

Complaint Investigation Report

v. RSU 73

July 8, 2021

Complaints # 21.065CS & # 21.066C

Complaint Investigator: Julia N. Pothén, Esq.

Date of Appointment: May 13, 2021

I. Identifying Information

Complainant:

Respondent: RSU 73 (“District”)
Scott Albert, Superintendent
9 Cedar Street
Livermore Falls, ME 04254

Tammy Verreault, Special Education Director

Named Student:

Unnamed Students: (“Unnamed Student 1”)

(“Unnamed Student 2”)

(“Unnamed Student 3”)

(“Unnamed Student 4”)

(“Unnamed Student 5”)

(“Unnamed Student 6”)

(“Unnamed Student 7”)

(“Unnamed Student 8”)

(“Unnamed Student 9”)

(“Unnamed Student 10”)

(“Unnamed Student 11”)

(“Unnamed Student 12”)

(“Unnamed Student 13”)

II. Summary of Complaint Investigation Activities

On May 12, 2021, the Maine Department of Education received and officially opened both a Systemic Complaint Request #21.065CS and an Individual Complaint Request #21.066C against RSU 73 (“District”) from the complainant (“Parent”), who is the parent of a child in the program. Therefore, the current complaint investigations cover the period of May 12, 2020 to present. See MUSER XVI(4)(B)(3). The complaint investigator was appointed on May 13, 2021.

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”) and is, or has the potential to be, applicable to a group of students, named or unnamed. Individual complaints are those that allege that a school district has violated the MUSER with respect to a specific student. After the receipt of Parent’s systemic and individual

complaints #21.065CS and #21.066C, a Draft Allegations Letter was sent to the parties by the complaint investigator on May 13, 2021, detailing three alleged systemic and individual violations of the MUSER. The Parent's systemic complaint #21.065CS named one student ("Student") whose educational rights were allegedly directly impacted by the systemic violations. The complaint also referenced other unnamed students in the

program who were allegedly impacted by the systemic violations.

The named Student in the systemic complaint is also the subject of the individual complaint #21.066C.

The complaint investigator held a telephonic Complaint Investigation Meeting on May 25, 2021. During the phone conference, all parties agreed that cases #21.065CS (the systemic complaint request) and #21.066C (the individual complaint request) would be consolidated by the complaint investigator into one comprehensive complaint investigation report because the three substantive allegations for both cases were identical. Therefore, this complaint investigation report fully addresses the Parent's systemic and individual complaint allegations #21.065CS and #21.066C. A revised Allegations Letter was sent to the parties by the complaint investigator on May 25, 2021, further clarifying the scope of the Parent's allegations and confirming the consolidation of these two complaints.

Soon thereafter, the District proposed a solution to resolve the systemic and individual complaints, in accordance with MUSER XVI(4)(A)(1)(c). The District's proposal includes the District's current and proposed steps to resolve the issues set forth in the Allegations Letter. The Department of Education accepts the District's proposal to remedy previous non-compliance with respect to Allegations 1 and 2, as detailed below in Section IV of this report. The Department will monitor the District's proposed corrective action plan, as detailed below in Section VII of this report. However, the Department of Education does not accept the District's proposal to resolve the systemic and individual complaints regarding Allegation 3. As such, the complaint investigator has completed her complaint investigations in full with respect to Allegation 3 (see Section IV below for a list of the complaint allegations).

The complaint investigator has received and thoroughly reviewed 330 pages of documents from the District, all of which specifically address Allegation 3. These documents include Individualized Education Plans ("IEPs") and other relevant documentation, such as Written Notices, Evaluations and email communications, for the named Student, as well as

relevant documentation from 13 additional unnamed students who were part of the _____ program during the 2020-2021 school year. The District, therefore, has identified a total of 14 students who are the subject of this consolidated complaint investigation. The investigator also received 21 pages of additional documentation submitted by the Parent and the Student’s Community Caseworker.

Complaint investigation interviews were conducted between June 14, 2021 and June 18, 2021. The complaint investigator interviewed the Parent, the Student’s Community Caseworker, the Special Education Director, the Student’s Special Education Teacher/Casemanager (who is also the Special Education Teacher for all students in the _____ program), and the Student’s Occupational Therapist (who also provides occupational therapy services to all students requiring such IEP services in the _____ program). To complete this investigation, the complaint investigator reviewed all documents provided, considered all information collected through interviews, and evaluated all written responses provided by the parties.

III. Preliminary Statement

The systemic complaint filed by the Parent identifies one named student (“Student”) who currently attends the _____ program in _____, Maine. The Student is also the subject of the Parent’s individual complaint. The Student is _____ old, and he recently completed his _____ year at _____ School. The Student resides at home with his family in _____, Maine.

The systemic complaint also referenced alleged educational harm to various other unnamed students in the _____ program. To ensure a thorough investigation, the complaint investigator collected special education documents for all 14 students (including the named Student) who participated in the _____ program during the 2020-2021 school year at _____ School.

This complaint has only thoroughly examined the District’s policies, practices, and procedures with respect to students in the _____ program. As such, the determinations in this report do not reflect on the District’s practices in other programs or at other schools within RSU 73.

IV. Allegations

1. The District has a practice, policy, or procedure of not implementing students' IEPs as written. Specifically, the District has not fully implemented the IEPs of the Student and other unnamed students in the _____ program during the 2020-2021 school year. MUSER IX(3)(B)(3).¹
2. The District has a practice, policy, or procedure of altering IEPs outside the IEP process by adding individual remote learning plans without obtaining agreement from parents and/or without designing individual remote learning plans based on the unique, individual needs of students in the _____ program during the 2020-2021 school year. Numerous students have been adversely impacted, including the Student. MUSER IX(3)(C)(4); MUSER IX(3)(C)(1); MUSER IX(3)(C)(2); MUSER VI(2)(I).²
3. The District has a practice, policy, or procedure of making unilateral decisions about Extended School Year ("ESY") services without considering the unique, individual needs of students in the _____ program during the 2020-2021 school year. Numerous students have been adversely impacted, including the Student. MUSER X(2)(A)(7); MUSER IX(3)(A)(1)(d).

V. Factual Findings Regarding Allegation 3³

1. The named student ("Student") is _____ old, and _____ recently completed _____ year at _____ School. _____ resides at home with _____ in _____, Maine.
2. The Student qualifies for special education services under the category of Other Health Impairment, based on _____ diagnosis with Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Presentation, and a Speech Language Impairment. See Student's Individualized Education Plan ("IEP"), dated 3/12/21, as amended on 4/27/21 and 6/2/21; Written Notice from Student's IEP Transition Meeting from _____ on _____

¹ As described above, the Department of Education has accepted the District's proposal to resolve this allegation with the corrective action plan detailed in Section VII of this complaint report. As such, the facts of Allegation 1 were not investigated further by the complaint investigator. The Department will monitor the District's compliance with the corrective action plan, which addresses Allegation 1 from both the systemic and individual complaint requests.

² As described above, the Department of Education has also accepted the District's proposal to resolve this allegation with the corrective action plan detailed in Section VII of this complaint report. As such, the facts of Allegation 2 were not investigated further by the complaint investigator. The Department will monitor the District's compliance with the corrective action plan, which addresses Allegation 2 from both the systemic and individual complaint requests.

³ Please note that these factual findings address Allegation 3 both with respect to the individual complaint request #21.066C (regarding the named Student) and with respect to the systemic complaint request #21.065CS (regarding both the named Student and 13 additional unnamed students who participated in the _____ program during the 2020-2021 school year at the _____ School).

April 28, 2020; Psychological Evaluation by Kathleen L. Weiss, Ph.D., dated 5/15/18; Psychological Evaluation by Michael P. Butler, NCSP, dated 5/24/21.

3. The Student's difficulties with attention, hyperactivity, risk-taking, and distractibility have an adverse effect on his educational performance, and the Student also struggles with social/pragmatic communication due to a severe mixed receptive/expressive language disorder, as well as academic deficits. Id.; Psychological Evaluation Report by Michael P. Butler, NCSP, dated 5/24/21 ("The most significant concerns are with [the Student's] hyperactivity and attention skills.").
4. The Student's most recent IEP, dated 3/12/21, as amended on 4/27/21 and 6/2/21, provides for 5 x 4.5 hours per week of Specially Designed Instruction ("SDI"), as well as 60 minutes per month of BCBA consultation. The Student also currently requires related services of 1 x 15 minutes per month of speech and language consultation services, and 4 x 30 minutes per month of direct speech and language services. Additionally, the Student receives 6 x 15 minutes per trimester of occupational therapy ("OT") consultation, and 4 x 30 minutes per month of direct OT services. The Student receives special transportation, and his current IEP provides 24 hours of 2021 Extended School Year ("ESY") programming, as well as 120 minutes of direct OT ESY services. See Student's IEP, dated 3/12/21, as amended on 4/27/21 and 6/2/21.
5. The Student's most recent psychological evaluation was completed on May 24, 2021 by Michael P. Butler, NCSP. The recent evaluation concluded that the Student's hyperactivity and attention deficits were "likely interfering with [the Student's] progress in his academic program." See Psychological Evaluation Report by Michael P. Butler, NCSP, dated 5/24/21.
6. As previously measured by the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV), the Student's verbal comprehension skills were low average (23rd percentile), with a full-scale composite score of 84 (14th percentile). See Student's Psychological Evaluation, dated May 15, 2018, conducted by Kathleen L. Weiss, Ph.D.
7. Additionally, on April 6, 2021, as part of a recent psychoeducational evaluation, the Student's educational achievement was assessed using the Woodcock Johnson-IV Achievement Test. See Student's Psychoeducational Evaluation by Elissa Cazassus, Psy.D., dated 4/6/21. The Student's basic reading, mathematics, and written language scores were all in the 'Low' or 'Very Low' range (between the 6th percentile and <1st percentile).⁴ Id.

⁴ Note, however, that the Student's recent psychoeducational evaluation discussed the evaluator's concerns about the Student's behavior during the administration of this test. The test was administered through a virtual platform due to COVID safety restrictions, and while the Student was initially cooperative and friendly with the evaluator, he

8. Prior to attending _____ School, the Student had an IEP through _____, and _____ attended a specialized, self-contained _____ in _____, Maine. _____ followed the methodology of Applied Behavior Analysis (“ABA”) instruction. See Transition Meeting Report from _____

9. The Student attended _____ from September 2018 through August 2020, and _____ providers recommended that the Student participate in an ABA program during the upcoming school year because the Student experienced success in his ABA _____ program as evidenced by his final progress review, both with a reduction of interfering behaviors and an increase in his skill development. Id.

10. On April 28, 2020, the Student’s IEP Team held a transition meeting to prepare for the Student’s move from his specialized _____ program into the _____ school system. The IEP Team agreed to adopt the recommendations of the Student’s _____ providers, placing _____ in the _____ program at _____ School during the 2020-2021 school year. See Written Notice from the IEP Transition Team meeting on 4/28/20.

11. The _____ program, much like the Student’s self-contained _____, employs the tenets of Applied Behavior Analysis (ABA) and discrete trial training in a highly structured classroom setting. The _____ program includes students in _____ at the _____ School. See District’s Response to Allegation #3 Regarding Student; Interview with Student’s Special Education Teacher/Case Manager.

12. In preparation for the Student’s transition, the IEP Team amended the Student’s IEP, effective on 8/31/20, to include 5 x 4.5 hours per week of Specially Designed Instruction, as well various accommodations, including a positive intervention behavior plan, modified curriculum/reporting, smaller groups for lunch, recess, and allied arts, and adult support throughout the day. See Written Notice from the IEP Transition Team meeting on 4/28/20. Because the Student was “not yet independent in _____ ability to comply with adult direction and regulate his behavior,” _____ IEP Team determined that 6% of his

demonstrated noncompliant behavior by the fourth subtest. Testing was discontinued when the Student became dysregulated and threw his weighted pillow at the computer. Testing was eventually completed during a second session, but the Student still required repeated directions and “a great deal of prompting and redirection, even in the structured one-to-one situation” to complete the test. See Student’s Psychoeducational Evaluation by Elissa Cazassus, Psy.D., dated 4/6/21.

educational time would be spent with non-disabled children. See Student's IEP, dated 3/5/20, as amended on 8/31/20.

13. On August 31, 2020, the Student was officially enrolled at School. See Student's Attendance Records, provided by the District.
14. Due to COVID safety protocols, the District operated under a modified schedule for the bulk of the 2020-2021 school year. The majority of students in the District utilized a hybrid learning model, accessing in-person learning two days per week and remote learning three days per week. However, the program at School began the school year with four days per week of in-person instruction, and the Student's family immediately opted for the Student to attend four days per week of in-person learning. See District's Response to Allegation #3 Regarding Student; Interview with Parent.
15. According to the Student's Special Education Teacher/Case Manager, the Student transitioned well into the program environment, and the Student began making progress towards IEP goals. See Interview with Student's Special Education Teacher/Case Manager; Student's Trimester 1 Progress Report.
16. On December 1, 2020, the Student's IEP was amended by agreement (without an IEP Team meeting) to add direct occupational therapy services.⁵ The Student's OT consultant had raised concerns with the Parent about the Student's tremulous hands while engaged in fine motor tasks, and the Parent stated that the Student had been diagnosed with tremors, Not Otherwise Specified (NOS). See Written Notice of an IEP Amendment by Agreement, dated 12/1/20.
17. Between January 17, 2021 and April 7, 2021, due to staffing shortages, the District moved all program students from four days per week of in-person learning to two days per week of in-person instruction and three days per week of remote instruction.⁶ See Email from Special Education Director to program parents, dated 1/15/21; District's Response to Allegation #3 Regarding Student.
18. On February 24, 2021, the Student's IEP Team met for an Annual Review of IEP program. The Student's services were maintained as previously set, new evaluations were order for the Student's triennial evaluation deadline, and 24 hours of 2021 Extended School Year Services were added to the Student's IEP because "data collection reveals a

⁵ The previous version of the Student's IEP had only included OT consultation services. See Student's IEP, dated 3/5/20, as amended on 8/31/20.

⁶ The District addressed potential compensatory education responsibilities related to this period of reduced in-person instruction through the process of its proposed resolution that was accepted by the Department of Education. The details of the resulting corrective action plan are included in Section VII of this report.

regression of skill sets over school vacations.” See Written Notice for IEP Team Meeting on 2/24/21.⁷

19. At the beginning of March 2021, the Parent requested another IEP Meeting to discuss her concerns that 24 hours of ESY services were insufficient to meet the Student’s needs and to discuss her ongoing concern that the Student was still only attending two days of in-person instruction due to staffing shortages. See Email from Student’s Community Case Manager to Special Education Director on March 3, 2021 (“[Parent] feels that an out of district placement is necessary at this point due to the fact that [the Student] is not able to access education appropriately. A placement where there is staff available is more appropriate for [the Student]. [Parent] and I have also discussed that he needs more education throughout the summer versus the one month that is available to through your ESY program...”); see also Written Notice from IEP Team Meeting on March 31, 2021.
20. On March 31, 2021, the Student’s IEP Team reconvened at the Parent’s request. The Parent reported that the Student was experiencing significant regression at home, remote school was “impossible,” and the 24 hours of ESY services as recommended by the Student’s Special Education Teacher/Casemanager was insufficient. See Written Notice from IEP Team Meeting on March 31, 2021.
21. The Director of Special Education told the IEP Team that a new staff member had been hired for another special education room, thereby freeing up staff to come into the program. The Director told the IEP Team that she hoped the Student would return to four days per week of in-person instruction within two weeks. Id.
22. According to Written Notice, the IEP Team discussed ESY services during the March 31, 2021 IEP Meeting as follows: “The Team discussed a total of 24 hours was recommended in order to maintain skills gained over the course of the school year and not to introduce new learning as well as to keep [the Student] in a routine of coming to school. [The Student] was easily able to recoup (within a day or two) skills lost over vacations.” Id.
23. The IEP Team also discussed behavior and academic data, as reflected by the Student’s second progress report. The behavior data reflected increases in interfering behaviors such as non-compliance, peer physical aggressions, inappropriate words, and perseverate

⁷ During the IEP Team Meeting on February 24, 2021, the Parent expressed frustration and concern that the Student’s IEP services, including his SDI, were not being delivered in accordance with his IEP due to the hybrid instruction model being utilized in the program due to staffing shortages. This issue relates to potential compensatory education responsibilities by the District, which are addressed in the corrective action plan detailed in Section VII of this report.

speech. The academic data reflected the Student's regressions in 4 out of 16 programs, including sequencing of 2 letters of his name, expressive 2D shape identification, rote counting from 0-12, and writing numbers 0-3 with tracing. In 12 out of 16 programs, the Student demonstrated progress towards his programmatic goals. See Written Notice from IEP Team Meeting on March 31, 2021; Narrative Progress Report, Trimester 2 by Student's Special Education Teacher/Casemanager.

24. Ultimately, the only change the IEP Team made on March 31, 2021 was adding 1 hour per month of in-home behavior consultation services to address the regression of the Student's behaviors at home with the Parent. See Written Notice from the IEP Team Meeting on March 31, 2021; Student's IEP, dated 2/22/21, as amended on 4/27/21.
25. On April 7, 2021, the Student was able to return to in-person instruction for four days per week. See District's Response to Allegation #3 Regarding Student; Interview with Parent; Letter from Director of Special Education to _____ program parents, dated March 31, 2021.
26. On May 10, 2021, the District received copies of the Parent's systemic and individual complaints #21.065CS and #21.066C, and on May 12, 2021, the Department of Education received and officially opened both complaint investigations. See District's Response to Allegation #3 Regarding Student.
27. On May 12, 2021, the Student's IEP Team came together again to review the Student's recent evaluations. Based on the new evaluations, the IEP Team reduced the Student's direct speech and language services to 4 x 30 minutes per month, added 120 minutes of OT services during ESY, added a number of accommodations, and ordered a Physical Therapy evaluation, based on the recommendations of the Student's Occupational Therapist. Additionally, the Parent asked the IEP Team to remove the 1 hour per month of in-home behavior consultation services because she had "too much to deal with at home at this point and it would not be helpful for her." See Written Notice from IEP Team Meeting on May 12, 2021.
28. The IEP Team also reviewed the Student's latest behavioral and academic data from trimester 3, as reflected by the Student's third progress report. The behavior data indicated decreases in nearly all interfering behaviors, such as non-compliance, adult physical aggression, peer physical aggressions, bolts, inappropriate words, and perseverate speech. The academic data reflected the Student's progress in all 16 out of 16 skills towards his programmatic goals. Id.; Narrative Progress Report, Trimester 3 by Student's Special Education Teacher.⁸

⁸ There was also a lengthy discussion during the May 12, 2021 IEP Team Meeting about the Student's exposure to non-disabled peers, with the Parent and the Student's Community Case Manager arguing that the Student requires

29. Again, the Student's Special Education Teacher reported, "[The Student] is able to easily catch up with any skills lost over vacations and weekends. [The Student] has made gains within programs." See Written Notice from IEP Team Meeting on May 12, 2021. The Parent and the Student's Community Caseworker continued to express concern about the limited amount of ESY services offered by the District and recommended by the Student's Special Education Teacher/Casemanager. Id.

30. According to Written Notice from the May 12, 2021 Meeting:

"The IEP Team discussed ESY services are not a 'boxed' service. ESY services are based on where a student is now and not where they were last year. ESY needs to be based on where [the Student] is now. ESY is not about if a student would benefit; all students would benefit from ESY services if that were the case; however, it should be about 'does a student require ESY students (*sic*) because data collection shows they cannot recoup skills easily over school breaks.' It is up to the team to review data collected and the use of professional judgement on the need of the individual student. The IEP team discussed originally, staff was going to recommend 12 hours of ESY services for [the Student] at the last meeting, however increased it to 24 hours of service as [the Parent] was wanting more ESY time. Some students may receive less time or more time depending on their needs. The team discussed [the Student] has made gains and not shown regression of skills during Trimester 3 and over the April break that could not be easily recouped. The team decided to keep ESY services as [the Student] did show some regression Trimester 2 and Parent would like to have ESY services. The team discussed 24 hours may look different for [the Student]. The team may decided he needs it spread out over the summer or it may need to be only a few weeks. [The Student] may need it to be in July or only August. [The Parent] shared she was not sure of family plans over the summer yet and did not want to decide today what that might look like for [the Student]. [The Director of Special Education] and [the Parent] can discuss what it will look like for [the Student] when it is closer to the end of the school year." Id.

31. During an interview with the complaint investigator, the Student's Special Education Teacher/Casemanager explained her individualized process for making recommendations

additional exposure to non-disabled peers and he is not currently in least restrictive environment. Where this allegation was not raised by the individual or systemic complaints #21.065CS and #21.066C, this complaint investigation report will make no finding about this dispute. See Written Notice for the IEP Team Meeting on May 12, 2021.

about ESY services. The Special Education Teacher emphasized that her decision is entirely data-driven for each individual student in the _____ program, and with 21 years of experience in special education instruction, she feels very confident in her recommendation of 24 hours of ESY services for the Student. In fact, the Special Education Teacher confirmed that she would have likely only recommended 12 hours of ESY services for the Student if she had not given weight to the Parent's concerns about observations about the Student's regressions at home. See Interview with the Student's Special Education Teacher/Casemanager.

32. The Special Education Teacher further explained that she knows the Student to be a very quick learner once his behaviors and non-compliance can be overcome. She has observed the Student recoup skills within one or two days following a break or a vacation. She also stated that the District has never any set limit whatsoever in the amount of ESY services she can recommend for any particular student, but she has learned through experience that children in her program rarely need more than 24 hours of ESY services to avoid a regression that cannot be quickly overcome at the start of the new school year. Id.
33. The Student's Occupational Therapist was also interviewed by the complaint investigator. She detailed her own process for making individualized recommendations about students' individual OT needs during ESY services, confirming that it is rare for her to recommend OT services during ESY, only because most children do not demonstrate regression in their OT skills over the summer months. The Student's Occupational Therapist noted, however, that she made an exception for the Student based on _____ unique needs, recommending 120 hours of OT during ESY, because she worries that the Student will lose progress in applying OT strategies for managing his tremors without short, frequent OT sessions during the ESY service period. See Interview with the Student's Occupational Therapist.
34. Finally, the Student's Occupational Therapist explained that she feels completely open during all her IEP Team meetings to share her frank opinions about students' unique needs, including a need for additional ESY services if she believes that is necessary. However, in the Student's case, because the Occupational Therapist has been working with the Student's Special Education Teacher for 20 years, she was very persuaded by the Special Education Teacher's recommendation for 24 hours of ESY services for the Student because the Occupational Therapist knows any decision by the Student's Special Education would be entirely driven by data and supported by her years of experience in the _____ program classroom. Id.
35. The Director of Special Education also confirmed to the complaint investigator that each student's ESY program can be completely customized to address an individual student's

needs. She admitted that this level of customization can make ESY services very challenging to schedule logistically, especially in terms of transportation and staffing, but the Director of Special Education was clear that there is no set time-period for ESY services because ESY would never achieve its purpose if it were a one-size-fits-all program. The Director explained that her message to all special education staff members and to IEP team members is that ESY must be based on the Student's own needs to maintain progress toward their IEP goals, and if that looks different for any student, then the District will make any reasonable efforts they can to accommodate students' needs. See Interview with the Director of Special Education.

36. On the other hand, the Parent and the Student's Community Caseworker both described a very different experience during IEP Team discussions about ESY services. The Parent explained that the District was not flexible or genuinely open to any discussion about the amount of ESY services that the Student needed. The Parent and the Community Caseworker both felt strongly that 24 hours is the maximum amount of ESY services that the District will normally allow because it fits neatly into the traditional, four-week ESY program the District has always provided for ESY students. See Interview with the Parent; Interview with the Student's Community Caseworker.
37. The Parent also felt that the concerns she brought to the IEP team about the Student's regressions at home were not fully considered by the IEP Team. Instead, the IEP Team looked at those issues as separate from the Student's progress in school and only entertained a discussion about whether the Parent needed additional in-home behavioral consultation support, rather than considering whether the Student's dysregulation at home was an indicator of regression during the hybrid learning model. See Interview with the Parent.
38. Notably, the Student's Community Caseworker explained to the complaint investigator that she has recently recognized some additional flexibility from the District in how ESY services are delivered to meet an individual student's needs, but those changes only became evident after the Parent filed her systemic complaint and her individual complaint regarding the District's unilateral decision-making process for ESY determinations. See Interview with the Student's Community Caseworker.
39. On June 14, 2021, the Parent received an email from the Student's Special Education Teacher/Casemanager about scheduling ESY services. The email stated, "ESY programming will run from July 6th – July 29th from 8:00am to 11:00am....Your child's ESY Teacher will be in touch with you about the specific dates your child will be in attendance as not everyone attends the entire summer session." See Email from Student's Special Education Teacher/Casemanager to Parent, dated June 14, 2021.

40. Additionally, the email stated, “In order to provide ESY, many staff and family schedules are considered. It’s important to us that we ensure that your child has the opportunity to receive these necessary services. Please reach out to me if you decide your child is not going to participate during the summer or if your child is going to miss a scheduled session. We understand that this past school year was unusual and many families are looking forward to traveling and enjoying the summer.” Id.
41. The Parent and the Student’s Community Caseworker immediately responded to the June 14, 2021, email, making inquiries with the Director of Special Education about whether there was flexibility in scheduling ESY, as previously stated during the Student’s IEP Team Meeting on May 12, 2021.
42. The Special Education Director emailed back on June 16, 2021, stating, “The times and days can change to ensure it reflects IEP decisions. When and where we can accommodate family needs we will do so...I have asked case managers to send out letters to parents of students who were deemed through the IEP process to be in need of ESY services. I drafted the letter to indicate a general timeframe because most families want to plan their summertime...The letter was intended to be a starting point of conversation. Cyndi, please call me and I would be happy to come to a mutually agreeable timeframe.” See Email from Director of Special Education to Parent and Student’s Community Caseworker, dated 6/16/21.
43. As part of the systemic investigation regarding the determination of ESY services, the District also provided special education records for all 13 additional students in the _____ program during the 2020-2021 school year. See Records for Unnamed Students 1-13. The complaint investigator has thoroughly reviewed relevant special education documents from all 14 students (including the named Student) in the _____ program, including Written Notices, IEPs, and IEP Amendments.
44. Out of the 14 students in the _____ program, the named Student was the only one for whom the IEP Team did not reach consensus about whether ESY services were required and how much ESY services would meet the students’ needs. Id.
45. Five of the 14 _____ program students (Unnamed Student 8, Unnamed Student 9, Unnamed Student 10, Unnamed Student 11, and Unnamed Student 12) do not have ESY services indicated on their IEPs. Written Notices from the IEP Team meetings for four of these five students indicate that ESY programming was specifically considered by the IEP Team but “not warranted” due to each of the students showing adequate progress toward their goals, as well as no indications of skill regressions that the students could not quickly recoup. Id.

46. Unnamed Student 12 from the _____ program does not have any ESY services indicated on _____ IEP, yet the Written Notice from _____ Annual Review on February 12, 2021 does not reference a specific IEP Team determination or IEP Team discussion about ESY services for Unnamed Student 12. Nevertheless, the Written Notice from Unnamed Student 12's Annual IEP Team meeting does indicate a detailed IEP discussion about Unnamed Student 12's significant progress towards _____ behavior and academic goals in the mainstream classroom setting, including _____ IEP Team's determination "to discontinue with the positive intervention behavior plan as [Unnamed Student 12] is successful within the classroom management plan." See Written Notice from Unnamed Student 12's Annual IEP Team Meeting, dated 2/12/21. Unnamed Student 12's IEP Team did consider opportunities for additional support or accommodations, but ultimately determined that Unnamed Student 12 was "experiencing success in the mainstreamed setting with [_____ current] accommodations and supports for reading, math, and content." Id. There was no indication from the data presented during the February 12, 2021 meeting that Unnamed Student 12 was demonstrating regression in any area. The IEP Team determined to reconvene in October 2022 to determine whether Unnamed Student 12 continued to progress as expected with _____ current levels of support. Id.
47. The remaining nine out of 14 _____ program students (the named Student, Unnamed Student 1, Unnamed Student 2, Unnamed Student 3, Unnamed Student 4, Unnamed Student 5, Unnamed Student 6, Unnamed Student 7, and Unnamed Student 13) have ESY services indicated on their IEPs. Id.
48. Unnamed Student 1 requires 12 hours of ESY services, as recommended by _____ Special Education Teacher/Casemanager and determined by _____ IEP Team. The Written Notice from _____ Annual IEP Team meeting on February 12, 2021 details _____ IEP Team's discussion about ESY services, including the recommendation for 12 hours of SDI for ESY and the recommendation from Unnamed Student 1's Occupational Therapist that OT services were not required to maintain _____ OT skills. See Written Notice from Unnamed Student 1's IEP Team Meeting on 2/21/21. Written Notice also indicates that Unnamed Student 1's parent was unavailable during the IEP Team meeting. However, Unnamed Student 1's parent was reached by phone after the meeting, and she was in agreement with the IEP Team's determination (and the Special Education Teacher's recommendation) for 12 hours of ESY services. Id.
49. The eight other students in the _____ program with ESY services on their IEPs all have 24 hours of ESY services indicated. See Records for the named Student and Unnamed Students 2, 3, 4, 5, 6, 7 & 13. In every student's case, the reasoning behind the recommendation for 24 hours of ESY services appears to be a concern about each student's limited ability to recoup skills after demonstrating a regression in some form,

and the written notices for each student indicate an IEP Team discussion regarding the individual student's progression towards his or her IEP goals. See Records for Unnamed Students 1-13.

50. For example, Unnamed Student 3, who qualifies for special education services based on the category of Speech/Language impairment was recommended to receive 24 hours of ESY services due to data demonstrating a skill regression after school breaks in four of Unnamed Student 3's seven academic program areas. According to Written Notice, "The IEP team discussed and agreed [the Unnamed Student 3] would continue to benefit from 2021 Extended School Year Services (ESY) for a total of 24 hours of programming given data collection shows a regression of some skill sets over school breaks" that were not easily recouped. See Written Notice for Unnamed Student 3's IEP Team Meeting on January 8, 2021.
51. As another example, Unnamed Student 6's IEP Team accepted the Special Education Teacher/Casemanager's recommendation for 24 hours of ESY services because "data collection revealed a regression of skill sets that were not easily recouped within a few weeks" and Unnamed Student 6 required "academic and functional skills to be provided in a smaller group setting as [Unnamed Student 6] requires a structured and low stimulating environment with lots of repetition to gain and maintain skills." See Written Notice for Unnamed Student 6's IEP Team Meeting on February 25, 2021.
52. The named Student and Unnamed Student 4, in addition to requiring 24 hours of ESY services, also have OT services during ESY on their current IEPs. The named Student has 120 minutes of OT during ESY services, and Unnamed Student 4 has OT 30 minutes per week for 4 weeks. See IEP for Student, dated 3/12/21, as amended on 4/27/21 and 6/2/21; IEP for Unnamed Student 4, dated 1/6/21, as amended 4/5/21 and 7/6/21.
53. During her interview with the complaint investigator, the Special Education Teacher/Casemanager for the _____ program explained why many of her students (eight total) all had recommendations for 24 hours of ESY services. She insisted that there is no policy or recommendation by the District to select a specific amount of ESY services. In fact, she is well aware that the Director of Special Education has supported many instances of more than 24 hours of ESY services for various students. See Interview with the Student's Special Education Teacher/Casemanager.
54. Instead, the Special Education Teacher explained that she bases each of her individual recommendations regarding ESY services on what she has learned through a review of each child's unique regression data, as well as her successful past experiences working with a wide variety of her _____ program students during ESY. The Special Education Teacher has found that all of her prior students have been successfully able to

maintain skills and avoid prolonged recoupment with a maximum of 24 hours of ESY programming, particularly because there is such a high-level of structure and support in the classroom environment, which means that she rarely sees dramatic regressions from her students. Id.; District’s Response to Allegation #3 reading Program ESY.

55. Although this complaint investigation examines the District’s practices, policies, and procedures within the program, it is also instructive to consider the larger trends in ESY service determinations across the District. On June 8, 2021, the Director of Special Education sent an email to special education staff, reminding them, “ESY services are individualized and the amount of time needed is determined by an IEP team. It is safe to say that most families appreciate that the bigger amounts of service time occur in July to allow time for a break at the end of June and in August. Some students require more and some less.” See Email from Director of Special Education to Special Education staff, dated 6/8/21.
56. The Director’s email then goes on to lay out the basic schedule for ESY in July, noting that some students have specific needs that are distinct and listed on their IEPs. She then goes on to catalogue the wide variety of ESY determinations across the district as follows: “PRIMARY SCHOOL: – 6 students have 24 hours and 1 has 12 hours; 1 of the 6 has 120 minutes for the month for ESY OT; Resource/Behavior – 1 student has 2x per week for 1 hour from July 5 to Aug 12 and 6 sessions of sp&l for 30 min each; 1 student has an IEP this week to make this determination. ELEMENTARY SCHOOL: – 7 students 24 hours over one month with 1 student with 1x60 min per month of behavior consult; 1 student 10 hours; 1 student 4 hours for 8 weeks speech, 3 days per week 2 hours per day for 6 weeks, mom will transport (remote: 3 hours per week for 6 weeks); Resource/Behavior – 1 student 24 hours over one month, reading, writing, math; 1 student 3x week for 60 min for literacy for a total of 24 hours; 1 student 3x per week for 60 min each for a total of 12 hours; 1 student 3x week for 60 minutes each for a total of 30 hours; 1 student for a total of 20 hours to be sched in eight 2.5 h sessions. MIDDLE SCHOOL: – NEEDS REVIEW with most needing 36 hours of time and some transferring from the elementary need 24 hours; Resource/Behavior – 1 student 2 days per week for 4 weeks, 3 hours per day for 24 h, back to back T, W or W, Th; 1 student with 16 academic hours total with 2 hours each day T, W and 1 40 min session for sp&l for 4 weeks; 1 student 2 days per week for 4 weeks, 1.5 hours per day; 1 student with 24 hours. HIGH SCHOOL: – 3 students with 24 hours with 2 needing 30 min sp&l for 4 weeks; 3 students 3 hours per day for 3 days per week for 4 weeks = 36 hours with 1 needing 30 min a week for 4 weeks of sp&l and another with sp&l for 20 min with 120 min of OT (and PT consult).” Id.

Other relevant facts may be included in the determinations below.

VI. Determinations

Allegation 3: The District has a practice, policy, or procedure of making unilateral decisions about Extended School Year (“ESY”) services without considering the unique, individual needs of students in the _____ program during the 2020-2021 school year. Numerous students have been adversely impacted, including the Student. MUSER X(2)(A)(7); MUSER IX(3)(A)(1)(d). **No individual violation found with respect to the named Student; No systemic violation found with respect to the unnamed students in the program. COMPLIANCE FOUND.**

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

Federal and State law entitle all children with disabilities to a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. See 34 CFR 300.101; 34 CFR 300.531; MUSER I. FAPE requires special education and related services that are reasonably calculated to enable the child to make appropriate progress in light of the child’s unique circumstances. See *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017).

In relevant part, MUSER requires all school districts to provide Extended School Year (“ESY”) services, or “special education and related services that are provided to a child age three to twenty-two with a disability beyond the normal school year...provided in accordance with the child’s IEP at no cost to the parents...only if a child’s IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child.” MUSER X(2)(A)(7). No district may “unilaterally limit the type, amount, or duration of those services.” Id. MUSER further sets forth the following areas of inquiry for an IEP Team to determine whether ESY services are required:

“The need for the particular services is demonstrated by means of:

- (a) A review by the child’s IEP Team of relevant information including, but not limited to, progress reports and relevant assessments, parent report, observations or documentation:
- (b) Consideration by the child’s IEP Team of the significance of the child’s disability, progress toward IEP goals; and
- (c) Consideration of the impact of previous service interruptions, if applicable, and the probability that the child is unable to recoup, in a reasonable amount of time, skills previously mastered.” MUSER X(2)(A)(7).

First, with respect to the named Student and Allegation 3 raised in the individual complaint #21.066C, the Student’s IEP Team all agreed that the Student requires 2021 ESY services based on a number of considerations, including the Student’s academic and behavioral regressions as noted during his Trimester 2 progress report.⁹ As such, this complaint investigation does not consider whether the District was required to provide ESY services to the Student. The IEP Team has already made a unanimous determination that the Student does, in fact, require ESY services. Instead, in her individual and systemic complaints #21.065CS and #21.066C, the Parent argues that the District made a unilateral determination limiting the “type, amount or duration” of ESY services offered to the Student, thereby violating MUSER X(2)(A)(7).

There is no indication that the Student’s Special Education Teacher recommended 24 hours of ESY services based on any policy, practice, or procedure that “unilaterally limited” the duration of the Student’s ESY services. Instead, the Special Education Teacher persuasively detailed her individualized, data-driven process for assessing the unique needs of her program students and developing a professional recommendation to share with each student’s IEP Teams. In the particular case of the Student, the Special Education Teacher believes strongly that the Student is a bright, quick-learner, who is very capable of recouping skills quickly within his educational environment, particularly when his interfering behaviors are reduced, as they were during the Student’s third trimester of the 2020-2021 school year. Notably, the Student’s Teacher considered relevant information from the Parent regarding observations of the Student’s behavioral regressions at home when determining that 24 hours of ESY services

⁹ Although the Student demonstrated recoupment of these skills during his third progress report, his IEP Team determined on May 12, 2021 that the regressions were concerning enough to warrant the provision of ESY services, particularly where the Student’s parent was strongly advocating for ESY services. See Written Notice from the Student’s IEP Team Meeting on May 12, 2021.

were needed, as opposed to the 12 hours of ESY services that she was originally inclined to recommend based on her knowledge of the Student's ability to quickly regain academic understanding within one or two days of a service interruption.

Although 24 hours of ESY services is far less time than the Parent and the Student's Community Caseworker believed the Student needed, there is also no indication that the Student's IEP Team decision to adopt the Special Education Teacher's recommendation was determined by any policy, procedure, or practice that "unilaterally limited" the Student's ESY services. To the contrary, it appears that multiple IEP Team members have a high degree of professional respect for the Special Education Teacher's ability to assess data and make recommendations based on day-to-day observations of her students. As evidenced by the Student's Occupational Therapist's strong recommendation to add OT services to his ESY schedule, the Student's Occupational Therapist likely would have raised an objection if she believed that 24 hours of ESY services was not sufficient to ensure the Student's continued progress towards his IEP goals. Additionally, where the Director of Special Education has repeatedly encouraged all special education staff and IEP Teams to shape every ESY program around the unique needs of individual children, there can be no finding that the Student's IEP Team determined his ESY services in a unilateral fashion. Therefore, **no individual violation is found** regarding Allegation #3.

In the review of all special education files for students in the _____ program, there was also no indication that the District has a practice, policy, or procedure of making unilateral determinations about ESY services without considering the unique needs of each individual student in the _____ program. Instead, Written Notices revealed a data-driven, collaborative IEP Team decision-making process to determine the appropriate level of ESY services for each child. Although there are nine _____ program students who are all receiving 24 hours of ESY service in 2021, each of the student's Written Notices reveal how each determination was tied to behavioral and academic data, as well as a larger discussion about the student's needs with the full IEP Team.

Furthermore, a wider review of the District's written communications with special education staff indicates a consistent and appropriate mandate that all ESY services shall be customized to address the unique needs of ESY students and their families, and as a result, there

are a broad range of ESY program options being provided to students throughout the District in 2021. See Email from Director of Special Education to Special Education staff, dated 6/8/21.

Based on the foregoing, there is **no systemic violation found** regarding Allegation #3.

VII. Corrective Action Plan

1. For each of the 14 students in the _____ program, the District must identify the degree of progress toward each student's IEP goals for the 2020-2021 school year.¹⁰
2. For any student who did not make expected progress toward any of his or her IEP goals, the District will convene an IEP Team Meeting to discuss the issue and determine whether compensatory services are warranted. If compensatory services are indicated, the IEP Team will determine the amount and type of services required and develop a plan to provide the necessary services.
3. All parents and/or guardians of the 14 students in the _____ program during the 2020-2021 school year must be notified in writing of the above-described process for determining a need for possible compensatory education. This written notification must be sent no later than **August 1, 2021**, with a copy of these notifications delivered to the Department by the same date.
4. Progress reports regarding the above-described process for all 14 students in the _____ program during the 2020-2021 school year are due to the Department by **September 1, 2021, January 1, 2022, and June 1, 2022.**

Dated: July 8, 2021

Julia N. Pothen, Esq.
Complaint Investigator

¹⁰ The process for determining compensatory education services must follow the timeline suggested by Erin Frazier, Director of Special Services Birth to 22, in her communications with special education directors and will be discussed by IEP teams at the students' annual IEP team meetings, if not before.