

Complaint Investigation Report
Parents v. Portland

January 15, 2016

Complaint #16.016C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainants: Parents

[REDACTED]

[REDACTED]

Respondent: Jeanne Crocker, Interim Superintendent
353 Cumberland Ave.
Portland, ME 04101

Special Services Director: Sharon Pray

Student:

[REDACTED]
DOB: [REDACTED]

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on September 24, 2015. The Complaint Investigator was appointed on September 24, 2015 and issued a draft allegations report on October 2, 2015. The Complaint Investigator conducted a complaint investigation meeting on December 11, 2015 (rescheduled from the original date of October 14, 2015 at the Complainant's request), resulting in a set of stipulations. On December 21, 2015, the Complaint Investigator received 70 pages of documents from the Complainant, and received a 9-page memorandum and 93 pages of documents from the [REDACTED] School Department (the "District"). Interviews were conducted with the following: Olivia Solodar, coordinator for state agency clients and special purpose schools for the District; Jamie Pratt, Director of ABA Services for [REDACTED] (" [REDACTED] Elizabeth Neuts, teacher for [REDACTED] Lynda Wall, speech/language pathologist for [REDACTED] Maureen Kronenburger, occupational therapist for [REDACTED] and [REDACTED] the Student's mother.

III. Preliminary Statement

The Student is [REDACTED] years old and is currently receiving special education under the eligibility criterion Autism. This complaint was filed by [REDACTED] alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to comply with regulatory requirements for the Student's abbreviated school day during the period from September 1, 2015 to the present in violation of MUSER §§II.1 and VI.2.L;
2. Failure to provide written notice of the determination to place the Student on an abbreviated school day program in violation of MUSER App. 1, 34 CFR §300.503 and 34 CFR § 303.403;
3. Failure to provide education in the least restrictive environment by determining to place the Student in a homebound program in violation of MUSER §X.2.B.

V. Stipulations

1. The Student was hospitalized at [REDACTED] Hospital from 6/15/15 until 8/26/15, returning to a full day educational program at [REDACTED] Center on 8/27/15.
2. On 9/1/15, [REDACTED] determined that the Student would not be permitted to attend school in its building until further notice.
3. At an IEP Team meeting on 9/3/15, the District determined to change the Student's placement to a homebound program with two hours of tutoring.
4. [REDACTED] has been providing tutoring to the Student at his residential location since 9/8/15.

VI. Summary of Findings

1. The Student lives in the [REDACTED], a residential treatment facility in [REDACTED]. He began receiving early intervention services at around [REDACTED] months.
2. The Student had been living in the [REDACTED] and attending the [REDACTED] program (formerly [REDACTED]) ("[REDACTED]") where he has attended since fall 2004, until June 2015. At that time, following a period of increasing instability, he was admitted to [REDACTED] Hospital and began attending [REDACTED] Academy.
3. Following his release from [REDACTED] on August 26, 2015, the Student returned to residing at [REDACTED] and attending [REDACTED].

4. The Student's IEP then in effect, with an effective date of September 20, 2014, contained both academic and functional goals, and provided for the following services: specially designed instruction, six hours per day/five days per week; speech/language services consult two hours per month; occupational therapy direct individual services 2 hours per week; physical therapy direct services 90 minutes per week; and social work direct services 30 minutes per week. In section seven of the IEP, the Student's least restrictive environment is identified as a day treatment setting, with the following explanation: "He displays disruptive and unsafe behaviors on a daily basis, and these presentations preclude successful integration into a less restrictive setting."

5. During the Student's first five days of attendance at [REDACTED] following his return, the Student was involved in six behavioral incidents that required completion of critical incident reports. Those incidents included physical aggression (biting, scratching, kicking and grabbing) towards peers and staff members, property destruction, and two incidents of elopement. In the latter two incidents, the Student left the school building and walked into the roadway without concern for traffic safety, flopping in the middle of the road on one of the occasions. When the Student got across the road, he flopped in front of a business and a school and disrobed.

6. On September 1, 2015, following the second elopement incident, [REDACTED] staff members Jamie Pratt, Psy.D., Director of ABA Services, and Kevin Proger, Assistant Clinical Director, met with the Student's mother. They discussed the significant safety concerns presented by the Student's recent behavior, and suggested that the Student would be better served in a school with locked exits and/or a remote location, with staff trained in restraint procedures sufficient to maintain the Student's safety. Dr. Pratt and Mr. Proger told the Student's mother that [REDACTED] staff would investigate whether there were ways to modify the [REDACTED] facility to protect the Student's safety, but that until then the Student would not be able to attend the [REDACTED] program.

7. On September 3, 2015, the Student's IEP Team met to review the Student's transition back to the District and to the [REDACTED] program. The IEP Team discussed the recent elopement incidents and safety concerns, and [REDACTED] decision that it was unable to provide a safe environment for the Student until it completed investigation into possible additional safety measures. The Team also discussed exploration of alternative placements for the Student. The Team determined that the Student's IEP would in the meantime be amended to provide for tutoring at [REDACTED] two hours a day, beginning September 8, 2015, with a subsequent IEP Team meeting to be held on October 1, 2015.

8. The District developed an IEP for the Student with an effective date of September 8, 2015. The IEP contained academic goals, OT goals, PT goals, speech/language goals and behavioral goals. The services to be provided to the Student consisted of tutorial instruction by a special educator five times per week for two hours, and PT one time per week for 1 hour. Section seven of the IEP stated that the Student required a highly structured setting with small group or 1:1 instruction and support within a therapeutic setting, but that the Student was receiving tutorial instruction for two hours per day until he is able to return to a special purpose school environment.

9. Due to logistical considerations, the Student did not actually begin to receive tutoring until September 14, 2015. [REDACTED] staff has been providing the tutoring services.

10. On September 25, 2015, [REDACTED] notified the District that it had decided it could not safely accommodate the Student and was discharging him. [REDACTED] staff members continued, however, to provide tutoring to the Student at [REDACTED]

11. At an IEP Team meeting for the Student held on October 1, 2015, the Team received reports of tutoring having been very successful, with the Student engaged at a level beyond his previous participation in those academic activities. The Team determined to increase the amount of tutoring to six hours per day, with PT reduced to 30 minutes per week, while placement at another special purpose school continued to be explored.

12. The District and the Student's mother agreed to seek placement for the Student at the new [REDACTED] in Saco. This program accepted the Student with the expectation that he would start school on November 1, 2015, but at the time of this report the school has not yet begun to operate and the Student continues to receive tutoring at [REDACTED]

13. During an interview conducted by the Complaint Investigator with Olivia Solodar, Ms. Solodar stated the following: She is coordinator for state agency clients and special purpose schools for the District. In spring 2015, the Student underwent surgery and when he returned to school at [REDACTED] he went into crisis, dysregulated with episodes of intense aggression. There were several weeks in May and June when the Student was attending [REDACTED] on a half day schedule while waiting to be admitted to [REDACTED] Hospital.

When the Student returned from [REDACTED] in September 2015, after having had his medication regime adjusted, she and the staff at [REDACTED] expected the Student to return to the level of performance he exhibited prior to the surgery. Instead, his behavior was more severe; whereas before the [REDACTED] staff was able to manage his behavior, now he was bigger and stronger, and they were unable to prevent the Student from leaving the school building. Ultimately, [REDACTED] decided that they could not secure the Student's safety in their program, and directed that he discontinue attending there.

Once [REDACTED] decided that they were unable to keep the Student safe, she called every program she could think of to which the student might transition, including Sweetser, The Center for Autism and Developmental Disorders (CADD), and the Collaborative School. She was constrained by the fact that the Student's mother would not consider a residential placement for the Student and the programs had to be located near [REDACTED]. Sweetser and the Collaborative School both said that the Student was not appropriate for their programs, and although CADD was willing to consider the Student for admission, the Student's mother ruled it out. The Student's mother also visited Spurwink's Glickman School and felt it was unsuitable. Eventually, [REDACTED] accepted the Student into their new location in [REDACTED], however, it was not yet operating which meant that the Student would have to wait for it to open before he could attend there.

While she and the Student's mother were investigating alternative placements, the Student's IEP Team met and decided to change the Student's IEP to provide for tutoring at the Student's residence for two hours per day. As [REDACTED] wouldn't allow the Student to attend there, and she had not yet found a suitable program willing to take the Student, there seemed to be no other choice available. Given the severity of the Student's behaviors, she considered that two hours of direct instruction was the most that the student could be expected to tolerate, and that it was not feasible to add speech, OT or PT sessions to that program. [REDACTED] said that the speech and OT providers would consult with the staff providing the tutoring, so that speech and OT work could be embedded in the tutoring sessions. At the time of the September 3, 2015 IEP Team meeting when the decision about tutoring was made, the Student's mother was in agreement with the decision; the Student's mother subsequently declared that she was not in agreement with it.

After the September 3, 2015 meeting, she prepared a Written Notice of the meeting, which was mailed to the Student's mother on September 4, 2015. On the face of the Written Notice, in the space for recording "Date sent to parents," next to the date "9/4/15" appears the initials of her administrative assistant, Peggy Bouffard. Ms. Bouffard always initials the Written Notices in this way to document that she personally placed the Notice in the mail on that date. Later, when the Student's mother wrote to her that she wasn't informed of the decision to provide tutoring, she assumed the Student's mother misunderstood that the Written Notice was the vehicle for informing her.

14. During an interview conducted by the Complaint Investigator with Jamie Pratt, Psy.D., Dr. Pratt stated the following: As the Director of ABA Services for [REDACTED] she oversees the school program, and supervises the staff members responsible for day-to-day operations of the program. The Student began attending [REDACTED] when he was a [REDACTED] student. Towards the end of April 2015, staff members were reporting increasing concerns about the Student's behavioral instability. The Student had always displayed physical aggression, noncompliance, elopement and disrobing behaviors, but there was an increase in the intensity of these behaviors accompanied by emotional changes and mood instability.

The Student's team was reviewing the last functional behavioral assessment of the Student to determine whether the report's recommendations were still relevant or whether changes to the Student's program were necessary. The team made some changes, but the Student's presentation was so different and his moods so concerning that the Student appeared to be in a state of crisis. The team felt that the Student needed management of his medications, and the Student's mother decided that this should be done while the Student was hospitalized, which had been done on a few previous occasions.

When the Student returned from the hospital on August 26, 2015, his mood was very positive – he was smiling and happy. The first two days day back, there were relatively minor incidents of physical aggression and property destruction. The third day, Friday, the Student eloped from the school building. Staff members tried hard to block him from leaving, instituting a crisis management plan developed after the Student eloped to a store across the street shortly before his hospitalization. The Student was able to push his way through several staff members.

The Student has no safety sense, and will walk right into traffic. On other occasions when the Student got outside, staff members would walk with him and try to regain his compliance so he would enter the building through another entrance. This time the Student was not complying. At least six staff members formed a wall to try to prevent the Student from entering the roadway, but the Student pushed through them. The Student flopped on the ground and threw himself against people. He was doing everything possible to get to the road, using physical aggression against staff members. The safety care method in which [REDACTED] staff are trained does not include techniques employing more than two adults, or that address restraint of a child on the ground. The staff just couldn't control the Student, and called local law enforcement to manage traffic, after convincing them to not put the Student in handcuffs, while staff members continued to work to get the Student back under control. The Student wandered in the road, ending up back at the store across the street where he flopped on the ground at the entrance, causing the store to lock its door.

On Monday morning, she spoke with the Student's mother, telling her of the staff's high level of concern regarding their ability to maintain safety when the Student leaves the building. Staff members could manage the situation when the Student escalated in the building, but were unable to keep the Student from leaving and couldn't keep him safe once he was outside. There was concern that police officers might not continue to be willing to keep hands off the Student, and that other community members might try to get involved. There are just so many variables once the Student leaves the school campus. She discussed with the Student's mother some things the staff might try to do to address these issues, but she remained very concerned.

The rest of Monday went reasonably well, but Tuesday the Student was again able to get outside the building. Staff didn't try to block the Student's access to the road this time because the situation became so unsafe the last time, and there was little traffic. The Student first went back to the same store and flopped, the store again locking the door. The Student then wandered over to another school on the same side of the street where students were outside during their lunch period. The situation was initially okay, but then the Student started throwing dirt and rocks at the other students and started to disrobe as the students went back inside their school building. The Student remained completely disrobed while staff members held up visual barriers to try to provide privacy to the Student. After a couple of hours, they were able to regain the Student's compliance and brought him back into the school building.

The Student's mother was called during the incident and arrived after the Student had returned to the building. She again discussed safety concerns surrounding the Student's elopement. The Student's mother said the Student was exhibiting the same behaviors as previously, but she explained to her that the Student was now stronger and staff could no longer keep him in the building by blocking and redirecting. She also explained that the attention given the Student during these incidents was reinforcing the behavior, that this was increasing the likelihood of further occurrences and would also interfere with the Student's educational programming. She told the Student's mother that the Student needed to be somewhere where there was blocked egress or a remote location so that there was no increased attraction for elopement, as well as a program where staff members were trained in more intensive physical restraint techniques. She told the Student's mother that [REDACTED] would

investigate installing a delayed egress system, changing their safety training program and some other things, but she didn't know if and when those things would happen.

At the IEP Team meeting on September 3, 2015, she stated that it was not safe for the Student to return to [REDACTED] without some modifications being made to the program. The Student's mother asked whether the Student didn't have a right to receive tutoring in the meantime, and Ms. Solodar asked whether [REDACTED] could provide tutoring. She said yes, as long as it could be done at the Student's residence where the necessary safety features were in place. Ms. Solodar suggested two hours of tutoring, and the Student's mother said she would agree if that was the only option available. The Student's mother asked about OT and speech/language services, and she suggested that the tutors could consult with the OT and speech/language providers on which goals could be integrated into the tutoring. The IEP Team decided to accept that proposal.

Ms. Nuet pulled together the tutoring program, using herself and two other teachers as the tutors. Ms. Nuet talked with the OT and speech/language providers about what types of skills could be worked on, such as echoics, strengthening requesting skills, and building in sensory and motor breaks. The providers did not provide ongoing consultation to the tutors.

She eventually heard from the fire marshal, on September 25, 2015, about locking the doors, and was told that the fire marshal would allow a delayed egress system providing the lock would release for 15 seconds if pushed for three consecutive seconds. Staff members discussed this and concluded that, given the Student's history of pushing on the door until he was able to get out, it was unrealistic to think that he wouldn't persist for three seconds and get through, which would only reinforce the behavior. There is delayed egress at [REDACTED], but the Student has no history there of getting out of the building. They also decided to go forward with additional safety training for the staff, but it would take a while to get all staff members trained in the new system. The ultimate conclusion was that the safety of the Student could not be ensured, and that the Student should not return there.

At the October 1, 2015 IEP Team meeting, the Team reviewed how tutoring was going. The student's mother requested that tutoring be increased to six hours. Everyone was willing to try this, but she didn't expect that the Student would be able to sustain engagement that long. It was agreed that the tutors would be available for the full six hours, but that if there were extended periods of escalation, the session would be terminated. Typically, the Student participates in tutoring for two hours in the morning, breaks for lunch, and then participates in another 2 ½ hours after lunch before his non-compliance dictates stopping.

15. During an interview conducted by the Complaint Investigator with Elizabeth Nuets, Ms. Nuets stated the following: She is a special education teacher at [REDACTED] and has worked with the Student for about three years. The Student had been out for about a week due to surgery starting April 1, 2015. When he returned, he was at first presenting typically for him, including some aggressive behavior. After a while, staff members noticed significant behavior, including behavioral instability, very significant aggression, and elopement out of the building and across the street.

A decision was made that the Student would become a patient at [REDACTED] Hospital while his medications were managed; this had been done in the past and the Student had returned to school in a better condition so that staff could manage him. While the Student was waiting for a bed to become available at [REDACTED], a shortened day (three hours) was instituted for about a week. During that time, there was always a staff member outside the classroom door to maintain safety in case the Student got out. This time when the Student returned, staff members saw a very similar presentation to what had been the case before the Student went to [REDACTED]. Staff members' primary goal was to maintain the Student inside the building. When the Student eloped on August 28, 2015, staff members tried to get him back into the building, but it was obvious the Student didn't want that, he wanted to cross the street and go to the business he had visited previously. He was highly aggressive with staff and walked into traffic. Staff called the police department and they were eventually able to get the Student back into school.

On September 1, 2015, the Student again got outside and staff members were unable to keep him on the property. The Student ended up at the school across the street, where he disrobed. The Student was outside for a total of three hours, and even when the Student was finally guided back to the building, he was trying to go outside again.

The Student has grown, and is now big and strong and shows a real determination. When the Student gets out, he enjoys all the attention that he gets, and he will keep trying to do that. Staff at [REDACTED] is trained in a safety care program that doesn't include the kind of physical restraint techniques that would be necessary to control the Student. The Student needs a locked facility, and the delayed egress system that would be permitted at [REDACTED] wouldn't be sufficient to keep the Student in the building. At [REDACTED], the Student knows he can't get out, so he doesn't try.

She is one of three staff members that are providing tutoring to the Student. The Student works from 9 to 11, has lunch, and then works again from 11:30 for as long as he can tolerate it – from 30 minutes to two hours. If the Student engages in non-compliance or aggression and can't regain compliance within 30 minutes, the tutor leaves. Typically, the Student receives 3 ½ to 4 ½ hours of tutoring per day. When tutoring started, the Student was very engaged, and was demonstrating skills that staff members didn't know he had. The Student has been making far more progress since beginning tutoring than she has seen from the Student when he was attending school. He is reading 30 words, and counting to 20 with 70% accuracy. As tutoring has gone on, however, the Student has been engaging in more significant escalations.

When tutoring was first being considered, there was discussion regarding consultation with OT and speech/language providers to allow for incorporating those goals into the tutoring sessions. Travel from [REDACTED] to [REDACTED] is about one hour, and there is no way to know whether the Student will be able to engage when they get there, so the OT and speech/language providers can't really provide services directly to the Student. Although the Student is not receiving direct services, the tutors have incorporated as many goals as they are able. As a result, during tutoring the Student has been working on basic movement, echoics, and requesting breaks. He is doing well with all of that. The Student has been requesting

breaks at a rate of 80% of opportunity, which is much greater than he had previously been doing.

The tutors have checked in with the providers as tutoring has proceeded, and the providers have provided resources to the tutors, such as manipulative objects for OT. She has checked in with the providers at least twice per month to go over questions about working with the Student. Ms. Wall initially didn't want the tutors to focus on having the Student use the phrase "I want..." but that's what the Student has been working on in the residence so Ms. Wall worked with her on how to use this. If the Student wants bubbles, she tries to get the Student to fully articulate the word "bubbles."

16. During an interview conducted by the Complaint Investigator with Lynda Wall, Ms. Wall stated the following: She is a speech/language pathologist employed by [REDACTED]. She has been providing services to the Student since the Student first began attending there. At the beginning, the Student had less than five words and was essentially non-verbal. The Student was learning to sign but had difficulty learning and retaining the information; he would learn new signs, but wasn't retaining the signs he had learned previously. She suggested to the Student's mother that they switch to using PECS, and the Student did pretty well with them and was learning to put together sentences. He could make one-word requests and occasionally two-word requests.

Later, they acquired a speech device for the Student. It worked well at the beginning, but it needed repairs frequently (partly as a result of the rough treatment it received from the Student), and then the Student would be without the device for one to three months. By now, his device has gotten quite old and malfunctions often. Most recently, at [REDACTED], the Student had a new evaluation and got a recommendation for a new device.

The Student's verbal output has been up and down, but she would still consider him to be non-verbal. The Student still relies mostly on behavior to get his needs met. His speech is very idiosyncratic, so if you didn't know him you might not understand. He has made some gains with his speech over the years, but progress has been slow and inconsistent.

Through the years, the Student has made gains in his receptive language, but it's hard to know what the Student really knows and what he's taking in from his environment. The Student is very inconsistent – sometimes he seems to be getting everything, and sometimes not much at all. It's hard to pin down how much of that is the Student just deciding he doesn't want to do it.

The Student has been receiving only consult speech/language services for years. Trying to sit down with the Student and deliver direct services just caused the Student to engage in aggressive behaviors. Consult was both direct (she observed the Student interacting with staff and consulted with the staff) and indirect (no direct observation of the Student). She has worked with staff on the Student's behavior around eating – the size of his bites and amount of chewing. She has observed staff asking the Student to imitate their speech and then given feedback. She has helped staff members implement procedures to improve the Student's sound production. She has worked with staff on trying to get the Student to get more than one

word out at a time; sometimes it takes multiple activations of his device to get more than one word out. She also worked on getting the Student to not reject the device; every time it came back from being repaired, the Student would initially reject it. She was working on functional communication – when something is bothering the Student, what words can he be given to help him avoid maladaptive behavior. This is difficult, because one can't work with the Student in the moment, when he is too volatile. One has to teach him after the fact, when he no longer has any interest in it. He could get to where he wanted through his behaviors, so he didn't see a reason to do the work.

In preparation for the tutoring, she met with Ms. Neuts for about one hour. Ms. Neuts gave her an idea of what programming she thought would be applicable to the tutoring context, and they looked at the Student's speech goals to see what could be incorporated in that work. She suggested to Ms. Neuts use of any book that included identification of body parts or function as highly motivating to the Student. She encouraged improving listening comprehension by using who/what/where questions, as long as the Student could respond by pointing to something/someone. For example, she could ask the Student "What do you use to see?" and the Student could point to his eyes. She suggested activities involving the Student matching objects to symbols. She suggested using echoics, incorporating reinforcing objects to increase motivation. For sequencing, she suggested expanded story-telling, using the Cloz technique where a series of cards tells a story and the Student is asked to pick out the next card in the sequence.

After tutoring had gotten under way, she checked in with Ms. Neuts who said things were going extremely well. Since the tutoring was expanded to six hours, she has heard that things weren't going quite so well, and that the tutors had to leave early sometimes. When the Student's behavior starts to decline, it's not a good idea to increase speech expectations. When the Student was at [REDACTED] she would sometimes observe him and he was so behaviorally unstable that she wasn't able to see any speech-related behavior. Their goal was to get the Student stable enough to be able to make growth in communication. It is good that the tutors have been people from [REDACTED] who knew the Student and with whom she had worked on communication issues.

The Student is a tough child to work with because one never knows from one moment to the next what one will get out of him. She has often seen a pattern where the Student goes through a period of six months of decline in communication skills, and then the next six months improves significantly.

17. During an interview conducted by the Complaint Investigator with Maureen Kronenburger, Ms. Kronenburger stated the following: She is an occupational therapist employed by [REDACTED]. She has worked with the Student since she started there in 2013. She initially was providing compensatory services for OT that had not been provided previously, and then she started seeing the Student for 2 hours of direct service per week. When she first arrived, she had the Student doing things like cutting, writing his first name, and doing puzzles. The Student could sit at a table and do work for 20 minutes. Then things changed due to the Student's behavior. She had to stop doing cutting with the Student. The Student liked to come into her room, listen to certain songs that he liked, and go to the swing. There were days

she could present the white board to the Student and he would write his name, and other days when he would throw it across the room. She tried to work on a variety of things while staying safe. The Student is a strong boy. There were always two Behavioral Health Professionals (BHPs) in the room with the Student, though sometimes he demanded that the BHPs wait outside the door.

There was only so much that she could do for the Student. He had a lot of basic self-help skills; he could put on his shoes and clothes, and zip a zipper. The self-regulation skills she worked on with the Student didn't really help that much. She tried many things – brushing, deep compression, yoga, a body sock, a tunnel, a crash pad – that one way or another didn't work for the Student. The Student could use an iPad or a laptop for long periods of time if he could do what he wanted on them (videos, games, etc.), but he wouldn't work on the keyboard. He knew how to use these devices, it was just a matter of whether he would engage in learning activities. Before the decision was made that the Student was not going to return to [REDACTED] she intended to go to the next IEP Team meeting and suggest that the Student's OT time be reduced to 30 minutes of consult per week, because she wasn't accomplishing enough in the 120 minutes. The Student's progress was variable and very slow; a couple of weeks went well, and then a month didn't go well. It's not that the Student didn't know how to do the things they worked on, it was the Student's behavior that got in the way.

She saw the Student a few times after he had returned from [REDACTED]. She wasn't able to accomplish much. She sometimes found that the Student was aggressing on his BHPs. He was very unsettled, and wanted to leave the room. One time he ordered her to leave the room. The school doesn't have locked doors, and there were specific places to which the Student wanted to go. The Student had figured out that he could leave the building, go across the street and take a walk.

After tutoring started, she met with the tutors for about a half hour, and she gave the tutors theraputty and other manipulatives to use with the Student. At first, the Student was doing great, so she put together a program based on Handwriting Without Tears. The tutors would bring back the Student's work and it was amazing. After the novelty wore off, it wasn't so amazing anymore. Writing stopped being so much fun for the Student, so he wasn't doing it so much. She was meeting with the tutors one or two times a week at first, but after October 1, 2015 she would generally meet with them one time per week, although she was always available to talk with them if they had a question.

The Student has accomplished much more since the tutoring started than he had in the last few months he was at [REDACTED]. She was amazed at how long the Student could sit and what he could accomplish. He finished far more work with the tutors than he ever did in school. At [REDACTED], he was in a room, he knew he had to sit there and he worked. It was like when she had first started to work with him.

18. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: The Student was identified as needing early intervention services when he was [REDACTED] months old. He has received diagnoses of PDD NOS and anxiety disorder, and is hyper-flexible. He started at [REDACTED] in fall 2004.

In spring 2015, the Student wasn't feeling well (he had headaches and earaches, was tired a lot and was having problems with his teeth) and ultimately underwent surgery. Afterwards, there was an increase in his aggressions; although he was feeling better, this meant he had more energy and was thinking more clearly so he could direct his behaviors more effectively at the people caring for him. The Student has always been a bolter, but now he had more energy to get away from people. The Student's residence staff also reported that he was now going after people but, unlike before the surgery, not letting go. This was all the same behavior as before, but with more intensity and longer duration. The Student's behavior was not being managed well with the medications the Student was using, so it was decided that the Student would return to [REDACTED] Hospital to work on his medication.

A few days after the Student returned to [REDACTED] from [REDACTED] on Friday August 28, 2015, she received a phone call from [REDACTED] about the Student's elopement from [REDACTED] earlier that day. The incident had not been reported to her by that time either by [REDACTED] or the District. Had they called her during the incident, she could have gotten to [REDACTED] in about 45 minutes and likely been able to guide the Student to a safer place. She texted [REDACTED] and then got a phone call from Dr. Pratt. During the conversation, there was discussion about getting more staff to help manage the Student. She offered to try to get [REDACTED] staff to come help with the Student at [REDACTED] but the offer was rejected.

The following Monday, she got a phone call from [REDACTED] about another elopement by the Student. They said the Student was back in the school, and had been out for about an hour. When she arrived at the school, [REDACTED] staff members were visibly upset. The Student looked fine, although he was a little dirty. She met with Dr. Pratt and Mr. Proger, and they told her that the Student would not be able to return to [REDACTED], that she should look for another placement for him.

When the Student left [REDACTED] [REDACTED] didn't say that they couldn't manage the Student. She never expected that the Student would return to [REDACTED] and they would then send him away a few days later. She was never given the option at the time the Student was preparing to leave [REDACTED] of finding another placement for the Student. There were safety measures that were supposed to be in place at [REDACTED]. The Student has a gait belt that can be used to guide the Student, but she had been told by [REDACTED] staff that they didn't need to use it but were going to use blocking instead. Also, [REDACTED] staff were supposed to be wearing Kevlar sleeves to protect themselves against the Student's biting and scratching. She doesn't believe that [REDACTED] staff tried to stop the Student from crossing the street. It's not possible that seven adults couldn't have stopped the Student. If they saw the Student was about to enter the street, they should have tackled him to prevent that from happening.

She looked at a number of other schools for the Student. Spurwink Glickman was too close to the road. She drove past Sweetser Saco and saw students outside the building without supervision, so she rejected that option. She looked at CADD, but the Student would be one of four students in a room with four adults, and the space wasn't big enough to allow students to get away from one another. She would have considered it anyway, but they didn't have an opening.

A transfer IEP Team meeting had already been scheduled for September 3, 2015, and she attended. It was obvious that Ms. Solodar hadn't yet been told that [REDACTED] was refusing to let the Student stay at their school. At the meeting, when it was clear what [REDACTED] had decided, she asked couldn't the Student at least get some tutoring. Ms. Solodar asked whether [REDACTED] could send over tutors to [REDACTED] and they said they could for two hours per day. She asked what about the rest of the day, and they said don't worry, the Student doesn't get that much work done anyway. The only thing that was offered for the Student was two hours of tutoring; she didn't agree to it, she just didn't have any other options.

The Student's data shows gains since tutoring began, but he didn't just make those gains recently; he's been working on these tasks for 10 years. His ability to show them now is a result of his not being so clouded by his medications; he can focus more, express more the information he's been taught. It has nothing to do with the fact that he's doing the work at [REDACTED]. He needs the intensity of a program like [REDACTED] or Margaret Murphy. The Student's aggressions at [REDACTED] have been increasing recently, and she is considering putting him back in [REDACTED]. Things have gotten so bad that Spurwink brought in their occupational therapist to do an assessment to help at the residential level.

The loss of speech/language services for the Student is devastating; instead of making gains he will have lost a lot of language opportunities over all these months. The tutors are not running his language program correctly. Verbal behavior programming is embedded in the Student's learning. His teachers should be doing a lot of labeling of objects, not asking him questions. Asking him questions will cause an increase in the Student's behaviors, because that's not how the Student recognizes language. The Student processes language in a different way, and he's been trained in the same way for 10 years. She told Ms. Wall that the tutors aren't talking to the Student in the way that they're supposed to. Ms. Wall said that was something she would have to work on with them. She asked Ms. Wall how she can do that when she isn't able to observe them with the Student, and Ms. Wall said we'll have to see how we can work this out.

For OT, the tutors are doing gross motor activities with the Student, but he's not getting what he had been when he was receiving 1:1 direct OT services. The Student thrives on OT, including a lot of sensory work, fine motor skills, cooking activities – all of that has stopped. The Student had been working on writing his name and changing his gait, but this work also has stopped. No occupational therapist has been present to supervise the Student's program for five months.

With regard to the Written Notice of the September 3, 2015 IEP Team meeting, she never got that document. There have been other documents in the past that were supposedly sent but she didn't receive them. The majority of the time, it takes at least one phone call before she gets a document, often by the District scanning and emailing it. She believes she called to ask about the Written Notice on or about September 21, 2015.

VII. Conclusions

Allegation #1: Failure to comply with regulatory requirements for the Student's abbreviated school day during the period from September 1, 2015 to the present in violation of MUSER §§II.1 and VI.2.L

NO VIOLATION FOUND

When the Student's IEP Team met on September 3, 2015, it learned that the special purpose private school in which the Student had been placed, [REDACTED] had decided that the Student could not be maintained there in safety and therefore could not return until further notice. [REDACTED]'s decision was based on their perception that the Student's needs had changed so as to require a program that provided a more secure facility, with locked doors or delayed egress to prevent elopement, in a more remote setting in case the Student was able to elope. In addition, the Student's strength and intensity of aggression had increased so that the safety care technique in which [REDACTED] staff was trained was not sufficient to manage him in the event he became a danger to himself or others. [REDACTED] stated that it would proceed to investigate possible changes to these elements of its program so as to make it appropriate for the Student but, in the interim, the school could not allow the Student to attend.

In response to this news, the Student's IEP Team determined that the District and the Student's mother would investigate alternative private school placements for the Student while awaiting the results of [REDACTED]'s own investigation. Having already decided that there were no programs appropriate for the Student within the District's schools and that the Student therefore required an out-of-District placement, there was no school then available which the Student could attend. The IEP Team determined to provide to the Student, while awaiting the results of [REDACTED]'s and the District's investigations, two hours of tutoring at the Student's residence. This program, being only two hours in length, constituted an abbreviated school day under the definition found in MUSER§II.1, subject to the requirements of MUSER §VI.2.L.

Section VI.2.L first requires that IEP Teams make every effort to maintain a child in full-day programs, and that a decision to provide an abbreviated school day be based on a student's individual educational needs. As previously stated, there was at that time no school program appropriate for the Student which the Student was able to attend, leaving tutoring as the only available option. Given the reports of the Student's behavior since his return from [REDACTED] including the fact that he had not been able to engage in academics, it was the reasonable determination of the IEP Team that two hours of direct instruction was the most that the student could be expected to tolerate.

Section VI.2.L further requires that the IEP Team have a plan for how the Student would return to a full day. In this case, the plan was that either [REDACTED] would determine that it could institute changes that would provide adequately for the Student's safety, or else the District, with the Student's mother's involvement, would identify an alternate out-of-district program which the Student could attend.

If the Student was unable to return to a full school day within 45 days of the initial determination, Section VI.2.L dictates that another IEP Team meeting be held to review the Student's status. This meeting took place on October 1, 2015, at which time the IEP Team determined to increase the amount of tutoring services provided to the Student to six hours, providing the student was able to tolerate that amount of instructional activity. At that point, the program in place for the Student no longer constituted an abbreviated school day. Although the Student proved to not be able to tolerate the full six hour day, there were teachers in place to provide it should that change.

Allegation #2: Failure to provide written notice of the determination to place the Student on an abbreviated school day program in violation of MUSER App. 1, 34 CFR §300.503 and 34 CFR§ 303.403

NO VIOLATION FOUND

This allegation is based on the contention of the Student's mother that she never received the Written Notice of the September 3, 2015 IEP Team meeting. The District produced that Written Notice to the complaint investigator, and noted the initials of the administrative assistant next to the date shown for delivery to the Student's mother as documenting its having been placed in the mail by the administrative assistant. Although the Student's mother insists she did not receive it, she was nevertheless aware that it reflected that she had purportedly agreed to the provision of tutoring, a position which she contested. Furthermore, there was no evidence that the Student or the Student's mother were in any way disadvantaged by the alleged delay in receipt of the Written Notice.

It is nevertheless of some concern that the Student's mother reported a history of the District failing to deliver documents without her having to specifically ask for them. The Department encourages the District to review its procedures for mailing such documents to ensure their proper and timely delivery.

Allegation #3: Failure to provide education in the least restrictive environment by determining to place the Student in a homebound program in violation of MUSER §X.2.B
Ancillary Allegation #1: Failure to fully and adequately implement the Student's IEP with respect to provision of speech/language and OT services in violation of MUSER §IX.3.B(3)
VIOLATION FOUND

In considering the proper educational placement for a child with an IEP, the goal is "to find the least restrictive educational environment that will accommodate the child's legitimate needs." *C.G. and B.S. v. Five Town Community School District*, 513 F. 3rd 279, 285 (1st Cir. 2008). On the continuum of alternative placements set forth in MUSER §X.2.C(2), private day schools for children with disabilities (§X.2.C(2)(d)) is less restrictive than homebound programs (§X.2.C(2)(f)).

In the IEP dated September 20, 2014, the least restrictive educational environment for the Student was identified as a "day treatment setting," a self-contained special education setting

with an embedded mental health component. The IEP dated September 8, 2015 similarly described the Student's least restrictive educational environment as a special purpose school with a highly structured setting, providing small group or 1:1 instruction and support within a therapeutic setting. As of the IEP Team meeting of September 3, 2015, however, the District was unable to provide a program that matched that level of restrictiveness, having decided that the District had no such program itself and not having identified an out-of-district program willing to accept the Student.

Procedurally, the District acted properly in having the Student's IEP Team develop interim programming for the Student until the appropriate educational placement could be developed. The District also moved promptly to search for that placement, and shortly thereafter identified the Margaret Murphy facility in Saco as the Student's placement. Unfortunately, however, that program has still not begun to operate, leaving the Student in a setting (homebound instruction) that is unduly restrictive. The District could have broadened its search for programs at a greater distance from the Student's residence, but chose to heed the wishes of the Student's mother to restrict the amount of time the Student had to travel to his educational program, and to not seek a placement that would result in a change of residence for the Student. The net result is that the Student has not received his educational program in the least restrictive appropriate educational environment.

When the IEP Team determined to substitute tutoring in the Student's residence for specially designed instruction in a day treatment classroom, it also removed from the Student's IEP the speech/language and OT related services that had been in the Student's IEP up to that time. The decision to delete those services was ostensibly based on pragmatic considerations of the need for providers of those services to travel from [REDACTED] to [REDACTED] with the very real possibility that the Student would not be capable of engaging in that work when they got there, and was not based on a determination that the Student no longer required those services. The District decided, instead, to have those providers consult with the teachers who were providing tutoring to the Student so that, to the extent possible, speech/language and OT work could be embedded in the tutoring program. This consultation was not included in the Student's IEP, however, and took place sporadically as the tutoring proceeded.

Whereas the Student's IEP had previously required that speech/language consultation be provided for two hours per month, Ms. Wall met with the tutors once before tutoring started and then occasionally checked in with them afterwards. As for OT, although the consultation during tutoring appears to have been more frequent, the IEP had previously required direct services. In sum, the Student has not fully received the related services to which he is entitled.

Having found that the District has not provided the Student with all the services to which he is entitled, and has not provided his educational programming in the least restrictive educational environment, the inquiry turns to the remedy appropriate to redress these violations. A common remedy for a failure to provide services is to require a period of compensatory educational services designed to compensate for past deprivations. *Me. Sch. Admin. Dist. No. 35 v. R.*, 321 F.3d 9, 17-18 (1st Cir. 2003); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993). Compensatory education serves to replace the "educational services the child should have received in the first place" and "should aim to place disabled children in the same

position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

With respect to the Student's educational programming generally, the consensus of those with knowledge of the Student's tutoring was that the Student has made substantial progress in his learning activities during the period of tutoring. The Student's mother acknowledged that this was so, although she challenged the idea that this was a function of the instruction taking place at the Student's residence. In the residential setting, the Student appears to have been available for learning to a greater extent than he had been in the school setting, and has been able to demonstrate his learning to a much greater extent than previously. It does not appear, therefore, that the transition of setting from private special education school to homebound tutoring has itself resulted in a deprivation of educational opportunity that requires redress.

As to the loss of related services, the effects of this deprivation are more difficult to assess. With respect to OT, Ms. Kronenburger spoke of the variability of the Student's performance due to his behavior issues, of the limited benefit the Student was receiving from her direct work with him, and of her intention (had the Student not been discharged from [REDACTED]) to seek to reduce her involvement with the Student to only 30 minutes per week of consult services. This is not much different than what the Student has received since tutoring began.

With respect to speech/language, Ms. Wall described the Student's progress in the speech/language area as slow and inconsistent. As previously indicated, the Student was already receiving only consultation services, although these included sessions when Ms. Wall would observe a teacher's interaction with the Student and consult with the teacher in the moment, a type of service not being provided to the Student while he has been receiving homebound instruction.

In sum, at the present time, there does not appear to be meaningful evidence of any failure to progress or of regression on the Student's part resulting from loss of services. Once the Student has been situated in his new placement, speech/language and OT providers will be in a better position to assess this and, if such failure to progress or of regression is evident, to determine what amount and kind of compensatory services would be necessary to put the Student in the position he would have been in had he received all the required services.

VIII. Corrective Action Plan

Within 30 days from when the Student begins to attend school in his new placement, the District will be required to convene the Student's IEP Team to conduct a 30-day review under MUSER §IX.3.H. In preparation for that meeting, the District will cause to be conducted evaluations of the Student in the areas of OT and speech/language, including assessments of the levels of the Student's skills in these areas relative to those levels in spring 2015. The IEP Team will review the results of those evaluations and address the issue of whether there is evidence that the Student failed to progress or regressed during the time that the Student received homebound instruction. If such failure to progress or regression is found to have occurred as a result of the discontinuation of services, the IEP Team will proceed to determine what compensatory services are required to put the Student in the same position with respect

to those skills that he would have been in had his related services continued to be provided during that time period. The District shall submit to the Department, within 10 days of the 30-day review meeting, the Written Notice of that meeting, along with the speech/language and OT evaluations reviewed at the meeting.