

Complaint Investigation Report

Complaint # 23.0011C

Report Date: October 7, 2022

Complaint Investigator: Leigh Lardieri

Date of Appointment: August 11, 2022

I. Identifying Information

Complainant: and Guardians/ Grandparents

Respondent: Child Development Services (CDS)

Case name: Guardians v. CDS

Student:

II. Summary of Complaint Investigation Activities

On August 10, 2022, the Maine Department of Education received this complaint. The complaint investigator was appointed on August 11, 2022. Therefore, the current investigation covers the period of August 10, 2021 to present. See MUSER XVI(4)(B)(3). The complaint investigator received ninety pages of documents from Child Development Services (CDS). The investigator also received forty-eight pages of documents from the Guardians (“Grandparents”) and Targeted Case Manager (“TCM”) on behalf of the family. On September 26, 2022 the Grandmother¹ was interviewed. Also on September 26, 2022 the following other parties were interviewed: the Psychologist, the CDS Consultant, (“Consultant”), the contracted Occupational Therapist (“OT”), the TCM and the contracted Speech and Language Pathologist (“Speech Therapist”). On September 28, 2022 the CDS Case Manager (“CDS CM”) was interviewed. On September 30, 2022, the CDS Site Director (“Director”) was interviewed. On October 2, 2022, a second OT provider was interviewed.

¹ Although both Grandparents are jointly named as complainants, only the Grandmother was interviewed for this investigation.

The complaint investigator reviewed the documents, emails and information obtained through interviews, as well as the responses provided by the parties pertaining to the allegations to complete this complaint investigation.

III. Preliminary Statement

The Student is a year-old who, at the start of the 2021-22 school year was receiving special education services under the disability category of Speech and Language Impairment. Individualized Education Program (IEP) consisted of Speech and Language (Speech) and Occupational Therapy (OT) services. In October 2021, it was determined that the Student would have evaluations completed to identify if the Student presented with the characteristics of Autism. A Physical Therapy (PT) evaluation was also ordered.

On March 4, 2022 the IEP team determined that the Student qualified for services under the disability category of Autism. Along with the continuation of the Speech and OT services, the amended IEP also included specially designed instruction (SDI) and PT services. Over the course of the next four months, the Student remained on a waitlist for a program, and did not receive the SDI or PT services. At the same time, the Grandparents sought placement in an out-of-state program, and proposed to CDS that the Student should attend this program as there were no openings in the placements offered by CDS. In May 2022, a transition to kindergarten IEP meeting was held. It was determined that the Student would attend a special education program at neighborhood elementary school. Throughout the late spring and summer, the Grandparents implored CDS to agree to enroll the Student in the out-of-state program, as there were no other programs for to attend at that time. They opined that the Student needed a transitional program as was not ready for kindergarten.

On August 10, 2022 the Maine Department of Education (MDOE) received a request for a complaint investigation filed by the Grandparents against CDS alleging violations of the Maine Unified Special Education Regulations (MUSER). Upon receipt of the complaint, a Draft Allegations Memorandum was sent to the parties by the complaint investigator on September 4,

2022 alleging three violations of MUSER. A telephonic Complaint Investigation meeting was held on September 6, 2022.

IV. Allegations

The following violations are alleged by the present complaint:

1. CDS denied the Student FAPE when it did not provide an appropriate level of programming in light of the Student's unique circumstances. **MUSER II (13); 34 CFR 300.1; MUSER X 2 B; 34 CFR 300.39.**
2. CDS denied the Student FAPE when it neither afforded the Guardians' an opportunity for meaningful participation in the IEP decision-making process, nor considered their input in making placement decisions. **MUSER II (13); 34 CFR 300.1; MUSER VI 2 I; MUSER X 2 B; 34 CFR 300.39.**
3. CDS denied the Guardians' meaningful participation in IEP decision-making process by not providing copies of the Student's IEP. **MUSER VI 2 H (6).**

On September 28, 2022 an ancillary allegations letter was sent to the parties.

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CDS denied the Student FAPE by not providing periodic IEP progress reports to the Grandparents. **MUSER II (13); 34 CFR 300.1; MUSER IX 3(A)(1)(c); 34 CFR 300.320 (a)(3).**

V. Factual Findings

1. The Student is a year-old who has lived with Grandparents since birth. The Student likes to bake with Grandmother, and work in the shop with Grandfather. is very active, and loves to be outdoors on the family farm. Grandmother reported that the Student has had limited interactions with other children. She also said that has difficulty with changes in routine². At times, has presented with challenging behaviors at home when gets upset. Since October 2021, the Grandmother has been transporting the Student to Speech, OT, and PT services.³ In addition, the Student has had targeted case management services for a few months. The TCM comes to the home, and has made referrals to Section 28 services to be delivered in the home for the Student.⁴
2. In October 2020, Speech and Language (Speech) and Occupational Therapy (OT) evaluations were completed.⁵ A psychological evaluation was also proposed by CDS but not completed.⁶ The purpose of the evaluations was for the transition from Part C to Part B services using an online Zoom platform. The Speech evaluation yielded the following results summarized here: ⁷ Clinical observations noted that the Student presented with delayed receptive and expressive language skills. In addition, the Student was unintelligible when used words/ word approximations. Throughout the evaluation, required visual and verbal prompts to complete the tasks.

On the Developmental Assessment of Young Children second edition (DAYC-2), The Student presented with receptive, expressive and communication domain scores in the below average range, significantly below the average range for a child of age. demonstrated mastery of the following receptive language skills: Turns and looks towards a

² As reported in the interview with the Grandmother, she gave examples of ways she teaches to accept “small” changes (eg, supporting to accept a different seat at a table, replacing blanket with a new comforter on bed).

³ As reported in the interview with the Grandmother.

⁴ As reported in the interview with the TCM.

⁵ These evaluation results are included for historical purposes.

⁶ As noted in the evaluation reports, at the time, the Grandparents did not want to pursue a psychological evaluation as they felt the Student was a late bloomer and would achieve developmental gains in own time.

⁷ See the Speech evaluation completed by , M.A. CCC-SLP dated 9/10/2020.

noise, briefly looks up when name is called, and response to appropriate gestures. The Student also demonstrated mastery on the following expressive language skills: spontaneously says familiar greetings/ farewells, has a word/sound/sign for “drink”, uses 10-15 words spontaneously and can name familiar characters or items seen on TV or in movies.

It was recommended that the Student receive direct Speech intervention due to receptive and expressive language delays, as well as articulation deficits, to be determined by the IEP team.

The OT evaluation revealed the following results summarized here:⁸

The clinical observation noted similarities to that of the Speech evaluation. The Student used a few words, with noted unintelligibility. relied upon imitation and verbal/visual cues to complete the tasks. demonstrated decreased hand skills with delayed grasp patterns and fatigue. also displayed delayed bilateral coordination skills.

The Student’s Grandmother reported that has been making some progress with speech and self-care. She indicated that uses various sensory strategies for calming, including seeking out quiet spaces when feels overwhelmed.

On the DAYC-2 Sensory Processing Measure-Preschool (SPM-P) as endorsed by Grandmother, the Student demonstrated typical hearing, some problems in vision, touch, body awareness, balance/motion, and planning/ideas. exhibited definite dysfunction in social participation. On the DAYC-2 Fine Motor assessment, the Student presented with moderate/borderline significant delay in fine motor skills. also demonstrated difficulty related to overstimulation within large group settings, and difficulty participating in larger social situations.

⁸ See the OT evaluation completed by

OTR/L dated 9/10/2020.

It was recommended that the Student receive direct OT intervention due to sensory and motor skills delays, to be determined by the IEP team.

3. In August of 2021, CDS reached out to the Grandparents to schedule an IEP meeting for the purpose of a program review, and to discuss compensatory services. Since they were dealing with a personal tragedy at the time, the Grandparents declined and stated that they would like to meet at a later date. Subsequently, the CDS case manager sent home a prior written notice without a meeting for the purpose of a 30-day program review and to discuss compensatory services.⁹
4. On September 27, 2021, the IEP team convened for an annual review. Under the disability category of Speech and Language Impairment, the team determined the following services would be delivered:¹⁰ Speech and Language services (Speech) for 3 times 30 minutes per week with goals focused upon language, articulation and speech intelligibility; Occupational Therapy services (OT) for 2 times 30 minutes per week with goals focused upon fine motor skills and sensory strategies; Transportation 5 days per week; and Supplementary aids and services.¹¹
5. On October 4, CDS staff reached out to the Grandparents informing them that they were making a referral¹² for Speech and OT services.¹³ On October 12, 2022 after a referral was made for Speech, the Speech Pathologist stated that she was able to provide services for the Student.¹⁴ Beginning in October/ November of 2021, and through the spring of 2022, the Student was transported to and from the services by Grandmother. received OT services at an outside agency location¹⁵ and Speech services at the Therapist's office.¹⁶ It

⁹ See prior written notice dated 8/20/21.

¹⁰ See prior written notice dated 9/27/2021 and IEP dated 10/6/2021 to 10/7/2022.

¹¹ Ibid. Written as Visual Schedules and Supports; Sensory Strategies and Supports.

¹² As reported in the CDS communication log. The referral was sent on 10/5/22.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ As reported in the interviews with the Occupational Therapists. When the Student first started, both OTs co-treated for five sessions. After the co-treatment period, the OT currently sees worked with in 1:1 sessions. After the sessions, it was reported that the OT spent time discussing the Student's progress with the Grandmother.

¹⁶ As reported in the interviews with the Speech Therapist. After the Speech sessions, it was reported that the Speech Therapist spent time discussing the Student's progress with the Grandmother.

was reported that there were some missed sessions due to a combination of family illness, transportation issues, and staff availability.¹⁷

6. On October 20, 2021, another IEP meeting was convened to discuss additional evaluations to be completed. The team determined that both a psychological, and physical therapy evaluation would be administered. This meeting was prompted by the Grandparents' concerns that the Student may have Autism, based upon observed developmental delays in language, social interaction, and behavioral difficulties.¹⁸ In addition, concerns regarding the Student's muscle control, strength, and coordination prompted the team to pursue a referral for a physical therapy evaluation.¹⁹ The prior written notice along with the parental consent for evaluation form were sent to the Grandparents electronically on November 12, 2021.²⁰ A request for copies to be mailed to the Grandparents was made on November 16, 2021, and the consent for evaluation form was returned to CDS staff on December 3, 2021.²¹

7. From early December 2022 when the consent to evaluate was received, through the completion of the evaluations in January and February 2022, unfortunate family circumstances beyond the control of the Grandparents and CDS arose, which created some delays in the completion of those evaluations.²²

8. In February 2022, the reports were completed and provided to the parties. On March 4, 2022, an IEP meeting was convened to review the evaluations. The following results of the psychological evaluation are summarized here:²³

¹⁷ As reported in the interviews with the parties, and in the CDS communication log, the Speech Therapist indicated on 10/12/22 that she could start services. On 10/29/22 there was a session cancellation. OT services did not begin until 11/17/21.

¹⁸ See prior written notice dated 10/20/21.

¹⁹ Ibid.

²⁰ As reported in the CDS communication log.

²¹ Ibid.

²² A family emergency arose in December 2022, as reported by CDS documents and emails exchanged between the parties dated 12/3/22.

²³ See psychological evaluation and report completed by Dr. _____, PsyD, NCSP dated 2/8/2022.

The Student is helpful around the house. is able to follow familiar one-step directions. On a daily basis, it was reported that the Student would have behavioral outburst, brought on by changes in routine, or by nothing at all. Emotionally it was reported that although the Student is happy, and does not exhibit excessive sadness, irritability, or depressed mood, rating scales indicated that anxiety and depression were in the high range.²⁴ The Student also becomes easily frustrated which result in big reactions. It was further noted that the Student engages in stereotypical behavior such as: watching particular YouTube videos, use of scripted phrases and echoic language, and perseveration. The evaluator concluded that the Student presents with the diagnostic criteria for Autism Spectrum Disorder, to be further considered by the IEP team to determine if met MUSER eligibility requirements as a student with Autism.

The following results of the Physical Therapy (PT) evaluation are summarized here:²⁵

The Student held Grandmother's hand while walking throughout the building. was observed walking on tiptoes or taking gallop-like steps. While on the floor, the Student was able to squat to pick up objects, use a half kneel to get up from the floor, and use a small slide with trunk upright. also showed independence while jumping on the trampoline. was not able to stand or hop on one foot. The Student was able to throw a playground ball up to 5 feet, but was not able to catch it when thrown to .

The Student's Grandmother reported that walked primarily on toes, and fell down multiple times a day. She stated that is able to use a slide, but has difficulty using a sling seat for swinging. The family spends a lot of time outdoors.

On the DAYC-2, The Student demonstrated a significant delay in the Physical Development Domain/ Gross Motor Subdomain. In conclusion, the PT opined that the Student presented with significant delays in gross motor skills as well as limitations in

²⁴ The Grandparents objected to this part of the evaluation as they perceived there to be contradictory statements regarding the presence of anxiety and depression. During the interview with the psychologist, she explained that higher ratings on the anxiety and depression scale emerged based upon how the questions were answered.

²⁵ See PT evaluation and report completed by , PT, DPT dated 1/13/22.

strength, balance, motor planning, coordination, range of motion, and body awareness. As a result, The Student's walking pattern, ball skills, and progressive locomotor skills were impacted. The PT concluded that it was up to the IEP team to determine if the Student qualified for direct PT services.

9. The IEP team determined the following:²⁶ the Student's eligibility changed from Speech and Language Impairment to Autism. In addition, the IEP was amended to include Specially Designed Instruction (SDI) for five days per week with Ed Tech support and a positive behavioral support plan in a special purpose program. Academic goals focused upon naming objects and their attributes; understanding sorting, sequencing and patterns; and following two-step directions. Behavior goals focused upon reciprocity in social interactions; interactive play; class participation (with visual supports); and following a visual schedule for group participation. Direct PT services were included for two times 30 minutes per week with goals focused upon progressive locomotive skills, balance and coordination. Extended School Year services (ESY) were determined to include sixteen speech sessions for 30 minutes each. In addition, the Student would continue to attend Speech and OT services as written in the IEP.

10. From March 4, 2022 through the rest of the spring, the Student remained on a waitlist for a program as none were available to at the time.²⁷ The CDS case manager continued to reach out to the Grandparents to schedule review of program meetings. However, no other solutions were presented in those meetings or conversations.²⁸

11. On May 11, 2022 the Targeted Case Manager reached out to the CDS Case Manager requesting copies of the OT and Speech evaluations, as well as the IEP. These documents

²⁶ See prior written notice dated 3/4/22, and amended IEP dated 3/4/2022.

²⁷ See CDS response dated 9/16/22. CDS fully acknowledged that this has been an ongoing issue with regard to providing services to students. It was reported that the CDS placement coordinator made program referrals for the Student and was in regular contact with the programs, awaiting news of an opening.

²⁸ As reported during the interview with staff, these meetings were to occur every 30 days while the Student remained out of program.

were sent to the TCM on May 19, 2022. However the attached IEP did not include the amendments made following the March 4, 2022 meeting.²⁹

12. On May 11, 2022 the IEP team met for the Student's CDS/public school transition meeting. The team determined the following services and supports would be in place at the neighborhood elementary school:³⁰ the Student would receive specially designed instruction (SDI) 6 hours per day with 1:1 support in a special education program. Speech services would be 120 minutes per week; OT services would be 180 minutes per month, with consultation 30 minutes per month. ESY services would include six one hour sessions of OT services. Special Transportation was also added to the IEP.

13. On July 26, 2022, the Grandmother sent an email to CDS staff requesting another copy of the IEP. It was noted in the email that the IEP was needed in order for the student to have proof of exemption from immunizations, and also to register the Student for school in their district of residence.³¹ She also inquired whether CDS had sent paperwork to Social Security for the Student's disability benefits. In the response by CDS staff, no mention was made regarding the request for the copy of the IEP, nor was there evidence suggesting a copy of the IEP was sent to the Grandparents at that time. However the response did include a summary of the compensatory education owed to the Student:³²

“OT was supposed to begin on 10/6/21 however did not start until 11/17/21 leaving five weeks of OT services unfulfilled at two sessions a week totals 10 OT sessions at thirty minutes a session compensatory time to address Specially Designed Instruction was to begin 3/14/22 and was unfulfilled to the end of the academic year 6/2/22 which amounts to 11 weeks, at five days a week three hours each session totals 55 sessions at three hours a session compensatory service time owed”.

²⁹ See emails between the parties dated 5/11/22 and 5/19/22. See also MUSER IX 3 C (6).

³⁰ See prior written notice from 5/11/22.

³¹ See emails exchanged between the parties dated 7/26/22 and 7/27/22. See also MUSER IX 3 C (6).

³² Ibid.

14. Over the summer of 2022, the Student had attended Speech therapy for 10 sessions and OT for 4 sessions.³³ attended PT for 3 hours.³⁴ It was also reported that the Student will have three PT sessions scheduled for October 6, 13, and 20th to complete the remainder of the compensatory time for PT owed to the Student.³⁵ The Student did not receive specially designed instruction at that time.
15. On September 12, 2022, the Grandmother, the Student and the TCM accompanied by the CDS Site Director³⁶, visited the neighborhood elementary school after hours, and toured the building where the Student would be attending kindergarten. They met with the Assistant Special Education Director, and the Special Education Teacher in the self-contained classroom where the Student would be receiving services and supports. During the roughly twenty minute visit, the Student was given toys to play with while the adults talked. The room was down the hall to the right, around the corner from the front entrance and office. It consisted of a play area with toys on shelves; a rug area with books; and a series of stations or centers. It was reported that each student and the staff with whom they worked would have ample space in the classroom. It was also reported that the program for the Student would be designed to meet specific needs, including a gradual transition of the Student to eventually join general education peers for lunch, recess, and other less restrictive opportunities. Although the Grandmother and TCM were amenable to having the Student attend this program, they continued to share concerns about how the Student would handle transitions, as well as the noise that comes with a busy elementary school environment.³⁷
16. On September 13, 2022 the Grandmother, TCM and CDS Site Director returned to the school for an informal meeting with the Assistant Director, and the Special Education Teacher. A transition plan was discussed where there would be a gradual increase of the Student's time from a partial day to a full day of school. Since the Grandparents' biggest concern was the Student's communication skills, it was proposed that begin by coming

³³ As reported by CDS staff.

³⁴ As reported during the interview with the PT.

³⁵ Ibid.

³⁶ As reported during the interview with the CDS Site Director.

³⁷ Ibid.

into the school just for speech therapy sessions to build up tolerance for the environment.³⁸ After the meeting, the Grandparent went to the office to begin the registration process for the Student.³⁹

17. Currently, the Student is registered to attend kindergarten in the special education class at the neighborhood elementary school in (“the District”). However, at this time, is not attending a full day of school.⁴⁰ Instead, as of September 27, 2022, the Student began attending for short periods of the day, receiving Speech therapy. As of this writing, there is no additional information as to when the Student will begin attending a full day of school. Outside of school, the Student continues to receive 60 minutes per week of OT services with the same OT who has been treating for the past year.⁴¹

VI. Determinations

1. CDS denied the Student FAPE when it did not provide an appropriate level of programming in light of the Student’s unique circumstances. **MUSER II (13); 34 CFR 300.1; MUSER X 2 B; 34 CFR 300.39. VIOLATION FOUND.**

In the fall of 2021, the evidence shows that the Student did not receive OT services for approximately six weeks after the IEP meeting held on September 27, 2021. Likewise, in March 2022 when the IEP team determined that the Student would receive specially designed instruction and PT services, these services were not delivered. There were simply no openings or service providers for the Student during this period of time, through June 2022. The failure to provide these services occurred in spite of the immediate response and efforts to remedy the situation on the part of CDS, to ensure services and programming were in place for this

³⁸ During the interviews with the parties, this was described as an informal meeting, outside of the IEP team process.

³⁹ As reported in the interviews with the parties. The following Tuesday, 9/20 it was reported by the Grandmother that the registration process was completed, and she also received a copy of the IEP.

⁴⁰ 9/6/22 was the first day of school for all students.

⁴¹ As reported during the interviews with both occupational therapists, the Student is able to receive these services through MaineCare until begins OT services in the school environment.

Student.⁴² CDS made it clear that they are fully aware of their responsibility to provide FAPE to this Student.⁴³ Nevertheless, a violation of FAPE occurred.

2. CDS denied the Student FAPE when it neither afforded the Guardians' an opportunity for meaningful participation in the IEP decision-making process, nor considered their input in making placement decisions. **MUSER II (13); 34 CFR 300.1; MUSER VI 2 I; MUSER X 2 B; 34 CFR 300.39. NO VIOLATION FOUND.**

From August 20, 2021, and through the summer of 2022, CDS provided eight prior written notices to the Grandparents. In addition, CDS staff exchanged multiple phone calls, emails or in-person contacts with the family about the Student.⁴⁴ The Grandmother was present at every IEP meeting, and her input was recorded.⁴⁵ When the Grandparents requested that the team consider additional evaluations to determine if the Student was presenting with the characteristics of Autism, CDS agreed.⁴⁶ As the evidence shows, a psychological evaluation and a physical therapy evaluation were completed. Subsequently, the Student's eligibility category was changed to Autism.⁴⁷ In the spring of 2022, when the Student remained on a waitlist and was not receiving all of services, the Grandparents proposed that the Student attend an out-of-state special purpose program.⁴⁸ In response, CDS staff continued the discussions about compensatory education, as the Student continued to attend Speech and OT services. Eventually, the family was informed that the program they sought was not under contract with CDS.⁴⁹ Moreover, further research revealed that the program does not serve preK students. It serves children in grades kindergarten through grade twelve.⁵⁰

⁴² During the interviews with the CDS staff, it was reported that the CDS placement coordinator was in regular contact with the special purpose programs on behalf of the Student in this case.

⁴³ See response from CDS dated 9/16/22.

⁴⁴ See communication log from CDS dated 8/20/21 through 9/12/22. See also copies of emails shared by the parties.

⁴⁵ See prior written notices dated 9/27/21, 10/20/21, 3/4/22 and 5/16/22. See parent concerns recorded on the IEPs dated 9/27/21 and 3/4/22.

⁴⁶ See prior written notice dated 10/20/21.

⁴⁷ See prior written notice dated 3/4/22.

⁴⁸ See emails exchanged between the Grandparents and CDS staff.

⁴⁹ Upon further inquiry, this investigator verified that this program was neither under contract with CDS, nor the State of Maine for K-12 students.

⁵⁰ See New Hampshire Department of Education [private-providers-approved.pdf \(nh.gov\)](https://www.nh.gov/education/private-providers-approved.pdf).

Setting aside these restrictions, placement decisions cannot be based exclusively on factors such as disability categories, the availability of programs, or administrative convenience.⁵¹ The evidence suggests that an out-of-unit program would have been too restrictive, and inappropriate for this Student. Throughout the year, the Student was making progress on Speech and OT goals.⁵² Of particular note is the progress that Student had made during OT sessions. It was shared that the Student who was once easily upset, overstimulated and dysregulated by noises and the general activity of the therapeutic environment is now able to parallel play, and increase peer interactions while focused upon treatment.⁵³ More recently, it was reported that one day, in reaction to the sound of blocks crashing to the floor, the Student helped peer pick up the blocks, instead of running away from the loud noise as had done in the past.⁵⁴ This account typifies the overall progress observed, and the messaging that has been shared with the Student's Grandparents by the providers who have been treating over the course of several months. That is with support, this Student who the presiders noted has been a pleasure to work with, can be educated in a special purpose program in a public school setting alongside kindergarten peers.⁵⁵

In May 2022 the IEP team met for the transition to Kindergarten IEP meeting, with the Grandmother, CDS staff, the OT and the District staff in attendance.⁵⁶ It was reported that that the tone of the meeting was positive and responsive to the Grandmother's concerns.⁵⁷ In particular, it was reported that the OT known to the family made statements of encouragement and reassurance in support of the Grandmother throughout the meeting.⁵⁸ The Grandmother appeared to be receptive to the proposal that the Student receive IEP services and supports in a self-contained special education classroom designed to meet needs in the least restrictive environment.⁵⁹ She reported that she was most concerned about communication skills, and kindergarten readiness in a public school setting. She stated that the staff would need to intervene

⁵¹ See *Letter to* , *Office of Special Education Programs, November 30, 2007* and 34 CFR 300.116.

⁵² See progress notes for Speech and OT.

⁵³ As reported during the interview with the OT.

⁵⁴ Ibid.

⁵⁵ As reported during the interviews with the presiders. One presider noted that the Student is "a different kid" from when she started working with . Another stated that she was pleased for to be able to attend the program at neighborhood school.

⁵⁶ See prior written notice dated 5/11/22.

⁵⁷ As reported during the interviews with the parties.

⁵⁸ Ibid.

⁵⁹ The program is located in the neighborhood elementary school in the Student's District of residence.

before the Student got upset.⁶⁰ Information was also shared about the Student’s favorite foods, preference for hugs, and the potential need for a visual schedule for toileting routine.⁶¹

By all accounts, the evidence suggests that throughout this case, culminating with the transition meeting in May 2022, CDS and the service providers maintained ongoing communication with the Grandparents, and considered their input, including their request for an out-of-unit placement throughout the IEP process. It is well-documented that “any parental choice option which allows a child to be placed solely on the grounds of parental preference is inconsistent with the IDEA.”⁶² With regard to placement decisions, it is incumbent upon the IEP team (including the Grandparents) to work towards consensus to find the appropriate program for this Student to meet needs in the least restrictive setting.

3. CDS denied the Guardians’ meaningful participation in IEP decision-making process by not providing copies of the Student’s IEP. **MUSER VI 2 H (6). NO VIOLATION FOUND.**

After the annual IEP meeting, an original copy of the IEP was sent to the Grandparents on November 4, 2021.⁶³ Eventually, in September 2022, after two requests a copy of the amended IEP was given to the Grandmother.⁶⁴ Although this procedural error occurred, it did not have a significant impact on the Grandparents’ opportunity to participate in the IEP process. As already mentioned, ample evidence in the case suggests that the Grandparents remained very engaged and involved in all aspects of the education of this Student. They were given ample opportunities at multiple IEP meetings to share their concerns. They remained in regular communication with the CDS staff throughout the year, and eventually given opportunities to tour the neighborhood school playground, the kindergarten classroom, and meet with the elementary school staff.

⁶⁰ See prior written notice dated 5/11/22.

⁶¹ Ibid.

⁶² See *Letter to _____, Office of Special Education and Rehabilitative Services, March 1991* and 34 CFR 300.552; See also *J.T., Appellant v. DISTRICT OF COLUMBIA, Appellee U.S. Court of Appeals, District of Columbia Circuit January 11, 2022.*

⁶³ See IEP dated 10/6/21 to 10/5/22.

⁶⁴ As reported during the interview with the Grandmother.

ANCILLARY ISSUE

CDS denied the Student FAPE by not providing periodic IEP progress reports to the Grandparents. **MUSER II (13); 34 CFR 300.1; MUSER IX 3(A)(1)(c); 34 CFR 300.320 (a)(3). NO VIOLATION FOUND.**

Similar to the previous allegation, in the IEP process, procedural errors may rise to the level of becoming a FAPE violation if there is "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." ⁶⁵ As the evidence shows, the major cause of the deprivation of educational benefits rests squarely on the lack of availability of appropriate programming for the Student. The periodic progress reports were eventually given to the Grandparents. In the interim, they were given ongoing, regular progress updates in-person by the presiders who worked with the Student.

VII. Conclusion

At the crux of this case is the denial of FAPE brought about by the lack of available programming for this preK Student. From the fall of 2021 through the summer of 2022, the Grandparents were vigilant in their efforts to ensure that the Student in this case received all of the services and supports needed to make progress as approached transition to kindergarten. Likewise, CDS was also concerned about the high needs of the Student, as they agreed to additional evaluations, which lead to changes in eligibility, and the addition of services and supports needed on the Student's IEP in the spring of 2022.

Ultimately, CDS was cognizant of their responsibility to provide the services as determined by the IEP team. Based on the evidence presented, CDS proceeded to initiate discussions and implement plans to provide compensatory services to the Student beginning in the summer of

⁶⁵ Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990).

2021. In any complaint investigation, if a denial of services is found, the provision of compensatory education is an appropriate remedy under the law.⁶⁶ In this case, the provision of compensatory education was raised again through the spring of 2022, and is ongoing at this time.

When the Student remained on a waiting list without a placement, the Grandparents became increasingly frustrated, and sought a placement on their own. Several weeks had passed before CDS staff provided the Grandparents with an answer as to whether the particular program they were seeking was accessible to the Student.⁶⁷ By that time, the communication between the parties had become very contentious. Coupled with the delay in communication regarding the out-of-unit placement, the provision of copies of the IEP and progress reports was also delayed. Although copies of the Student's IEP, and progress reports were *eventually* given to the Grandparents, if these documents had been provided more expeditiously, perhaps some of the contention may have been averted and the frustration on the part of the Grandparents may have been mitigated. Although these procedural errors did not rise to the level of a denial of FAPE, they should shine a light on the importance of sharing this information with the Grandparents in this case on an ongoing basis, and likewise with all parents and guardians in future cases. Fortunately, because the Speech Therapist and OT met with the Grandmother after every session, and reviewed the Student's progress, at least there was ongoing communication and evidence that the Student was making some gains, and improving in communication, motor skills, and self-regulation skills. As such, the evidence showed that the Student was responding to interventions, and had acquired some basic skills to carry forward into transition to kindergarten.⁶⁸ Ultimately, the Grandparents opined that they have witnessed more action from the District concerning the transition to kindergarten than what they have seen up to this point in the Student's education.

In sum, CDS has a practice of offering a continuum of services and programs including Head Start, Kindergarten, Reverse Mainstream, public preschool, and special purpose placements. The lack of openings and staffing shortages for students in need of special purpose private school placements is a serious issue of which CDS is keenly aware as they continue to work to remedy the situation in this case, and others as well.

⁶⁶ See IDEA 34 CFR 300.151 (b)

⁶⁷ See email between the parties dated 7/27/22 where it was reported to the Grandparents that CDS does not contract with the out-of-unit placement the Grandparents sought.

⁶⁸ As reported during the interviews with the parties. See also the progress notes.

With the exception of allegation #1, and the need for corrective action as described below, in light of the evidence CDS was found to be compliant on all other issues brought forth in this complaint.

VIII. Corrective Action Plan

CDS needs to work with the District to do the following:

- discuss the status of the provision of compensatory services, based on the Student's present levels, for the failure to fully implement the Student's IEP and/or provide FAPE.
- if compensatory services continue to be warranted, then the IEP Team shall develop a plan to provide those services as the IEP Team sees fit during the school year and/or during the summer, and the Grandparents must be given an opportunity to provide input about the amount and scheduling of any compensatory services.
- By December 31, 2022 CDS needs to provide to the MDOE a record of the communication with the District, including an update of the plan to provide compensatory services to the Student.

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