

Complaint Investigation Report
Parents v.
Complaint 22.081C
Complaint Investigator: David C. Webb, Esq.
August 24, 2022

DRAFT

I. Identifying Information

Complainant: _____, Parents

Respondents: _____, Superintendent; _____, Special Education Director.

Student:

II. Summary of Complaint Investigation Activities

On June 27, 2022, the Maine Department of Education received this complaint. The complaint investigator was appointed on June 27, 2022.

The Complaint Investigator received no documents from the Parents and 221 pages of documents from the District. Interviews were conducted with the following people: _____, Parent; _____, Special Education Director, _____; _____, Principal, _____ School; _____, Assistant Principal, _____ School; _____, case manager, _____, regular education teacher; _____, grade case manager; and _____, BCBA for the District.¹

III. Preliminary Statement

This complaint was filed by the Student’s parents (“Parents”) alleging that the District violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the Parents’ complaint, a Draft Allegations Letter was sent to the parties by the Complaint Investigator on June 30, 2022, alleging three separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on July 5, 2022.

IV. Allegations

1. Not properly developing or revising the Student’s IEP thereby depriving the Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;

¹ _____, the Social Worker for the District, was out of the country and not available to be interviewed within the deadlines of this complaint investigation.

2. Not ensuring that a continuum of alternative placements was available to meet the Student’s educational needs in violation of MUSER §X.2.B; and
3. Not providing a functional behavior assessment and behavioral intervention services and modifications in violation of MUSER §XVII.1.D(1), §XVII.1.F and §IX.3.C(2)(a).

The Complaint Investigator reviewed all documents, information, and responses from the parties.²

V. FACTUAL FINDINGS

1. The year-old student (the “Student”) resides with Parents and five younger siblings in , Maine. is the educational responsibility of the School Department (“District”) where qualifies for special education and related services as a student with an “other health impairment” [“OHI”]. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder and Syndrome. attended the School in , Maine until early March 2022 when Parents withdrew from the District. is currently home schooled by Parents.³
2. In an interview with the Complaint Investigator, the Parent stated as follows:
 - The Student started grade year (2021-2022) having a “very good year” and then beginning in late 2021 and early 2022 emotional dysregulation got steadily worse. would have “good phases and then exhibit more troubling behavior.” He was not sure what triggered the change in behavior at the noted times-though he did note that the Student started going through puberty with hormonal changes that “could have been a factor.” He also noted that there were some changes at home in connection with the family expecting their sixth child and the building of an addition on their home.
 - Last year (grade, 2020-2021 school year) was having “best year”, but was only in school two days per week with a mask. He noted that grade case manager () “was wonderful...steering [the Student] away from emotionally charged issues.”
 - When the Student is experiencing a dysregulated episode, emotions “hijack ” and can “quickly get to a point of being unsafe.” The Student’s dysregulation is linked with Syndrome diagnosis and behaviors are impacted when is having digestive issues.
 - After the Student’s behavior became more troubling, he tried to “coach” school staff that “can’t acknowledge behaviors...that distorts... needs to

² As determined by the Department, the Complaint Investigator reviewed and considered the District’s supplemental response dated August 11, 2022.

³ On March 31, 2022, the Parents submitted notice of their intent to home school and unenroll from the District.

feel safe and that someone is on [redacted] side.” He tried to have Ms. [redacted] come back to work with [redacted] as he didn’t feel that Ms. [redacted] knew [redacted] very well or had made a connection with [redacted].

- On the Friday before February break, the Student “needed restraint after scratched a teacher.” The Parent noted that the school “then tried to get [redacted] to apologize” which [redacted] was unable to do. The Parent stated that he requested a new IEP several times, including a request for a meeting in early March.
- During the second week of March, there were two other incidents-one involving [redacted] becoming dysregulated at a dodge ball tournament and another where [redacted] had a heightened sympathetic reaction when one of [redacted] school friends had an emotional regulation issue. The Parent said that Assistant Principal [redacted] and other school staff did not properly respond to the Student in either of these incidents. In particular, the Parent said that school staff were “telling [redacted] to go back to the classroom, which [redacted] was not able to do.” As a result, [redacted] then left the school building in a heightened dysregulated state. To make matters worse, Mr. [redacted] then told the Parent and the Student that “[redacted] will have to serve in-school suspension.” The Parents at this point determined to home school the Student and withdrew [redacted] from the District.
- In sum, the Parent said that he felt that the District wasn’t prepared when the Student’s behaviors increased, and that the IEP was “too vague” and did not take into account suggestions given by them.

3. Dr. [redacted] conducted a psychological evaluation of the Student in April, 2019 and offered a diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”). Dr. [redacted] also noted in [redacted] report:

- The Student also exhibited emotional dysregulation and anxiety symptoms. In the report [redacted] noted: “To attribute [the Student’s] difficulties to only being the manifestation of characteristics associated with [redacted] diagnosis of Attention Deficit Hyperactivity Disorder does not reflect the complexity of [redacted] profile.”
- On the WISC V, [the Student’s], Full Scale IQ was 109, which is placed in the average range and at the 73rd percentile.
- Obtained a Verbal Comprehension Index of 124, which is in the very high range and at the 95th percentile rank.
- Fluid Reasoning Index was placed in the average range (ss = 94, 34th percentile rank).
- Working Memory Index of 94, which is placed at the 34th percentile rank and in the average range
- Processing Speed Index of 108 which is in the average range and at the 70th percentile rank.
- The BASC-3 was completed by [the Student’s] parent and teacher. Results of the BASC-3 noted elevated levels of broad behavioral difficulties as assessed by both

raters. [The Student] was rated as demonstrating difficulties in the area of externalizing behaviors, or behaviors where [redacted] comes into conflict with the rules and expectations of [redacted] environment. Areas elevated by both raters included Aggression and Conduct Problems, with [redacted] parent also noting challenges in the area of Hyperactivity. Teacher and Parent checklists also noted clinically significant challenges on the defiance/aggression factor on the Conners 3. [The Student] appears to have a difficult time complying with the rules and behavioral standards of the school setting and [redacted] may be triggered to aggressive behaviors.

- [The Student] was rated as demonstrating significant levels of internalizing problems by both [redacted] teacher and parent. [The Student] was rated as demonstrating clinically significant levels of anxiety as well as features of depression and somatization.
- The Conners 3 [test] reported significant challenges in the area of peer relations.
- [Dr. [redacted] noted that she] was impressed with the supports the Student was receiving across the school setting. “[redacted] is provided with a thoughtfully designed individual positive behavioral supports plan, [redacted] is prompted to engage in prosocial behaviors in the classroom milieu, [redacted] is provided with support during periods of emotional dysregulation (including a focus on teaching more adaptive coping skills) and [redacted] is working with a mainstream teacher who clearly understands [redacted] behavior needs while providing intervention in a positive manner.”

4. In April, 2019 psychological evaluation, Dr. [redacted] recommended as follows:

- [The Student] be provided with access to a small, highly structured classroom setting where [redacted] can receive individualized support during periods of upset.
- [The Student] complete a very simple mood charting document daily, with the intent of helping [redacted] learn about [redacted] moods as [redacted] attempts to apply strategies for regulating [redacted] behavior.
- The school-based Occupational Therapist should consult with the team around [The Student’s] current presentation to determine if additional supports/services are appropriate at this time.
- [The Student should be] provided with extra work or activities that [redacted] can access once [redacted] work is completed and [redacted] is provided with unstructured time.
- [The Student should be] provided with a simple checklist [redacted] can follow to review [redacted] work before [redacted] passes it in. This checklist should outline all the steps the teacher hopes for [redacted] to follow.

5. In an Occupational Therapy evaluation prepared by [redacted], MS,OTR/L on March 1, 2020, it was noted as follows:

- [The Student] is demonstrating visual perceptual skills well within the average range of development. [redacted] appears to have some laxity in both [redacted] finger and hip joints but this is not impacting the quality of [redacted] writing or motor control...It will

be important to assure neat, organized work spaces, as well as, determine if it is difficult for [redacted] to complete worksheets with a lot of information on the page. [The] results of the Sensory Processing Measure are consistent with observations made by this evaluator. [The Student] had difficulty sustaining one position while completing work on the floor; [redacted] ability to switch positions appeared to help with [redacted] ability to sustain attention. However, many of the areas indicated as “concern” are being addressed through specially designed instruction (peer interactions and emotional control).

6. In [redacted] March 1, 2020 report, [redacted] recommended as follows:
 - Continued opportunities for movement breaks, as well as, sensory diet activities and accommodations built into [redacted] school day.
 - A multi-sensory approach and practice writing numbers; [redacted] did not reverse numbers with far to near point copying and this should be considered.
 - Continue to allow alternative “seating,” such as, laying on the floor, or sitting on a wobble seat or wiggle cushion; when it is expected that [redacted] sit for long periods of time, trunk support should be considered (such as a circle seat or sitting against a wall). It may be beneficial to encourage [the Student] to sit in either a long sit or tailor position rather than in the “w-position.”
 - Provide [redacted] with a simple checklist [redacted] follows to review [redacted] work before [redacted] passes it in.
7. The written notice prepared in connection with the May 11, 2021 IEP team meeting noted that the Student would be transitioning from hybrid learning during the 2020-2021 school year (in school 2-3 days per week) to returning to 5 days a week in the fall. Additionally, the following was noted:
 - [The Student] can engage in unexpected behaviors that can impact [redacted] access to [redacted] education making it necessary for [redacted] to receive adult support when needed in the regular education setting. Due to the potential impactful behaviors and low tolerance to perceived frustrating situations, [the Student] benefits from breaks in either the regular education or special education setting... [and] benefits from accessing an alternate lunch and/or recess space... [and] movement and sensory inputs throughout the day.
 - Due to [the Student's] potential unexpected behavior, pre-teaching of behavioral and social skills is essential to supporting [redacted] through unexpected changes and perceived challenging situations. [The Student] is assisted by visual supports to help [redacted] with organization and coping skills. [The Student] is motivated by positive behavior supports throughout the day, which assist [redacted] with further development of behavioral and social skills where [redacted] can engage in behaviors that impact [redacted] access to [redacted] learning environment.
 - Academically, [the Student] is a really strong student. [redacted] NWEA scores were high in January. A 207 in Math, a 222 in reading. [redacted] picks up on things very

quickly in the classroom. does struggle at times when it is not something is interested in, or will sneak book out and read. can miss instructions due to this. Spring benchmark level will be done soon. knows multiplication facts really well. seems like a student who does not need to study.

- [The Student] has met current IEP goals. We will be focusing on accessing copings skills and perception... [The Student] has made substantial progress in comparison to last year. However, it is noted that we may see an increase in behaviors when we return to school for 5 days in the fall.
 - [The Parents] have noticed an increase in stuff at home over the last couple of months and are glad that is doing so well at school. fluctuations in behaviors are very much tied in with digestion. In general, we are really proud and relieved that is very smart and we are in a position to focus on emotional well being without academics being impacted.
8. The Student's progress towards IEP goals was measured on June 10, 2021 and noted the following:
- Behavioral: "maintaining appropriate boundaries with peers 100% of the time." (partially meets).
 - Behavioral: "accessing coping strategies regularly with adult support as measured by data collection and/or teacher observations." (meets).
 - Behavioral: "with adult support, increasing social/emotional skills within 4 out of 5 opportunities as measured by data collection and/or teacher observations." (partially meets).
 - Behavioral: "with adult support, Student will state why a person might be feeling a particular emotion within 4 out of 5 opportunities as measured by data collection and/or teacher observations." (partially meets).
 - Behavioral: with adult support, increasing social/emotional skills within 4 out of 5 times a stressful opportunity presents itself as measured by daily target sheets, social worker observations, self reports and teacher reports. (partially meets).
 - Social/emotional: "Student will learn, practice and demonstrate social communication skills including perspective taking, coping skills and identification of thoughts and feelings." (partially meets).
9. The Student's report card for the 2020-2021 school year indicated that was either "meeting" or "exceeding" grade level expectations in all academic subjects except for several areas of writing skills, where was "approaching grade level expectations." With regard to the "work habits" portion of the report, the Student received marks of "good" or "excellent" in all areas except a rating of "needs improvement" in the areas of attentive listening, self-control, accepting responsibility or producing/completing work and organizational skills.

10. The IEP developed for the Student on May 25, 2021 provided that the Student would spend 89% of time with non-disabled children, with the following educational services and supports:

- Special Education and Related Services:
 - i. Specially Designed Instruction-behavioral/executive functioning 10 x per week for 15/min;
 - ii. SEL (Social Emotional Learning) specially designed instruction 1x30 min/week; and
 - iii. Social Work 1x30 min/week.
- Classroom supports and services, supplemental aids, and modifications:
 - i. Behaviors: Adult support as needed in the regular ed setting. (including periodical check ins throughout the day and after recess),
 - ii. Access to the Special Education Setting for behaviors and /or academic support-5X per week/daily as needed;
 - iii. Behaviors: Positive Behavior Supports-5X per week/daily as needed;
 - iv. Break spaces outside/inside of the classroom as needed (including access to the Special Ed room for a break if needed);
 - v. Flexible seating in the regular education setting, access to alternative lunch and recess space as needed, sensory supports (headphones, fidgets, wobble seats, Wobble stool, etc.);
 - vi. Pre-teaching of behavioral strategies/social skills to help with unexpected changes, perceived challenging situations; and
 - vii. Visual supports (check lists, etc.) for coping skills, organization, etc, access to the SPED setting for work completion and/or behavioral support, positive behavior supports.

11. A Written Notice prepared in connection with an agreement reached without a team meeting on September 27, 2021 noted as follows:

- SEL 1x30 min/week will be removed from the IEP.
- The accommodation of an IRLP (individual remote learning plan) will be added to the IEP.

12. As a rationale for the above modifications, the September 27, 2021 Written Notice stated:

- “SEL is naturally embedded in the programming at school. [The Student] participates in social emotional learning through out the day in general education setting. Students participate in social skill development as well as problem solving and using coping skills.”
- Due to COVID-19, there is a possibility that the school may need to go fully remote. If this should occur, [the Student’s] team will follow the agreed upon Individual Remote Learning Plan.

13. In an interview with the Complaint Investigator, _____, the Student’s grade case manager, stated as follows:

- She runs a program that is a more restrictive “self-contained” classroom where children spend less time in mainstream setting-working with kids with higher needs.
- During the 2020-2021 school year, the Student attended a “hybrid” schedule where [redacted] attended school in-person for two days per week on an alternating schedule.
- The Student faces challenges “navigating difficult situations... [redacted] is very smart but has a hard time with [redacted] perceptions of situations and a hard time with empathy... [redacted] has an especially hard time if [redacted] perceives something ‘is not fair’, or if a peer had a ‘better’ item.”
- Ms. [redacted] started the 2021-2022 school year as the Student’s case manager. The Student was then transferred to Ms. [redacted] in October of 2021, who oversees a program with children with less severe needs and served as the Student’s case manager. Ms. [redacted] noted that other than one incident at the end of September where the Student hit another student⁴, [redacted] had a very good grade year and was “excelling at the beginning of [redacted] grade.” As a result, the IEP Team determined that the Student ‘didn’t require the level of services’ that Ms. [redacted] program provided.
- Although Ms. [redacted] remained “a resource for [the Student] to access” in the event that [redacted] experienced difficulties, she did not recall any times in the fall of 2021 that she was asked to help. When the Student’s behaviors became more pronounced in the mid-winter and early spring, she was asked to help “approximately 4 or 5 times.”
- During the instances where Ms. [redacted] was brought in to help, she said that the Student would be given an opportunity to share [redacted] feelings and Ms. [redacted] would work with [redacted] on “accessing strategies to reduce frustration” in a comfortable environment to help [redacted] to deescalate, helping with areas where peers were upset and also to help build positive peer interactions.
- She described the Social/Emotional Learning (SEL) program with the Student as explicit instruction in “role modeling and working with zones of regulation. She said that the Student responded well to that but that she felt that it was OK to remove that part of [redacted] instruction in the fall of 2021 as this instruction was “so ingrained with guidance and social circles-and that [redacted] had made demonstrable progress in these areas.”

14. The Student’s progress towards [redacted] IEP goals was measured on November 22, 2021 and noted the following:

⁴ On September 29, 2021, the Student’s [redacted] grade teacher [redacted] notified the parents by e-mail that the Student “hit another student” at recess.

- Behavioral: with adult support, the Student will maintain appropriate boundaries with peers 100% of the time as measured by data collection and/or teacher observations. (partially meets)
- Behavioral: given adult support and visual “menus” of accessing coping strategies regularly with adult support as measured by data collection and/or teacher observations. (meets).
- Behavioral: with social mapping, adult support and access to special education, [the Student] will increase social/emotional skills within 4 out of 5 times as measured by data collection and/or teacher observations. (meets)
- Behavioral: given social mapping, adult support and access to the special education setting, [the Student] will identify various emotional states in others in 4/5 opportunities as measured by data collection and/or teacher observations (meets)
- Behavioral: given social mapping, adult support and access to the special education setting, [the Student] will state why a person might be feeling a particular emotion in 4/5 opportunities as measured by data collection and/or teacher observations. (meets)

15. In an interview with the Complaint Investigator, _____, the Principal of the School, stated as follows:

- She first started working with the Student in kindergarten and continued through _____ grade. The Student did not have any significant behavior incidents during _____ grade year and wasn’t on a formal behavior plan.
- After the Student’s challenging behaviors began increasing in early 2022, District staff began a system of tracking _____ behaviors with the help of _____, BCBA.
- She acknowledged that the Student did not handle “consequences” well, and therefore a more “restorative” approach was used-especially by _____, the School Social Worker. This restorative process gave the Student a chance to “decompress” and to discuss _____ feelings during a time that _____ frustration had subsided.
- It was _____ understanding that the behavior plan developed by Ms. _____ on February 1, 2022 was shared with other staff that worked with the Student and that the plan was followed in connection with the incidents on March 8 and 9, 2022.

16. In an interview with the Complaint Investigator, _____, the Student’s grade regular education teacher, stated as follows:

- She felt that the Student seemed to enjoy school. She referred to _____ as a “go getter” and “brilliant.” When the Student did have a minor period of being upset, _____ did a “check in-check out” with _____, an Ed Tech who worked with the Student in the Special Education resource room.

- She did a form of social/emotional learning in class with the Student, including “opening and closing circles” and “talking about things [the Student] was excited for and reading books with “behavior moments and reactions.” She noted that Tara (the Student’s case manager) would also come in during these sessions.
- Beginning in December, she noticed worsening behavior which she attributed to several factors, including two new students joining class in December. She also said that she was aware of some changes at home with mom having a new baby and an addition being built on to their home.
- By January, she was “seeing a lot of frustration, [for] things that had not upset before.” As a result, she began communicating more frequently with parents⁵ and (School Social Worker) and for support.
- In January, 2022, she started a “check in” chart with and a “behavior chart” with (BCBA) to keep a running record of the Student’s behaviors. She noted that they were “trying to figure out what was making upset...what was triggering for ” and whether more supports could be put in place. She also adjusted the Student’s seating to minimize contact with another student who was having a negative influence on behaviors. behavior chart noted incidents on January 18, 19, 20, 21, 24, 25, 26, 27 and 31. By February, the incidents of negative behavior decreased and were noted only on February 3, and 8.⁶
- charting system on laptop used “stoplights” to indicate the Student’s overall day (red: a “Level 1” indicator meaning that the Student had a “really hard day”, yellow: a “Level 2” indicator meaning that the Student “needed some reminders” and green: a “Level 3” indicator meaning that the Student “did great.”) This charting form also included a “notes and comments” section where she discussed the incidences with specific triggers and responses, including both “what was in place and what was not working.” This charting form also included three different levels that would be assigned to the Student’s “overall” behavior on any given day in the areas of being “responsible”, “respectful” and “safe.”⁷

⁵ See e-mails from Ms. sent e-mails to the Parent on January 6 and 19 when Student behaviors began to escalate.

⁶ Another behavior incident on February 18, *infra*, was not reflected in Ms. reporting.

⁷ The Student received a “Level 1” indicator: On January 31: for “screaming no” and “crying” when was asked to perform certain tasks; On February 3: for refusing to put books or laptop away after being directed to do so; on February 18: for throwing laptop on the ground and “stomping and crying” for having wet feet from recess; and on March 4: for getting upset about a book where two girls say goodbye to each other and equated that with girls getting married, which caused to become upset. The Student received Level 2 indicators for “Some reminders” on January 27, February 1, 2 and 8. For the remaining 12 school days noted in the logs, the Student received green “Level 3” indicators. The Student received Level 2 indicators for “Some reminders” on January 27, February 1, 2 and 8. For the remaining 12 school days noted in the logs, the Student received green “Level 3” indicators.

- On February 1, 2022, she met “informally” with _____ and _____ to develop strategies to address the Student’s behavior, which resulted in an updated behavior plan for the Student.⁸ She had a second meeting with _____ and _____ where a “target sheet” was developed to more closely track the Student’s behaviors where the Student could earn points for positive behavior. This “target sheet” plan did not get put into use since the Student was removed from the District by _____ Parents to be home schooled in March.⁹
 - She said that she was not in school on the day that the Student eloped, and that she was not sure who was working as the substitute teacher that day. She provided a substitute teacher plan with guidelines on addressing the Student’s behaviors.¹⁰
 - She agreed that asking the Student to address the consequences of _____ behavior immediately after an incident was likely make the Student feel “more out of control and upset.”
17. When the Student’s behaviors began to escalate in January, 2022, Ms. _____, Ms. _____ and Mr. _____ noted the behaviors in a series of e-mail correspondence with each other and the Parents to document and address antecedents and responses to the behavior on January 6, January 10, January 12, January 17, January 19, January 24, January 25 and January 31, 2022.
18. On February 1, 2022, _____, _____ and _____ met to develop strategies to address the Student’s behavior. This meeting resulted in a document prepared by _____ referred to as “[the Student’s] Plan” This plan identified coping and calming strategies to help the Student, along responses to avoid with the Student. The plan also identified a list of school staff to contact if the strategy is not effective within five minutes. Strategies to address these behaviors included the following:
- The Student’s teacher should remind _____ to use a coping strategy;
 - Refer to _____ visual calming strategies list.
 - Give [the Student] 5 minutes to choose a strategy.
 - If _____ is successful in choosing and using a calming strategy _____ will receive a token. After 3 tokens _____ can earn a small reward. After 6 tokens _____ can earn extra recess time. (When the Student chooses to sit in the hallway _____ will need to be quiet - no screaming or loud crying. If _____ is doing this an adult will need to be called.
 - If within 5 minutes _____ has not done so, call the office for assistance. (The office can call for assistance from any of the following people):
 - Ms. _____
 - Ms. _____

⁸ See S-138, fact #18 *infra*.

⁹ See S-179

¹⁰ See S-168

- Mr.
 - Mr.
 - Dr.
 - Ms.
 - Ms.
 - Ms.
 - Ms.
- If you are called to meet with the Student:
 - Limit processing with _____ - it escalates the situation.
 - Remind _____ that _____ needs to choose a coping skill.
 - Have _____ practice or use the skill.
 - When _____ has used a coping skill and is calm _____ may return to class.
 - Coping strategies _____ has identified:
 - Read a book quietly in the hallway
 - Sit in the hallway quietly while using a fidget or _____ stuffed animals
 - Listen to music
 - Take a walk with an adult
 - Rewards _____ has identified:
 - Popcorn
 - Putty, fidget or popit
 - Playing a game
 - Extra time to read
 - Extra time to play with _____ stuffed animals
 - Something to eat that is on _____ OK list to eat

19. The Student's "Log Entry" form indicates behavior instances where discipline was imposed as follows:

- 9/29/21 Hit Another Student –while in line with _____ fist. _____ was angry because he said "shush" to _____ while they were in line.
- 1/6/22 Upset at Recess - Student became agitated when _____ stuffed animal was not voted the best. Ms. _____ processed with _____ on how to better manage those situations. Dad was notified.
- 1/13/22 Student had a restorative conversation and completed a think it over sheet with myself and our social worker for kicking a student on the playground. Dad was notified and will reinforce at home.
- 1/27/22 Student became upset, yelling in the room when directed to revise writing. _____ also blocked the teacher from calling the office. Dad came and processed with student after _____ spent time in the social worker's office. Student completed an apology letter about _____ unsafe behaviors

- 3/8/22 Unsafe in Hallways - Student walked out of social worker's office. then attempted to enter the classroom. Staff blocked from entering. then bolted downstairs and then requested to use the blue room. (IR form filled out...no restraint or seclusion, but used for documentation)
 - 3/9/22- ... Student left the building running behind the building. then re-entered the building, ran through the building, and hid. Dad picked up an hour before school ended. will be [sic] “in school suspension” on Thursday 3/10.
20. In an interview with the Complaint Investigator, _____, the Assistant Principal at the _____ School, stated as follows:
- He first became aware of the Student following behavior incidents on January 6 and January 13, 2022. He was also aware of a “yelling and screaming” incident on the day before February break (Feb. 18) and was directly involved with the March 8 and 9 incidents prior to the Student’s withdrawal from the District.
 - He knew of a behavior plan that had been used by Ms. _____, but did not recall seeing it. (He said that even though his name was listed on the February 1, 2022 [Student] Plan, he would not necessarily have seen this plan prior to its implementation.)
 - After the January incidents, he was part of a “restorative meeting” but said that the Student had a hard time “owning behavior.” He was also part of a meeting on January 27, 2022 with the Parent when they talked about what steps to take when _____ was “in crisis.” He stated that even the Parent acknowledged that when _____ is in a highly dysregulated state, there is not much you can do to calm down, short of “giving _____ a hug.”
 - He knew that _____ had a good relationship with the Student and was able to arrange for _____ to work with the Student during some of dysregulated moments help _____ calm down.
 - He said that other than the February 18 incident, the Student did well in February until the March 8, 2022 incident.
 - The March 8, 2022 incident began after the Student walked out of _____ office without permission, and wanted to return to _____ regular education classroom. He said that he blocked the doorway and told _____ that “_____ needed to find another place to go.” The Student then “bolted” downstairs until other staff were able to help _____ to deescalate. He completed an “incident report” and notified the Parent by phone.¹¹
 - He was also involved in a second incident the next day on March 9, 2022 when the Student eloped from the building and hid from staff. He said that he understood this incident was caused by the Student’s reaction to one of _____ friends who was having a behavior episode. Mr. _____ said that he contacted the

¹¹ See S-162

Student's father after the Student eloped from the building, but that they were able to find the Student before the father arrived.

- After the March 9 incident, he said that he told both the father and the Student that needed to serve an "in-school suspension" as a result of behavior. He said that "we weren't really following the behavior plan...we were beyond that" when issuing a suspension in reaction to the Student's elopement from building.
- He stands by his decision to issue the suspension as a consequence for the Student's poor choices. He acknowledged that the conversation shut down with the Parent after the suspension was announced.

21. An incident report was prepared by Mr. in connection with the March 8, 2022 incident with the Student. The report noted that the Student was trying to enter classroom after walking out of a "restorative circle" meeting in Ms. office. The report noted that Mr. stood in the doorway to block the Student from entering the classroom, when subsequently bolted downstairs to the girl's bathroom. No physical restraint or seclusion was used and the Parent was notified shortly after the incident occurred.

22. In an interview with the Complaint Investigator, , the Director of Special Education for the District, stated as follows:

- While she has known the Student since started receiving special education services, she was not directly involved with programming until the February 18 and March 8 and 9, 2022 incidents.
- She said that was involved with daily interactions with the Student and other staff, including , the District's BCBA, when the Student's behaviors escalated in early 2022.
- She was not sure of the use of a positive behavior support plan (PBSP) that was used for the Student prior to the increase in behaviors in January, 2022. With regard to the behavior intervention plan developed by on February 1, 2022, that would have been included in the Student's IEP at the next meeting, "assuming that it worked."
- With regard to the March 8 and 9, 2022 incidents, she said that the substitute teacher should have been aware of the Student's behavior plan which would have been in a "substitute folder" that should have been left for the substitute filling in for Ms. .
- Ms. noted that "if the February 1, 2022 plan worked" then the team planned to put it within the Student's IEP at a meeting they were planning to schedule in March, 2022 prior to the Parents withdrawal of the Student.

23. In an interview with the Complaint Investigator, , the Student's grade case manager stated as follows:

- Her caseload involves working with students that have more academic needs and she is not typically with students who have more significant emotional/behavior challenges.
 - The Student first came on to her case load in mid October, 2021. She followed the IEP that was developed for the Student, including check in/out with [redacted] -and at the end of the day.
 - She had no concerns with the Student until January when things “got more difficult” for the Student. In response, Ms. [redacted] said that she started making adjustments in [redacted] programming and solicited Ms. [redacted] to work with the Student. She said that she would also have regular conversations with Ms. [redacted].
 - She noted that “not all things happening [with the Student] were ‘big;’ rather there were some more routine peer interaction issues.”
 - She continued with her “check in/check out” routines with the Student and reiterated coping strategies.
 - She was aware of the behavior plan developed by Ms. [redacted] on February 1, 2022. She was not aware of any other specific behavior plans with the Student prior to the plan that was developed just prior to the Student’s withdrawal.
24. In an interview with the Complaint Investigator, [redacted], BCBA for the District, stated as follows:
- As a BCBA for the District, his role is to provide consultations to teachers, including collecting data/skill building and developing responses and supports for students.
 - He has known the Student since [redacted] started receiving special education services in [redacted] grade year (2018-2019 school year).
 - He was aware of a behavior plan developed by the District during the 2019 school year by [redacted], the Student’s case manager at the time.¹² He said that this plan addressed antecedent interventions, coping strategies and rewards. He noted that it was “not a formal behavior plan that included a consequence component.”

¹²The plan developed by the District during the 2019 school year entitled “[the Student’s] Coping Skills”

- Take 3 deep breaths
- Go for a walk
- Do an errand
- Go for a wagon ride
- Lemon Squeeze
- Read a book
- Use headphones
- Pillow scream
- Lazy 8 breathing
- Ask for a backrub
- Ask for a hug

- He said that he was not formally on the Student’s IEP that was in place during the 2021-2022 school year and was not at the Student’s IEP team meeting in May of 2021. He was, however, asked to help with the Student’s case in January, 2022.
- He said that he met with _____ and gave data to _____ from _____ plan. He noted that _____ generated the February 1, 2022 plan which had many components of what had been successful at the Fairfield school, including “token board.”
- He noted that Ms. _____ daily reports from February indicated some success until right before the winter break. When returning from break, he said that he checked in with the Student’s father and got his permission to get more involved as part of _____ plan with regular consult service and another level of reinforcement with the case. He said that he worked to have restorative circles for the Student which were designed to review what had happened later at a calm moment. He said that this restorative circle process would give staff and the Student a chance to better understand and to share their feelings and what to do next time they were feeling that way.” He said that before the Student withdrew from the District, he was preparing a target sheet to more formally collect data.
- With regard to the “in-school suspension” resulting from the Student’s behavior on March 9, he understands that there is a stigma behind the term “suspension” and that words used with _____ are important. He said that he understands _____’s (Assistant Principal’s) decision to issue the suspension, but the key is how to “do it as a team” that will help the Student.
- At the time the Student withdrew from the District, he was planning to look at behavior triggers and antecedent interventions. He noted that the Student’s IEP team was planning to meet in March where they would consider adding regular BCBA consulting services and a more formal behavior plan to _____ IEP.

VI. DETERMINATIONS

1. Not properly developing or revising the Student’s IEP thereby depriving the Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;
2. Not ensuring that a continuum of alternative placements is available to meet the Student’s educational needs in violation of MUSER §X.2.B; and
3. Not providing a functional behavior assessment and behavioral intervention services and modifications in violation of MUSER §XVII.1.D(1), §XVII.1.F and §IX.3.C(2)(a).

COMPLIANCE FOUND; NO DENIAL OF FAPE FOUND

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to

develop or revise an Individualized Education Program to provide each identified child with a disability a free appropriate public education.

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

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

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

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

There is a two-part standard for determining the appropriateness of an IEP and placement. First, was the IEP developed in accordance with the Act’s extensive procedural requirements? Second, was the IEP reasonably calculated to enable the child to receive “educational benefits”? See *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley* (“*Rowley*”), 458 U.S. 176, 206 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27 (1st Cir. 2008). “Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 205.

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

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. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement. *Id.*, *Slip Op* at 8

The Least Restrictive Environment (LRE) requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." See 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004).

MUSER §VI.2.I provides that the School Administrative Unit (“SAU”) has the ultimate responsibility to ensure that the child’s placement is in the least restrictive educational placement. 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.

MUSER §X.2.B. further provides:

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

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).

With regard to programming to address a student's behavior, the IDEA provides that the IEP Team shall, in the case of a child whose behavior impedes the child's learning or that of others, *consider the use* of positive behavioral interventions and supports, and other strategies, to address that behavior. MUSER §IX.3.C (2)(a); *See also*, 34 CFR § 300.324(a)(2)(i). (emphasis added). The IDEA only expressly mandates the development of a behavior intervention plan in certain circumstances, such as when discipline is imposed.¹³

In addition to not mandating a behavior plan, the IDEA does not require that specific programs or strategies are put into place for a student with behavior challenges so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior. *Enterprise City Board of Education v. S.S. and J.S.* 76 IDELR 295 120 LRP 18398 U.S. District Court, Middle District of Alabama; *citing M.W. ex rel. S.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 140 (2d Cir. 2013) (holding that absence of functional behavioral assessment "does not render an IEP legally inadequate under the IDEA"); and *C.T. v. Croton-Harmon Union Free Sch. Dist.*, 812 F. Supp. 2d 420, 431 (S.D.N.Y. 2011) (noting that IEP was not procedurally defective for failing to include functional behavior assessment because IEP did include "numerous strategies" to address student's behavior). *See also, Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008).

In this case, the evidence supports a finding that the IEP team took appropriate steps to address and implement strategies regarding the Student's behavior. First, May, 2021 IEP included specially-designed instruction in behavioral/executive functioning, social emotional learning and weekly meetings with the school social worker. Additionally, it included a variety of supplemental aids, services and modifications to address behavior issues including adult

¹³ In the present case, the District was not required to develop a behavior intervention plan for the Student. *See* 34 CFR § 300.530 which provides in relevant part that a child with a disability who is removed from the child's current placement pursuant to paragraphs (c- disciplinary changes in placement that would exceed 10 consecutive school days), or (g -possesses a weapon, uses or sells drugs or inflicts serious bodily injury upon another person at school) of this section must -

- (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
- (ii) Receive, as appropriate, a functional behavioral assessment, and *behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.* (emphasis added) (*see also* MUSER sec. XVII (1))

support as needed in the regular ed setting, access to the resource room for behaviors as needed, positive behavior support, flexible seating, sensory supports and access to alternative lunch and recess space as needed.

The Parent and District staff working with the Student noted success during grade year and despite having one incident where hit another Student in September, 2021, was demonstrating progress and success during the first several months of grade year.

The Student demonstrated progress between June and November, 2021 by “meeting” three out of four of behavior goals and partially meeting one of goals as noted in November 22, 2021 progress report. Although the Social/Emotional Learning instruction was removed from IEP in September, the record supports a finding that the Student was participating in social emotional learning throughout the day in general education setting. (See Fact #16.) Pursuant to MUSER §X.2.B., placement in a more restrictive setting should only be considered when those services cannot be achieved satisfactorily in a regular education setting.

When Ms. , the Student’s regular education teacher, noticed that the Student’s behaviors and emotional dysregulation began to escalate in January, 2022, and other District staff including , and began to take steps to address this uptick in negative behavior. Ms. started a “check in” chart with and a “behavior chart” with (BCBA) to keep a running record of the Student’s behaviors and a means to determine what was making upset. The record reflects multiple emails in January and early February between District staff and the Parents addressing behaviors and adjusting responses to them.¹⁴

On January 27, 2022 BCBA met with the Parent to talk about what steps to take when the Student was “in crisis.” On February 1, 2022, an informal meeting was held with Ms. , Ms. and Mr. to develop additional strategies to address the Student’s behavior. This meeting resulted in a document prepared by referred to as “[the Student’s] Plan.” This plan identified coping and calming strategies to help the Student, along with responses to avoid with the Student. The Plan provided for a number of preventative strategies and a system referred to as a “token system” to signal to the Student that is demonstrating a target behavior to assist with these behaviors.

While this plan was not included in the Student’s IEP, the IEP adequately identified the student's behavioral impediments and implemented strategies to address that behavior. *C.T. v. Croton-Harmon Union Free Sch. Dist.*, 812 F. Supp. 2d at 431; *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d at 25.

¹⁴ See S-124-162

The record supports a finding that the interventions taken by the District were helping with the reductions of behavior incidents in February and early March. behavior chart noted multiple incidents on January 18, 19, 20, 21, 24, 25, 26, 27 and 31. By February after the “[Student]” Plan was implemented, the incidents of negative behavior decreased with entries only on February 3, 8 and 18. On February 18, 2022, the Parent noted in an email after getting a positive report from Ms. : “Seems like we’re generally doing a lot better which is a relief to see.” It is noteworthy that even before an IEP team meeting could be scheduled, the District got Mr. Theberge on board with this case -with the Parent’s permission - as another level of reinforcement with this case.

The Student’s “Log Entry” form indicating behavior or instances of discipline also showed improvement. In January, the form included three behavior incidents resulting in discipline. There were no reported behavior incidents resulting in discipline noted in February and two instances on March 8 and 9.¹⁵ Ms. “stoplight” charting showed that by February 7, the Student received exclusively “Level 3” indicators meaning that the Student “did great” on each of the remaining school days in February, except for February 8 (where needed “some reminders” and 18 (the day before vacation when had a “really hard day.”)

MUSER §VI.2.J.(4) provides that one of the major IEP Team Responsibilities is to develop and *revise* an Individualized Education Program. (emphasis added). In the present case, the record supports a finding that the District took appropriate steps to both track and address the Student’s uptick in behavior issues. It appears from the record that some of the steps taken by the District reduced the frequency of the Student’s negative behaviors. Both and reported that the District was planning to convene an IEP team meeting in March to consider revisions to the Student’s IEP to include regular BCBA consultation and a formal behavior plan/positive behavior support plan. As noted, the IEP meeting did not occur due to the Parents’ withdrawal of the Student from the District later that month.

In sum, the record supports a finding that the Student’s grade IEP provided a FAPE to the Student and was reasonably calculated to enable to make progress in light of circumstances. The record also supports a finding that the Student’s IEP was implemented with

¹⁵ In response to the Student’s bolting behavior on March 9, Assistant Principal said that he told both the father and the Student that needed to serve an “in-school suspension” as a consequence of behavior. Mr. said that “we weren’t really following the behavior plan...we were beyond that.” Mr. comment was upsetting to the Student who, as noted by the Parent and other District staff “is unable to acknowledge or process consequences of behavior.” While his response to the Student was inconsistent with approaches offered by the Parent and other staff, it was an isolated response relating to a discrete safety incident. The record supports a finding that this was a de minimis variation from the behavior plan and did not result in a loss of FAPE for the Student. see, *Farrin v. Maine School Ad. Dist.*, No. 59, 165 F. Supp. 37 (D. Me 2001).

fidelity, demonstrated in part by the District's response when the Student's behaviors became more pronounced in January, 2022.

As the First Circuit stated in *Lenn v. Portland Sch. Comm.* 998 F.2d 1083, (1st Cir. 1993) the law does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Id* at 1086. The Individuals with Disabilities Education Act (IDEA) sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. *Id.* at 1089. Because the FAPE duty is one of "reasonable calculations," an adjudicator must view the IEP decisions not in hindsight, but in terms of what was reasonable at the time the IEP was promulgated." *Roland M.* 910 F.2d at 992.

VII. CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

As the record supports a finding that the District complied with MUSER and the IDEA, there is no corrective action that must be completed by the District.