically significant” in hyperactivity, depression, learning problems and atypicality.
  - “[Student 6] has been having a difficult time focusing and remaining on task, needs multiple reminders to stay on task and to focus when completing his work.
20. Student 7 is a \_\_\_\_\_ who qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the Parents on March 10, 2021 and referenced an agreement for an IEP amendment without a team meeting on August 26, 2020 for an amended IEP that went into effect on March 4, 2021.<sup>20</sup> Student 7’s previous IEP provided 345 minutes/week of language arts SDI in the special education room and 345 minutes biweekly of SDI in math and 345 minutes biweekly of SDI in ‘learning center’ (supported study hall). Student 7’s amended IEP eliminated his SDI in language arts but continued programming in math. The March 4, 2021 Written Notice based the decision to change his programming upon a “2019 WIAT scores and his classroom performance.” No other modifications/supports were added to this IEP.
21. Student 7’s October 22, 2020 amended IEP states in relevant part:
- NWEA results through Fall of 2019 show reading at 173 (1<sup>st</sup> percentile).
  - During the 2019/2020 school year, Student 7 was assessed at a \_\_\_\_\_ grade reading level.

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<sup>20</sup> The March 4, 2021 IEP and Written Notice references changes to the original IEP that were implemented as of August 26, 2020, but no notice was sent to parents until March 10, 2021 due to “administrative oversight.”

- “Progress towards IEP goals” reveals that Student 7’s progress “does not meet” as of June 2020 and November, 2020 in the areas of reading and comprehending literature...of grades text.”
  - “[Student 7] has been having a difficult time staying on task, often gets distracted by things around and needs directions repeated in an individual manner... ] works best in a small group setting where there are limited distractions.
  - WIAT-III – 2019: total reading - 89 (23rd percentile) average; basic reading - 97 (42nd percentile) average; reading comprehension and fluency - 83 (13th percentile-below average); written expression - 88 (21st percentile) average; essay composition - 98 (45th percentile); pseudoword decoding - 103 (58th percentile).
22. Student 8 is a and qualifies for special education based on the category of multiple disabilities (autism, other health impairment, specific learning disability). In previous IEP, Student 8 received 1125 minutes per week of SDI in math, ELA, learning center and interventions. The September 23, 2020 Written Notice was sent to the parents on September 24, 2020 and referenced an agreement with the parent for an IEP amendment without a team meeting on September 23, 2020. The new IEP went into effect on September 23, 2020. The new IEP discontinued SDI in ELA and math and provided “intervention” for five times bi-weekly for 30 minutes. The September 23, 2020 Written Notice noted that the aforementioned changes were based upon a “review of present performance and progress on IEP goals and noted that Student 8 “has no academic needs”. said that Student 8 “has a lot of behaviors [and] teachers have a hard time [but that he] does not have a behavior plan.” No new modifications or supports were added to amended IEP.
23. Student 8’s September 29, 2020 amended IEP states, in relevant part:
- NWEA results through winter, 2020 show that Student 8 is in the 14<sup>th</sup> percentile in math and the 11<sup>th</sup> percentile in reading and shows declining progress in language: fall 2018, 34<sup>th</sup> percentile; winter 2019, 23<sup>rd</sup> percentile, spring 2019: 7<sup>th</sup> percentile.
  - Star 360 results (undated) show reading levels at the 1<sup>st</sup> percentile and math at the 15<sup>th</sup> percentile.
  - September 2020 WISC-V shows processing speed at 80 (9<sup>th</sup> percentile) and full-scale IQ at 85 (16<sup>th</sup> percentile)
  - September 2020 WIAT-4 shows a total a total achievement composite at 66 (extremely low-very low)
  - BASC-3 teacher report: at risk for Hyperactivity (94<sup>th</sup> percentile) Attention problems (91<sup>st</sup> percentile), school problems (86<sup>th</sup> percentile) and atypicality 94<sup>th</sup> percentile)
  - Disruptive behaviors, including at home during remote learning.
  - “Narrative for June 5, 2020”: [Student 8] “didn’t complete any work in the form of internet based activities or learning packets as of April 13, 2020... some work was returned by June 5, 2020 deadline but most of the worksheets appeared to be in someone else’s handwriting.”
  - Inconsistent medication routine appeared to impact behaviors.



- Needs a great deal of help with organization and that is more productive in a small group setting with more individualized instruction.
24. In an interview with the Complaint Investigator, the Parent of Students 6, 7, 8 and 13 said the District staff provided information verbally, and then mailed documents afterwards. She has attended meetings by zoom; she feels clear about what is going on. She said that “not much has changed” with regard to programming for her children, and that she notices her children making progress.<sup>21</sup>
25. Student 9 is an \_\_\_\_\_ and qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the Parents on October 21, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 30, 2020 for an amended IEP that went into effect on September 30, 2020. Student 9’s previous IEP provided 140 minutes/day of ELA SDI in the special education room. Student 9’s amended IEP provided that \_\_\_\_\_ would receive 80 minutes/day pull out SDI and 30 min push in support per day of SDI in ELA. The Written Notice based the decision to change \_\_\_\_\_ programming upon “progress on IEP goals.”
26. Student 9’s October 22 amended IEP states in relevant part:
- WIAT-III – (undated) total reading – 1st percentile; basic reading – 3rd percentile.
  - “progress towards IEP goals” reveals that progress decreased in the area of reading fluency in March 2020 where she was rated as “partially meets” to June, 2020 where \_\_\_\_\_ was rated as “does not meet.” In the area of stating the first 100 Fry sight words, Student 9 was rated in March 2020 and to June, 2020 as “partially meets.” In the area of stating “CVCe words with e and common vowel team patterns” in March 2020 where \_\_\_\_\_ was rated as “partially meets” to June, 2020 where she was rated as “does not meet.”
  - NWEA results Fall of 2019 show reading at 171 and math at 164 (75<sup>th</sup> and 60<sup>th</sup> percentiles).
  - No other modifications/supports were added to this IEP.
  - Written Notice based the decision to change \_\_\_\_\_ programming upon “progress on IEP goals,” but progress was declining in the area of reading, the area of biggest academic challenge for Student 9.
27. Student 10 is a \_\_\_\_\_ who qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the parents on October 5, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 24, 2020. The amended IEP went into effect on September 24, 2020. Student 10’s previous IEP provided 100 minutes/week of SDI in the special education room.<sup>22</sup> Student 10’s amended IEP provided that \_\_\_\_\_ would receive reading consultation by a special educator (and regular education staff) once per week for 10 minutes. The Written Notice based the decision to change \_\_\_\_\_ programming upon “a

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<sup>21</sup> It appeared that this Parent, \_\_\_\_\_ was not able to recall or willing to share some of the details of her communications with District staff.

<sup>22</sup> IEP is not specific as to subject area, though it appears from WN that it was in the area of ELA.

review of recent level of performance and progress on IEP goals.” No other new modifications/supports were added to this IEP.

28. Student 10’s September 24, 2020 amended IEP states in relevant part:

- “Progress towards IEP goals” reveals no progress noted in March or June 2020 regarding “maintaining passing grades in reading (70 or above). was noted as “partial progress” in March 2020 with regard to “retelling key facts from passages” with no progress noted in this area in June, 2020.
- NWEA scores from January 2020 indicate reading level between late to and received a “pass” for reading in the trimester ending in June 2020.
- WIAT-III – (December 2018) Total Reading 78 (below average).

29. Student 11 is an and qualifies for special education based on the category of a Multiple Disabilities (Other Health Impairment, Specific Learning Disability). The Written Notice was sent to the parents on October 22, 2020 and referenced an agreement with the parent for an IEP amendment without a team meeting on September 29, 2020 for an amended IEP that went into effect on October 22, 2020. Student 11’s previous IEP provided 825 minutes/week of SDI in the special education room in language arts and math. Student 11’s amended IEP provided that would receive SDI in ELA and math by a special educator ed tech (in the special education and regular education rooms for ELA with pull out support for math) for 750 minutes per week. The Written Notice based the decision to change programming based upon “progress on IEP goals.”

30. Student 11’s September 24, 2020 amended IEP states in relevant part:

- “progress towards IEP goals” reveals that progress decreased in the area of reading comprehension in March 2020 where was rated as “partially meets” to June 2020 where was rated as “does not meet.” In the area of knowing and applying end of level phonics was rated as “partially meets” in March 2020 and in June 2020 where was rated as “does not meet.” In the area of improving his ability to problem solve using graphs was rated as “partially meets” in March 2020 and in June 2020 where was not rated. In the area of solving word problems involving money was rated as “not started” in March 2020 and in June 2020 where he was not rated. In the area of improving ability to solve two-step word problems involving addition and subtraction was rated as “partially meets” in March 2020 and in June 2020 where he was not rated. In the area of improving focus and work completion was not rated in March 2020 and in June 2020.
- Winter 2018 WISC-V shows below average to average in verbal comprehension, reasoning processing speed and working memory scores and a full-scale IQ of 84;
- Winter 2018 WIAT-III shows total reading, reading comprehension and fluency and written expression scores in the below average range (70, 72 and 72).
- NWEA scores from Fall 2018 indicate reading reading level.

31. Student 13 is an and qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the parents on October 23, 2020 and referenced an agreement with the parent for an IEP amendment

without a team meeting on October 20, 2020 for an amended IEP that went into effect on October 22, 2020.<sup>23</sup> Student 13's previous IEP provided 600 minutes/week of SDI in the special education room in ELA. Student 13's amended IEP provided that \_\_\_\_\_ would receive SDI in ELA by a special educator ed tech (in the special education and regular education rooms) 480 minutes per week. The Written Notice based the decision to change her programming based upon "current IEP goal progress."

32. Student 13's October 20, 2020 amended IEP states in relevant part:

- "Progress towards IEP goals" in June, 2020, the most recent progress reports to this IEP, classified the Student's progress as "not started" in the area of Fry sight words, identifying characters in stories, reading at \_\_\_\_\_ level, answering comprehension questions, increasing writing performance, word meanings, generating synonyms, spontaneous speech and producing age level phonemes. Student 13's progress was also characterized as "not started" in the areas of forming letters and numbers and accuracy, using learning tools, visual motor integration, copying designs and independently scanning and locating letters.<sup>24</sup>
- April 2019 WISC-V shows verbal comprehension, processing speed and full-scale IQ significantly below average.
- April 2019 WIAT-III scores shows oral language written expression, listening Comprehension, reading skills and writing fluency at the below average range.

33. Student 16 is a \_\_\_\_\_ who qualifies for special education based on the category of OHI. In his previous IEP, Student 16 received pull out room SDI in \_\_\_\_\_ for 345 minutes per week. The Written Notice was sent to the parents on March 10, 2021 and referenced an agreement with the parent for an IEP amendment without a team meeting on September 1, 2020 for a new IEP that went into effect on September 1, 2020.<sup>25</sup> The new IEP provided that Student 16 would no longer receive pull out room SDI but will receive \_\_\_\_\_ consultation once per week for 20 minutes. The September 23, 2020 Written Notice noted that the aforementioned changes were based upon the student's "increased \_\_\_\_\_ scores."

34. Student 16's March 10, 2021 amended IEP (portions of actual amendments went into effect on September 1, 2020) states in relevant part:

- NWEA results through winter, 2019 show that Student is in the 31st percentile (low average range) in \_\_\_\_\_ for \_\_\_\_\_ grade level.
- Spring 2018 WISC-V shows full scale IQ of 102, (average).
- Spring 2018 WIAT-III shows \_\_\_\_\_ scores in the average range.
- [Student 16] needs to receive support in a small group setting to help with organizational skills so that \_\_\_\_\_ can keep track of his homework and complete it as independently as possible.

35. In an interview with the Complaint Investigator, the parent of Student 16 said as follows:

- Both of Student 16's parents

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<sup>23</sup> Student 13 began the year fully remote; returned to in-person learning by the end of September 2020.

<sup>24</sup> While Student 13 did demonstrate progress as "partially meets" in many of these categories by November 2020, this data appears to have been unavailable to the IEP team at the October 2020 meeting.

<sup>25</sup> Due to "administrative oversight."

- Student 16’s annual meeting in May 2020 confirmed that Student 16 was “supposed to receive pull out help in \_\_\_\_\_” which the parent believed had been necessary for him. She then received a call last summer asking if student 16 would “work on \_\_\_\_\_ issue over summer” which the parents agreed to.
  - By end of last summer, the Student had reached a \_\_\_\_\_ level, but the parents were concerned that it would be very difficult for him going into the \_\_\_\_\_, where he was still over two years behind.
  - The phone call from the District in August 2020 was a request that the parents “try to have [Student 16] in the regular education classroom based on his achievement over the summer.” During this call, the District did not have any specific programming details or other modifications. The Parents agreed to try the new placement with the understanding that if there was a problem, Student 16 could go back to the “pull out” room.
  - While student 16 has made progress this year, they credit this progress with lots of additional help from their \_\_\_\_\_ teacher and lots of extra time at home working with \_\_\_\_\_.
36. Student 18 is a \_\_\_\_\_ and qualifies for special education based on the category of a specific learning disability. In \_\_\_\_\_ previous IEP, Student 18 received pull out room SDI in math, ELA and Learning Center for 345 minutes per week. The March 10, 2021 Written Notice was sent to the parents on March 10, 2021 referenced an agreement with the parent for an IEP amendment without a team meeting on September 2, 2020 for a new IEP that went into effect on September 2, 2020. The new IEP discontinued SDI in math and ELA and provided that Student 18 will receive SDI in the learning center for five times bi-weekly for 69 minutes. The September 23, 2020 Written Notice noted that the aforementioned changes were based upon the psychological evaluation of 2018 and classroom performance.
37. Student 18’s March 4, 2021 amended IEP (portions of actual amendments went into effect on September 2, 2020) states in relevant part:
- NWEA results through winter, 2019 show that Student is in the 11<sup>th</sup> and 17<sup>th</sup> percentile in math and reading and the 10<sup>th</sup> percentile in general science, noting that her math scores from spring 2018 to fall 2019 have “only gone up three points.”
  - Spring 2018 WISC-V shows verbal comprehension 68 (extremely low) and full scale 75, (very low)
  - Spring 2018 WIAT-III shows below average difficulties in reading comprehension, which is consistent with her very low verbal comprehension. She scored in the 10<sup>th</sup> percentile, a \_\_\_\_\_ average and often answered “I don’t know” when asked questions. In the math subset, \_\_\_\_\_ scored in the 12<sup>th</sup> percentile, \_\_\_\_\_ average.
38. In an interview with the Complaint Investigator, the Parent of Student 18 said that she received a phone call prior to the start of the school year where a representative of the District said that because of covid and limited staffing, things had to change. There were

no statements about the change being “what was best for her .” She said that last year did a lot better when in “break out time and had a lot of 1:1 or 1:3 support” She said that the District didn’t offer a new IEP on a timely basis and that she has a lot of concerns, due to a lack of support and having to attend classes with a lot of noise and children who have behavior issues. In November, 2020, she ended up pulling out of school to do home schooling until returning to the District in February 2021. She noted that her daughter “did much better” in a home school program than she was doing at school. Since has returned, she hears from her that they now have ed techs who are helping her but “they are giving the answers.” She notes that still struggles and because she has not made progress this year “fears a crisis for next year” because of lack of skills.

39. Student 20 is a who qualifies for special education based on the category of Multiple Disabilities (Other Health Impairment, Specific Learning Disability.) The Written Notice was sent to the Parents on October 5, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 24, 2020 for an amended IEP that went into effect on October 5, 2020. Student 20’s previous IEP provided 400 minutes/week of SDI in the special education room in ELA and 400 minutes/week of SDI in the special education room in math. Student 20’s amended IEP maintained her SDI in math and amended SDI in language arts from 400 minutes to 150 minutes per week. The Written Notice based the decision to change programming based upon “present level of performance and progress on IEP goals.”
40. Student 20’s October 20, 2020 amended IEP states in relevant part:
- “Progress towards IEP goals” in June, 2020, (the most recent progress reports to this IEP), classified the Student’s progress as “not started” in the area of Fry sight words, identifying characters in stories, reading at level, answering comprehension questions, increasing writing performance, word meanings, generating synonyms, spontaneous speech and producing age level phonemes.
  - January 2020, NWEA scores: math 14% (low range); reading 14% (low range).
  - December 2019 Rigby Benchmark Reading Assessment: 8% accuracy for beginning level (“frustration level”).
41. Student 22 is a who qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the parents on September 29, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 23, 2020 for an amended IEP that went into effect on September 29, 2020. Student 22’s previous IEP provided 345 minutes/week of SDI in the special education room in ELA and 345 minutes/week of SDI in the special education room in math. Student 22’s amended IEP discontinued SDI in math and ELA and provided that would receive SDI “interventions” by a special educator and ed tech in the special education and regular education rooms three times “per bi-week” for 30 minutes.
42. Student 22’s September 29, 2020 amended IEP states in relevant part:
- NWEA Fall 2019:
    - i. Math - 215 (32nd Percentile)

- ii. Reading - 216 (54th percentile)
- iii. Language and Usage - 215 (53rd percentile)
- iv. Science - 217 (80th percentile)

- September 2017 Woodcock Johnson Tests of Cognitive Abilities and Achievement shows scores of “below average” to “average” in all categories.
- “Progress towards IEP goals” shows “partially met” on June 9, 2020 with regard to “producing clear and coherent writing”; “met” on June 9, 2020 with regard to “comprehend literature, including stories, dramas, and poetry, at the high end of the text”.

43. Student 24 is a \_\_\_\_\_ and qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the parents on October 5, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 25, 2020 for an amended IEP that went into effect on September 25, 2020. Student 24’s previous IEP provided 400 minutes/week of SDI in the special education room in ELA. Student 24’s amended IEP reduced SDI in ELA to 180 minutes per week. The Written Notice stated the decision to change programming was based upon “present level of performance and progress on IEP goals,” and added the accommodation of “reduced work in ELA as needed.” \_\_\_\_\_’s phone log with the Parent on September 1, 2020 noted only: “discussed adjustments due to covid. 3x’s 30 for [comprehension] otherwise in class-mom felt that will be good for him.” On September 24, 2020, \_\_\_\_\_’s call record stated: “we are going to wait to see what STAR reading score comes out to.” On February 11, 2021, the call record noted that the recently received STAR results were “still in the same range.” There were no references in the call record to conversations about adjustments related to Student 24’s individual needs or progress.

44. Student 24’s September 25, 2020 amended IEP states in relevant part:

- Rigby Benchmark Assessment for Reading on March 9, 2020: beginning \_\_\_\_\_ to \_\_\_\_\_ level.
- NWEA January 2020 Math- RIT score 216 and 47% (average range); Reading - RIT score 199 and 23% (low to low average range.) His Lexile range is an early \_\_\_\_\_ through ending \_\_\_\_\_ range.
- WISC and WIAT scores (spring, 2019) in the below average to average range, with processing speed in the above average range.
- Progress towards IEP goals: “able to retell events from a story at 90% accuracy at the early \_\_\_\_\_ level” No progress noted as of June, 2020, “does not meet” as of November, 2020; “write a story with at least three paragraphs as measured by student produced work.” No progress noted as of June 2020, “partial progress” as of November, 2020.

45. Student 25 is a \_\_\_\_\_ and qualifies for special education based on the category of a Multiple Disability/OHI and SLD. In her previous IEP, Student 25 received 345 minutes per week of SDI in \_\_\_\_\_. The April 4, 2021 Written Notice referenced an agreement with the parent for an IEP amendment without a team meeting on August 26, 2020 for a new IEP. The April 4, 2021 Written Notice stated that student 25 would “no

longer receive SDI in the area of \_\_\_\_\_.”<sup>26</sup> The January 5, 2021 IEP provided that Student 25 would receive SDI in \_\_\_\_\_ intervention in the general education and special education rooms for 100 minutes biweekly and SDI in functional \_\_\_\_\_ intervention in the general education and special education rooms for 30 minutes biweekly. The April 4, 2021 Written Notice based this decision that “mom agreed that based on [student 25’s] WIAT-III scores and \_\_\_\_\_ classroom performance \_\_\_\_\_ has the skills needed to transition into the general education setting with support.”

46. Student 25’s January 5, 2021 amended IEP states in relevant part:

- NWEA results through fall 2019 show math at 22<sup>nd</sup> percentile, reading at 4<sup>th</sup> percentile.
- 2018 WISC-V shows composites score in the average to below average range and a full-scale IQ of 86 (low average).
- 2018 WIAT-III also shows scores in the average to below average range: reading-82; basic reading-82; reading comprehension and fluency- 86; mathematics-89; math fluency-79 (low range).
- BASC-3 was completed by Student 25’s classroom teacher. She noted that [Student 25] has difficulties in math, weakness in processing-trouble maintaining work [and a] number of gaps in learning, noting her math score of 48, in the 9th percentile.
- Due to slow processing speed and ADHD, [\_\_\_\_\_ needs a] small group setting, with as few distractions as possible, to receive instruction as well as to complete assignments.
- Weaknesses in \_\_\_\_\_ fluency and knowing \_\_\_\_\_ facts cause \_\_\_\_\_ trouble in accessing \_\_\_\_\_ curriculum.

47. In an interview with the Complaint Investigator, the parent of Student 25 stated as follows:

- When she was contacted by the District regarding the changes to \_\_\_\_\_ daughter’s programming, she was told that this was a decision that the District wanted for the group and was not told that it was based upon her \_\_\_\_\_’s particular needs or skills.
- She said that \_\_\_\_\_ had been in pull out \_\_\_\_\_ in a small group setting which had been very successful for \_\_\_\_\_, especially due to \_\_\_\_\_ attention and distractibility issues.
- She expressed reluctance because \_\_\_\_\_ daughter’s \_\_\_\_\_ skills were at a \_\_\_\_\_-grade level and she doesn’t have a grasp of \_\_\_\_\_ “\_\_\_\_\_.” She noted that Student 25 has anxiety and depression as well. Ultimately, she agreed to the change in placement based on the District’s promise that there would be an ed tech available to help \_\_\_\_\_ and that she understood that \_\_\_\_\_ programming could be changed if needed.
- She “absolutely feels it was too much... it was a very stressful and difficult year.” She said that \_\_\_\_\_ daughter was a hard worker and would regularly stay after

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<sup>26</sup> The most recent IEP submitted is dated January 5, 2021 which references revised programming starting on January 6, 2021. According to the parent, it appears that Student 25’s new \_\_\_\_\_ programming went into effect in September of 2020.

school for approximately two hours with \_\_\_\_\_ teacher to understand \_\_\_\_\_ academic lessons.

- The fact that \_\_\_\_\_ did ultimately make progress over the course of the year was due to the extra help \_\_\_\_\_ received, especially from \_\_\_\_\_ teacher,

48. Student 26 is an \_\_\_\_\_ and qualifies for special education based on the category of a Specific Learning Disability. The Written Notice was sent to the parents on October 5, 2020 and referenced an agreement for an IEP amendment without a team meeting on September 24, 2020. The amended IEP went into effect on September 24, 2020. Student 26's previous IEP provided 400 minutes/week of SDI in the special education room in \_\_\_\_\_. Student 26's amended IEP eliminated \_\_\_\_\_ SDI in ELA and math and provided SDI in reading for 180 minutes per week (assistance provided in the general education classroom setting). The Written Notice based the decision to change programming upon "present level of performance and progress on IEP goals."

49. Student 26's September 24, 2020 amended IEP states in relevant part:

- Rigby Benchmark Assessment for Reading on 3/9/2020: Level 21 (ending instructional level).
- NWEA January 2020 Reading: 38% (low average) "According to this assessment his range of reading is independent at the early \_\_\_\_\_ level through instructional level at late \_\_\_\_\_ level. His January 2020 NWEA Math achievement test placed \_\_\_\_\_ at the 23% which is in the low average range."
- WISC and WIAT scores (2019) in the below average to average range, with processing speed in the above average range.
- Progress towards IEP goals: "Word problems that include information from graphs, [Student 26] will be able to solve the problems and increase his accuracy from 0% to 80% accuracy (4 out of 5 problems)": June, 2020, no results; November, 2020 "partially met"; Working at the beginning of \_\_\_\_\_ level, will increase his ability to solve one step word problems using multiplication/division (through 9's) from 0% to 80% accuracy": June, 2020, no results, November, 2020 "not started", March, 2021: "does not meet"; "Will retell events from a passage/story he has read independently, at the instructional level (70% accuracy), increasing from a late \_\_\_\_\_ to an early level June, 2020, "does not meet", November, 2020 "does not meet", March, 2021: "meets."

## **VI. DETERMINATIONS**

- 1. Having a policy or practice of not utilizing a student's IEP Team, including parents, as the vehicle for determining whether a student's educational placement is in the least restrictive environment and that a continuum of alternative placements is available to meet a student's educational needs in violation of MUSER §X.2.B;**
- 2. Having a policy or practice of not adequately including or considering the concerns of parents in the IEP decision making process in violation of MUSER §VI.2(H), §VI.2(I), §IX.3.C(1)(b), and MUSER App. 1 (34 CFR 300.501(b) and (c));**



3. **Not obtaining parental agreement or providing appropriate notice for modifying a student’s IEP in the absence of convening an IEP team meeting in violation of MUSER §IX.3.C (4);**
4. **Not providing parent(s) with proper prior written notice of the Districts’ proposals regarding the students’ educational program in violation of MUSER §VI.2.A, MUSER App. I (34 CFR §300.503);**  
**and**
6. **Having a policy or practice of not properly developing or revising IEPs thereby depriving students of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C and 34 CFR 300.101(a).**

**SYSTEMIC NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND** <sup>27</sup>

In the present case, the District’s goal of making sure that all students are placed in the Least Restrictive Environment (LRE) is consistent with the requirement under MUSER and the IDEA that “[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled.” MUSER §X.2.B; 20 U.S.C. §1412(a)(5); See, *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). As noted in this report, it is clear that a number of the Identified Students were placed in overly restrictive settings during the 2019-2020 school year. Director Flacke was correct to identify and attempt to correct this problem for these Students. However, in a number of cases, the District did not properly notify Parents or fully consider the individual needs and circumstances of a subgroup of Identified Students before implementing these IEP changes.

Children with disabilities are afforded certain rights and protections under MUSER and the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 et seq. These rights include the development of an IEP and the delivery of special education services and supplementary aids in the least restrictive environment. 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 (1<sup>st</sup> 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.

There is a two-part standard for determining the appropriateness of an IEP and placement. See *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley* (“Rowley”),

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<sup>27</sup> Denial of FAPE found with regard to a subgroup of 13 Identified Students, as set forth below.

458 U.S. 176, 206 (1982). 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 "educational benefits"? *Id.*, *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27 (1<sup>st</sup> Cir. 2008). In *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012), the Second Circuit Court of Appeals addressed the two-part "procedural" and "substantive" inquiry and held:

Substantive inadequacy automatically entitles the parents to reimbursement. Procedural violations, however, only do so if they "impeded the child's right to a [FAPE], ...significantly impeded the parents' opportunity to participate in the decision making process..., or caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *A.C.*, 553 F.3d at 172. *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 160 (2d Cir. 2014). Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not. *See Werner v. Clarkstown Cent. Sch. Dist.*, 363 F.Supp.2d 656, 659 (S.D.N.Y.2005). *R.E. v. N.Y.C. Dep't of Educ.*, *Id.* at 190.

In *R.E.* the court concluded that the failure of an IEP team to conduct an adequate FBA, without otherwise adequately identifying the problem behavior and prescribing ways to manage it, was a "serious procedural violation" because it prevented the [IEP team] from obtaining necessary information about the student's behaviors. The *R.E.* court held that such a failure "seriously impairs substantive review of the IEP because courts cannot determine exactly what information an FBA would have yielded and whether that information would be consistent with the student's IEP." *Id.* at 190.

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

The written notice provisions of 34 CFR §300.503 require districts to give parents notice, according to specifically defined terms, at least 7 days prior to the date the district proposes to change or initiate programs for students.<sup>28</sup> Prior written notice, under 34 CFR 300.503(a), is

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<sup>28</sup> Pursuant to 34 CFR §300.503, the written notice must:

1. Describe the action *regarding the referral, evaluation, identification, programming or placement* that your SAU proposes or refuses to take;
2. Explain why your SAU is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record, or report your SAU used in deciding to propose or refuse the action;

required when the IEP is amended to change the student's placement, including when the amendment is made through an agreement with the parent instead of convening the full IEP team.

MUSER IX.3(C)(4) allows changes to IEPs without a team meeting, after the annual IEP meeting, if there is an agreement between the school district and the parent. This regulation provides:

(4) Agreement. In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the SAU may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a *written document* to amend or modify the child's current IEP. If changes are made to the child's IEP in accordance with 34 CFR 300.324(a)(4)(i) the SAU must ensure the child's IEP Team is informed of these changes [34 CFR 300.324(a)(4)] *and the parent is provided prior written notice in accordance with 34 CFR 300.503. see also: 20 U.S.C. § 1414(d)(3)(D).* (emphasis added)

Although section IX.3(C)(4) doesn't explicitly limit the types of revisions that may be made without a team meeting, it specifies both the need for a written document to amend or modify "the child's current IEP" along with the added requirement that the parent is provided prior written notice in accordance with 34 CFR 300.503. Explicit in this requirement is that parents understand "the referral, evaluation, identification, programming or placement" proposed for their child, along with the reasons therefore, before the change is implemented. Specifically, while parents may waive their right to a team meeting, the District is responsible to make sure that Parents understand what they are agreeing to and have an opportunity to access their procedural safeguards in the event that they do not agree with the proposed changes. The importance of providing this notice in writing becomes even more important, as in the present case, where changes involve substantive changes to students' educational environments and the delivery of special education services. In *Union Sch. Dist. v. Smith*, 20 IDELR 987 (9th Cir. 1994), the Ninth Circuit Court of Appeals noted:

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4. Include a statement that you have protections under the procedural safeguards provisions in Part B of the IDEA;
  5. Tell you how you can obtain a description of the procedural safeguards if the action that your SAU is proposing or refusing is not an initial referral for evaluation;
  6. Include resources for you to contact for help in understanding *your rights under Part B of the IDEA, such as and the Due Process Office of the Maine Department of Education (207-624-6644), the Maine Parent Federation (1-800-870-7746), and Southern Maine Parent Awareness (1-800-564-9696)*
  7. Describe any other choices that your child's individualized education program (IEP) Team, *which includes* the parent, considered and the reasons why those choices were rejected;
  8. Provide a description of other reasons why your SAU proposed or refused the action.
  9. *Include a summary of comments made by the parents, including the parents' description of their child's progress; and*
  10. *Names and titles of each member.*

The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the . . . educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). Id.

In this case, the Parents of the Identified Students were contacted by phone by District staff prior to the start of the school year with regard to increasing inclusive programming for their children. The conversations with the Parents, however, did not offer details with regard to the reasons for the change, or what the new program would look like. [redacted] said that "the District didn't know exactly what each student's program would look like during those initial calls." [redacted] characterized the initial calls as "informal chit chat with the parents" clarifying to them that someone from the District would call back when more formal changes were in place.<sup>29</sup> [redacted] said that "parents were not given sufficient information about their children's programming to make informed "agreements" about their new IEPs." Sandy Flacke noted that she didn't have any staff requirements for documenting these calls, other than to record that Parents 'had agreed' to waive the formal IEP team meeting.<sup>30</sup> Parents confirmed the lack of detail during these initial calls, and that the notice was given to them without reference to what the programming would look like or why it was best for their child.<sup>31</sup>

Additionally, none of the Parents of the Identified Students were given a copy of a Written Notice within seven days prior to the date the district proposed to change or initiate the new programs, as required. Instead, Written Notices were sent to Parents *after* the new inclusive programming started.<sup>32</sup> For several of the Students, notice was sent to the Parents approximately six months after the Students' amended IEP began.<sup>33</sup>

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<sup>29</sup> Several of the call log references from [redacted] suggest that Parents were "told" that programming would change for their student during these initial calls: [Call to Parent of Student 4] Explained *she will be working with her class for ELA and I will be doing intervention*; [Call to Parent of Student 21] Explained program *will look different* [call to Parent of Student 26] "Explained program *will look different*... will pull out less, in room support but will make push-in as much as possible-Told her we'd be in touch again soon.

<sup>30</sup> Dr. Flacke inferred that Erin Frazier said that some of the notice rules would be relaxed due to the urgency of the pandemic and the overly restrictive programming that she felt was in place for the Identified Students. Ms. Frazier clarified that while she was sensitive to the extra burdens placed on staff at no time did she endorse an approach that bypassed parental notice provisions of MUSER or IDEA.

<sup>31</sup> See facts 35, 38 and 47.

<sup>32</sup> See facts 10, 12, 14, 16, 18, 22, 25, 27, 29, 31, 36, 39, 41, 43 and 48.

<sup>33</sup> The District notes that this was due to "administrative oversight" See fact 20, 33 and 45. Further evidence that the District pre-determined placement decisions for the Identified Students is supported by the fact that the District recommended reductions in staffing for ed techs in the spring of 2020, before determining whether additional staffing was needed for the Identified Students. See, facts 1, 6, 8.

In *Spring Branch Independent School District v. O.W. by Hannah W.*, 961 F.3d 781, 796 (5th Cir. 2020), the Fifth Circuit Court of Appeals found a “substantial and significant deviation from the IEP...[resulting in] a loss of academic benefits” from an IEP amendment outside of meeting when the content of the modification and written document detailing the IEP modification were not properly prepared. *Id.* at 799. See also, *Georgetown Indep. Sch. Dist.*, 121 LRP 3995 (SEA TX 11/18/20).

The District correctly notes that the IEP team must consider ways to maximize the opportunity for each of the Identified Students to be educated with children who are not disabled.

MUSER §VI.2.I provides that the SAU has ultimate responsibility to ensure that each child’s placement is in the least restrictive educational environment. MUSER §X.2.B 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. [20 USC 1412(a)(5) and 34 CFR 300.114] 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. (emphasis added).*

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) (questions about least restrictive programming are “an integral aspect of an IEP package (and) cannot be ignored when judging the program’s overall adequacy and appropriateness.”). 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.

The IDEA’s preference for mainstreaming, however, is not absolute. In *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014), the court noted that “the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students.” *T.M. Id.*, quoting *Briggs v. Bd. of Educ.*, 882 F.2d 688, 692 (2d Cir.1989) ” In *Briggs*, a lower court found a student’s placement in a mainstream setting that provided “intensive adult intervention and language therapy” to be an appropriate placement. The *Briggs* court reversed the lower court holding that “the court did not elaborate on how this

could be done. Further, neither the court nor the Briggs pointed out anything in the administrative record to substantiate the claim that the Student's needs could be met in a less segregated setting." *Briggs v. Board of Education*, 882 F.2d 688, 692 (2d Cir. 1989). "We are not as convinced as the district court was that the benefits [to the student] of mainstreaming outweigh the benefits that he would obtain from being placed in a segregated program that could effectively meet his needs." *Briggs v. Board of Education*, 882 F.2d 688, 693 (2d Cir. 1989). (See also, *C.D. v. Natick Pub. Sch. Dist.* WL 3510291, at 3: "The benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment.")

To make these determinations, MUSER §IX.3.C (1) addresses the specific items that an IEP team must consider in developing each child's IEP, including: (a) the strengths of the child; (b) the concerns of the parents for enhancing the education of their child; (c) the results of the initial evaluation or most recent evaluation of the child; and (d) the academic, developmental, and functional needs of the child.

OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994) notes that each student's placement must be individually determined based on the individual student's abilities and needs.... it is the program of specialized instruction and related services contained in the student's IEP that forms the basis for the placement decision. In determining if a placement is appropriate under IDEA, the following factors are relevant:

- the educational benefits available to the disabled student in a traditional classroom, supplemented with appropriate aids and services, in comparison to the educational benefits to the disabled student from a special education classroom;
- the non-academic benefits to the disabled student from interacting with nondisabled students; and
- the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student.

95-9, 21 IDELR 1152 (OSEP 1994)

Because there is no "bright-line rule on the amount of benefit required of an appropriate IEP," courts and hearing officers must use "an approach requiring a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood Bd. of Educ.*, 172 F.3d at 248 (decision-maker must "analyze the type and amount of learning" that a student is capable of when determining whether "meaningful benefit" has been provided). Whether a program provides a "meaningful benefit" however, must be individualized, based upon each student's potential for advancement. *Polk v. Central Susquehanna Interm. Unit* 16, 853 F.2d 171, 180 (3d Cir. 1988). The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this *fact-intensive exercise* will be informed not only by the expertise of school

officials, but also by the input of the child’s parents or guardians. *Andrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017) (emphasis added)<sup>34</sup>.

The appropriateness of an IEP must be assessed as of the time the IEP was developed. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) ("Because the question ... is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, ... the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. ... Neither the [IDEA] nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* (other citations omitted.)

In the present case, for a subgroup of five Identified Students, the record supports a finding that the District considered these Students’ individual needs and abilities as required by MUSER §IX.3.C (1) so that these Students could be educated more inclusively with their non-disabled peers. For this subgroup of Students, there is no evidence that a substantive denial of FAPE has occurred.<sup>35</sup>

However, for a different subgroup of 13 Identified Students, there remain significant questions about whether the changes in their programs were appropriate. Specifically, for this subgroup, there was very little elaboration of how, if at all, each Student’s needs could be met in a less segregated setting. For many of the members of this subgroup, the rationale for making these significant changes was a simple notation: “review of recent performance and progress on IEP goals.” The actual documentation of the Students’ progress or academic needs for this subgroup, however, was frequently based on old or inconsistent testing results or contradictory information with regard to the Students’ actual progress as documented within their IEPs.<sup>36</sup> In

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<sup>34</sup> The *Andrew* Court held that a student’s educational program must be appropriately ambitious in light of his 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. *Id.*, Slip Op at 11.

<sup>35</sup> The record shows supporting data and documentation of the amended IEPs, with greater inclusivity in the regular education setting, for Students 2, 16, 22, 24 and 26.

<sup>36</sup> (see fact 5) **Student 1:** Previous IEP with 890 minutes per week of SDI in math, ELA, and Interventions reduced to 45 minutes per week based upon “review of present performance and progress on IEP goals.” Amended IEP reports: “completed minimal work in remote program-passed in less than 25%”; NWEA results show declining progress in reading between fall of 2019 and winter 2020; No record of additional modifications/supports were added to amended IEP.

**Student 3:** 400 minutes per week of SDI in reduced to 90 minutes of direct instruction based upon review of recent performance and progress on IEP goals. NWEA results through winter, 2020 show reading at 7th percentile; recent progress reported as “does not meet” for oral fluency and reading memory.

**Student 4:** 400 minutes per week of SDI in reduced to 150 minutes of direct instruction and 60 minutes of push in support without indicating reason. NWEA results through winter, 2020 show reading at 17th percentile, STAR 360 district wide achievement tests [November 2020], placed at 10<sup>th</sup> percentile in reading, recent progress reported as “does not meet” for oral fluency and reading memory. Teacher comments on November 17, 2020 “I explained to the Parent that is struggling...with a high # [of absences]...”;

**Student 6:** Reduction in SDI in from 600 minutes per week to 200 minutes/week with ed tech support based upon “Progress towards IEP goals.” IEP reveals that progress “has not started” in the areas of writing; March 2018

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WISC-V shows “significantly below average range” in verbal comprehension; “clinically significant” reports of hyperactivity, depression, learning problems and atypicality; No record of additional modifications/supports added to this IEP.

**Student 7:** Determination to eliminate SDI based upon a “2019 WIAT scores and classroom performance.” While the WIAT scores show average or below average scores, the NWEA results through Fall of 2019 show reading at 173 (1st percentile). Progress “does not meet” as of June 2020 and November, 2020 in the area of “reading and comprehending literature...of text.” Staff noted has a difficult time staying on task, often gets distracted by things around and needs directions repeated in an individual manner...[ ] works best in a small group setting where there are limited distractions. No other modifications/supports were added to amended IEP.

**Student 8:** Determination to reduce 1125 minutes per week of SDI in math, ELA, and interventions to “intervention” for three times bi-weekly for 30 minutes based upon “review of present performance and progress on IEP goals” and noted that Student 8 “has no academic needs”. IEP BASC-3 teacher report: at risk for Hyperactivity (94th percentile) Attention problems (91st percentile), school problems (86th percentile) and atypicality 94th percentile); Narrative for June 5, 2020: [Student 8] “didn’t complete any work in the form of internet-based activities or learning packets as of April 13, 2020... some work was returned by June 5, 2020 deadline but most of the worksheets appeared to be in someone else’s handwriting. Amended IEP noted that Student “needs a great deal of help with organization and that is more productive in a small group setting with more individualized instruction.” Regular education teacher characterized behavior as “very disruptive” to the extent that other students “can’t sit next to ” and that behaviors significantly interfered with her teaching other students. Same teacher noted lack of initial information about student needs and overall lack of push-in supports offered to her from the District for this and other students. No new modifications or supports were added to amended IEP.

**Student 9:** Determination to reduce SDI programming upon “progress on IEP goals.” IEP reveals that progress decreased in the area of reading fluency in March 2020 where was rated as “partially meets” to June, 2020 where was rated as “does not meet.” progress of “restating words with e and common vowel team patterns” in March 2020 was rated as “partially meets” and by June 2020 was rated as “does not meet.” No record of additional modifications/supports added to this IEP.

**Student 10:** Determination to reduce SDI in based upon “a review of recent level of performance and progress on IEP goals.” IEP reveals no progress noted in March or June 2020 in the area of “maintaining passing grades in reading (70 or above).” was noted as “partial progress” in March 2020 with regard to “retelling key facts from passages” with no progress noted in this area in June 2020.

**Student 11:** Determination to reduce SDI programming in ELA and math based upon “progress on IEP goals”. IEP reveals that progress decreased in the area of reading comprehension in March 2020 where was rated as “partially meets” to June 2020 where was rated as “does not meet.”

**Student 13:** Determination to reduce SDI programming in based upon “current IEP goal progress”. IEP reveals that progress as of June, 2020 was “not started” in the area of Fry sight words, identifying characters in stories, reading at level, answering comprehension questions, increasing writing performance, word meanings, generating synonyms, spontaneous speech and producing age level phonemes. Student 13’s progress was also characterized as “not started” in the areas of forming letters and numbers and accuracy, using learning tools, visual motor integration, copying designs and independently scanning and locating letters. April 2019 WISC-V shows verbal comprehension, processing speed and full-scale IQ significantly below average.

**Student 18:** Determination to reduce SDI programming in ELA and math from 345 minutes per week to 345 minutes biweekly based upon “the psychological evaluation of 2018 and classroom performance.” NWEA results through winter, 2019 show that Student is in the 11th and 17th percentile in math and reading and the 10th percentile in general science, noting that her math scores from spring 2018 to fall 2019 have “only gone up three points.” Spring 2018 WISC-V shows verbal comprehension 68 (extremely low) and full scale 75, (very low) Spring 2018 WIAT-III shows below average difficulties in reading comprehension, which is consistent with very low verbal comprehension. scored in the 10th percentile, a average and often answered “I don’t know” when asked questions. In the math subset, scored in the 12th percentile, average (Student is a ).

**Student 20:** Determination to reduce SDI programming in from 400 minutes per week to 150 minutes weekly based upon “present level of performance and progress on IEP goals.” In June, 2020, (the most recent progress report for amended IEP), classified Student 20’s progress as “not started” in the area of Fry sight words, identifying characters in stories, reading at level, answering comprehension questions, increasing writing performance, word meanings, generating synonyms, spontaneous speech and producing age level phonemes.



short, the changes occurred with inconsistent, insufficient or outdated data and insufficient input from Parents and teachers. Instead, the decision to change the placement for these Students appears to be a broad-brush removal of resource room instruction. While the District's goal to maximize each Students LRE was appropriate, the record does not reflect that the IEP teams fully considered the individual needs of this subgroup of Students as required by MUSER §IX.3.C (1). In addition, the teams did not sufficiently elaborate how the Students' needs could be met in a less segregated setting. *Briggs v. Board of Education*, Id at 692; See *Roland M. v. Concord Sch. Comm.*, 910 F.2d 928, 993 (1st Cir. 1990).

**5. Not providing qualified staff in violation of MUSER §X.2(5);**

**COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND**

MUSER X.2(5) provides that special education and related services must be provided by “appropriately certified education personnel, or licensed contractors...” If a school administrative unit is unable to hire qualified staff for the provision of related services, the unit shall make an ongoing, good faith effort to recruit and hire appropriately and adequately trained personnel to provide related services to children with disabilities. The record supports a finding that while there are notice violations and questions about the placement and supportive services considerations, the instruction was provided to the Identified Students by appropriately qualified and certified teachers and ed techs.

**CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT**

1. With regard to the Subgroup of the 13 Identified Students identified in this report where questions about whether the changes in their programs were appropriate, the IEP teams for these Students shall convene within 30 days of this report to:
  - a) Determine whether updated or additional evaluations are needed for these Students, and if so, to conduct said evaluations pursuant to §MUSER V;

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January 2020, NWEA scores: math 14% (low range); reading 14% (low range). December 2019 Rigby Benchmark Reading Assessment: 8% accuracy for beginning level (“frustration level”).

**Student 25:** Determination to eliminate 345 minutes per week of SDI programming in and replace with “intervention in the general education and special education rooms for 100 minutes biweekly” based upon “WIAT-III scores and classroom performance [indicating that] has the skills needed to transition into the general education setting with support.” January, 2021 IEP reports that WIAT-III scores were from 2018; Classroom teacher BASC-3 noted that [Student 25] has difficulties in , weakness in processing-trouble maintaining work [and a] number of gaps in learning, noting score of 48, in the 9th percentile. IEP also noted “Due to slow processing speed and ADHD, [ needs a] small group setting, with as few distractions as possible, to receive instruction as well as to complete assignments. weaknesses in fluency and knowing facts cause trouble in accessing curriculum.”

- b) Once said evaluations are completed, determine whether their current placement is appropriate and in the Least Restrictive Environment with appropriate modifications and supportive services. If not, each Student's IEP team shall determine a new placement for the Student taking into account the requirements set forth in MUSER §X.2.B and MUSER §IX.3.C(1), including all necessary educational supportive services and specialized instruction;
  - c) Determine whether compensatory education and services must be provided to any of the subgroup of 13 Identified Students for equity. If any of the Identified Students were denied a FAPE and compensatory services are warranted, the IEP Team shall develop a plan to provide those services during the school year and/or during the summer and Parents must be given input about the amount and scheduling for the provision of compensatory services;
  - d) The IEPs shall be properly amended to reflect any such modifications of programming or services; and
  - e) The District shall insure that Parents are given proper prior written notice of the District's proposals regarding the students' educational program as required by MUSER §VI.2.A, MUSER App. I (34 CFR §300.503).
2. The District shall schedule training for all appropriate staff members in order to review state and federal regulations with respect to IEP Team responsibilities with a specific focus on parental notification, communication and inclusion with regular education staff and documentation issues, pursuant to MUSER §VI.2.A, MUSER App. I (34 CFR §300.503).
3. The following compliance documentation shall be sent to the Due Process Office and the Parents:
- a) A copy of the Students' revised IEPs developed from the above referenced meeting;
  - b) Copies of all evaluation reports;
  - c) A copy of the Written Notices (WN); and
  - d) Copy of the staff training curriculum, trainers and staff members attending the training.