

**STATE OF MAINE  
SPECIAL EDUCATION DUE PROCESS HEARING**

Parents	)	
	)	
v.	)	DECISION AND ORDER
	)	
Child Development Services	)	
	)	

Representing the Parents: Mother  
 Representing Child Development Services: Nathaniel Bessey, Esq.  
 Hearing Officer: Sheila Mayberry, Esq.

This hearing was held and this decision was issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), Title 20-A M.R.S.A. § 7202 *et seq.*, Title 20 U.S.C. § 1415 *et seq.*, and accompanying regulations. The hearing took place before Sheila Mayberry, Esq. on November 29 and December 4, 2017, in Portland, Maine. Appearances for the Parties included: Nathaniel Bessey, Esq., counsel for Child Development Services (“CDS”) and [REDACTED] (“Parent” or “Mother”).

Testifying at the hearing were:

- Lisa-Kay Folk            Site Director and Case Manager, CDS York
- Susan Macri            Special Education Director, RSU 60/MSAD 60
- Lisa Steege            BCBA, Margaret Murphy Center for Children
- Mackenzie Holland    Speech and Language Pathologist, Margaret Murphy Center for Children
- JoAnn Pion            Case Manager and Teacher, Margaret Murphy Center for Children
- Kristopher Michaud    Early Childhood Special Education Technical Advisor, State of Maine
- Mother

On October 17, 2017, the Mother and [REDACTED] (“Father”) [REDACTED] (together as “Parents”) submitted a Due Process Hearing Request (“Hearing Request”) on behalf of their son, [REDACTED] [REDACTED] (“Student”), alleging violations of the Individuals with Disabilities Education Act (“IDEA”) by Child Development Services (“CDS”).

On October 31, 2017, CDS submitted a Motion to Dismiss the Parents’ Hearing Request, to which the Parents immediately replied. A rebuttal was submitted by CDS on November 2, 2017, to which the Parents responded. The Motion to Dismiss was denied by the Hearing Officer on November 13, 2017.

A prehearing telephone conference was held on November 22, 2017. Present for the conference call were the Mother; Roy Fowler, CDS State Director; Nathaniel Bessey, Esq., attorney for CDS; and Sheila Mayberry, Hearing Officer. The statement of the issues and witnesses were determined. The Hearing Officer vacated the subpoena for Peter D. Lowe, Esq. based upon a motion by CDS that his legal representation of, and advice to, CDS were protected by attorney-client privilege. The Hearing Officer granted the Parents’ request that the hearing be made open to the public.

The hearing took place on November 29 and December 4, 2017, at the Portland District Court in Portland, Maine. The Hearing Officer denied CDS’ motion to vacate the subpoena for Kristopher Michaud, permitting the Parents to call him as a witness. The Hearing Officer granted the Parents’ request to keep the hearing record open until January 12, 2018, to allow the parties to prepare and submit closing arguments.

CDS provided the Parents and the Hearing Officer with exhibits identified as S-XX and the Parents provided an index of exhibits identified as P-XX. All exhibits for CDS were admitted. The Parents’ exhibits admitted into the record were as follows: P-2, P-4, P-5, P-10 through P-14, P-17 through P-23, P-25, and P-27.<sup>1</sup>

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<sup>1</sup> S-19 and P-27 are audio recordings.

<sup>2</sup> MM is a private school specializing in providing special education and related services to children with autism. (<https://www.jfmhomes.org/what-we-do/25-what-we-do/63-margaret-murphy-centers-for-children>).

## **I. ISSUES PRESENTED**

### **Issue 1**

- a. Did CDS violate the IDEA by failing to add the phrase “at risk” in Section 5A of the Student’s Individual Education Plan (“IEP”) dated September 29, 2017?
- b. If so, did CDS violate the IDEA?
- c. If so, did it prevent the Student from receiving a free appropriate public education (“FAPE”)?
- d. If so, what shall be the remedy?

### **Issue 2**

- a. Did the IEP Team agree to include Extended School Year (“ESY”) services in the IEP dated September 29, 2017?
- b. If so, did CDS fail to include ESY services in the IEP dated September 29, 2017, in violation of the IDEA?
- c. If so, does the failure to include ESY services in the Student’s IEP prevent the Student from receiving a FAPE?
- d. If so, what shall be the remedy?

### **Issue 3**

- a. Did CDS fail to develop an annual IEP that included special education and related services for a full year?
- b. If so, did CDS violate the IDEA?
- c. If so, did the violation prevent the Student from receiving a FAPE?
- d. If so, what shall be the remedy?

### **Issue 4**

- a. Did CDS fail to allow the Parents to meaningfully participate in determining the Student’s special education instruction and related services in the IEP decision-making process to develop the Student’s IEP dated September 29, 2017?
- b. If so, did CDS violate the IDEA?
- c. If so, did CDS actions prevent the Student from receiving a FAPE?
- d. If so, what shall be the remedy?

## II. FACTS

1. The Student is [REDACTED] years old and was born on [REDACTED]. (P-2; S-1, 24). He resides in Berwick, Maine with his family. (P-2; S-1, 24). Berwick is located within RSU 60/MSAD 60 public school district (“the District”). He is eligible for special education and related services under the category of Autism Spectrum Disorder. He began receiving educational services through the York County CDS site in October 2016. (S-3). Through an agreement with CDS and the Parents, and with the knowledge of the District, the Student is currently receiving special education and related services at the Margaret Murphy Center for Children (“MM”) in Saco, Maine. (S-1, 9).<sup>2</sup>
2. On May 30, 2017, a Decision and Order was submitted in Case No. 17.042H in a prior matter between CDS and the Parents regarding the Student’s FAPE. The remedy included five months of compensatory education (“CE”) from the date of a mandatory IEP meeting that was to occur 14 school days from the receipt of the decision. (S-66).
3. On June 7 and 16, 2017, the IEP met to discuss the Hearing Officer’s Order. (S-4). The parties reached an agreement to begin the Student’s CE at MM on August 14, 2017. (S-7, 8). The Parents and CDS also agreed that CDS’ responsibility for the Student’s CE would end on April 20, 2018. (S-8). The agreement was summarized in a Written Notice (“WN”) and in a letter to the Hearing Officer, dated June 19, 2017. (S-8, 9). The WN stated:

CDS proposed the above actions due to the Hearing Officer’s Order Dated 5/30/2017. CDS also previously agreed to the above listed ESY service levels for (the Student). The dates have been amended on this IEP and WN to reflect a new start date at (MM) to be 8/14/17 as opposed to the original date of 7/10/2017 proposed by (MM) due to a family vacation that was previously scheduled. (MM) could not accommodate the parent’s choice of a 7/24/17 start date, so the IEP team has agreed to 8/14/17 and this has been confirmed by Rebekah Bickford from (MM). (S-8, Sec.2)  
...Lisa-Kay Folk will also contact Susan Macri (the District’s) SPED Director to let her know about the IEP Team determinations. (S-8, Sec.4).

Upon all calculations for the services listed above; (the Student) will remain at (MM) for ESY & Compensatory Services through CDS until April 20, 2018.  
(S-8; Sec.4).

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<sup>2</sup> MM is a private school specializing in providing special education and related services to children with autism. (<https://www.jfmhomes.org/what-we-do/25-what-we-do/63-margaret-murphy-centers-for-children>).

4. The IEP Team also agreed to refer the Student for a psychological evaluation due to the Parents' suspicion that the Student may have a specific learning disability ("SLD"). (S-8).
5. The Student began school at MM on August 14, 2017. (S-8).
6. On August 18, 2017, emails between the Mother, Lisa-Kay Folk, and Lisa Steege discussed having an IEP meeting for a 30-day review of the Student's programming and whether a staff person from the District should be at the IEP meeting. (P-10). Ms. Folk indicated that she was the District's designee. (P-10).
7. On August 22, 2017, a psychological evaluation was performed by Dr. Glen Davis in order to determine whether the Student exhibited a SLD. (S-11). Various assessment tools were used.<sup>3</sup> In summary, Dr. Davis found that overall, the Student had average intellectual abilities based upon the scores from the assessments. However, Dr. Davis stated that the Student exhibited a pattern of cognitive strengths and low average cognitive processing that indicated he was at "somewhat heightened risk for developing a SLD, although the Student exhibited no specific deficits in cognitive processes." (S-11, p.4). He noted that typically a SDL was not identified in children until late kindergarten, first grade, or later. He concluded that based upon all the results from the various assessment tools, the Student did not meet the criteria for a diagnosis of a SDL at that point in time. (S-11, p.4).

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<sup>3</sup> Assessment procedures included:

- Review of referral information;
- Brief interview of the Father;
- Observation of the Student;
- Wechsler Preschool and Primary Scale of Intelligence Fourth Edition ("WPPSI-IV");
- Bracken Basic Concept Scale – Expressive;
- Selected subtests of the Kaufman Test of Educational Achievement;
- Achenbach Child Behavior Checklist (completed by the Mother);
- Achenbach Caregiver – Teacher report form (completed by Smartipants Preschool staff).

8. The IEP Team met on August 29, 2017, to discuss Dr. Davis' evaluation and to get an update on the Student's progress at MM. (S-12).<sup>4</sup> Based upon Dr. Davis' opinion that the Student did not exhibit a SDL at that time, there were no changes made to the Student's IEP. (S-12, p. 2). A report from the MM staff indicated that the Student's behavior was not significant enough to require a functional behavior assessment or a formal behavior plan. The MM staff indicated that they believed the Student's IEP goals were appropriate. The Team agreed that his annual IEP meeting would take place prior to October 4, 2017. (S-12, p. 5).
9. Between September 1 and 5, 2017, Ms. Folk communicated with the IEP Team to schedule the Student's annual IEP meeting. (P-12). Ms. Susan Macri, the District's Special Education Director, was also invited. (P-12). Ms. Folk found that a majority of the IEP Team could attend on September 29, 2017. This did not include Ms. Macri. (P-12). Ms. Folk indicated in her email that she was not sure whether Ms. Macri needed to attend but that she wanted to extend her the invitation. (P-12). The Advance Notice of the meeting included Ms. Macri. (S-13).
10. A reminder of the annual IEP meeting was emailed to the IEP Team on September 22, 2017, but the recipients did not include anyone from the District. (P-13).
11. On September 28, 2017, Ms. Steege sent proposed IEP goals and objectives, an updated Positive Behavior Support Plan, ESY services, and dates of service to members of the IEP Team, including Ms. Folk, Ms. Macri, and the Parents. (S-14-16).
12. On September 29, 2017, the IEP Team met to discuss and determine the Student's annual IEP. (S-23). Those present included: the Mother; Mr. Lowe, representing CDS; Ms. Folk; Ms. Scribner; and the following from MM: Bill Harris, Ms. Bickford, Ms. Steege, Ms. Pion, and Holland MacKenzie. (S-23). There were no staff members from the District present.

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<sup>4</sup> Present at this IEP meeting were the Mother; Peter Lowe, attorney for CDS; Ms. Folk; Dr. Davis (electronically); Pam Scriber, CDS; and MM staff (Rebekah Bickford, Lisa Steege, and JoAnn Pion).

13. The IEP Team discussed that the Student was at risk for developing academic needs, based upon the view of Dr. Davis. The Team agreed that while he was at grade level academically, the IEP and the WN would indicate that he was academically or functionally “at risk.” (S-19 at 1:09:53-59). Ms. Folk stated that this language would be included in the annual IEP. (S-19 at 1:09:53-1:10:02).
14. The IEP Team also discussed service dates. While Ms. Folk was going to write that service dates ended on June 20, 2018, the MM staff informed her that the MM school year ended on June 29 or 30, 2018 and Ms. Folk agreed that the dates should coincide with the MM school-year calendar. (S-19 1:39, 1:54:36-42). The Mother and Ms. Folk both told the Team that based upon informal conversations they had with Ms. Macri, they understood that the District would honor the terms of the IEP after April 20, 2018. (S-19 at 1:39:40-56). The Mother agreed to send Ms. Folk the paperwork from Ms. Macri confirming this arrangement. (*Id.*). Ms. Folk reiterated that CDS’ responsibility would end on April 20, 2018 (*Id.*).
15. The IEP Team also agreed that the Student would need ESY services during the summer of 2018. However, it was also agreed that the IEP Team would convene at a later point to determine the frequency and intensity of those services. (S-19: 1:53:20 - 1:54:34). The Mother stated that she did not want to see ESY taken out of the IEP. (S-19: 1:54:17-22).
16. During the IEP meeting on September 29, 2017, the Mother asked many questions and was asked about any concerns she had. (S-19). Ms. Folk had the IEP Team members discuss the Parents’ areas of concerns. (S-19).
17. At the time of the IEP Team meeting on September 29, 2017, the Student was not enrolled or registered for school in the District. (Tr. Macri 125-127,129).
18. The WN describing the results of the IEP meeting on September 29, 2017 reflected that the Team agreed to the following:
  - Specially designed instruction – 6.5 hours daily, five days per week
  - Occupational therapy consultation – 1 hour weekly
  - Speech therapy – 1 hour weekly

- BCBA Consultation – 12 hours quarterly
- Transportation – All round trips/total miles
- Updated occupational therapy testing (fine motor task concerns).  
(S-23, p. 2)

19. All of the above specially designed instruction (“SDI”) and related services had an ending date of April 20, 2018. (S-23, p. 2). The WN also noted that services from April 21, 2018 to June 20, 2018 would be the responsibility of the District. (S-23 §1).
20. The WN also stated that, “The IEP team also discussed ESY. ... The IEP team agreed that (the Student) is a child that would need ESY. The frequency and intensity of these services will be determined with (MM), (the Parents) and (the District) who will be his future IEP Team.” (S-23, p. 2).
21. Ms. Folk drafted the Student’s annual IEP as a result of the IEP Team meeting on September 29, 2017. (Tr. Folk). It included 14 functional goals and no academic goals. The goals were for the full calendar year. (S-25, pp. 3-9). Section 5.A. – Academic Performance, under “Needs” stated: “There are no special education needs in his academic areas at this time. His skills will be monitored through curriculum in the classroom.” (S-24).
22. Ms. Folk stated that while she was drafting the IEP, she became confused about how to indicate the duration of SDI and related services because she realized she could only commit funds on behalf of CDS and did not believe that CDS could commit funds on behalf of the District to pay for the Student’s services after April 20, 2018. (Tr. Folk 35-36, 38). She understood that the District would be honoring the IEP after that date, but she had not received written confirmation at that point. (Tr. Folk 86-87). She also believed that amendments to the annual IEP could be made at an IEP meeting that included Ms. Macri from the District and MM staff. (Tr. Folk 38). Therefore, she decided to write the service dates to only reflect the period of time CDS would be providing SDI and related services, from September 29, 2017 to April 20, 2018. (Tr. Folk; S-24, pp.10-11).
23. Ms. Folk did not include the phrase “at risk” in the annual IEP when describing the Student’s developing academic needs. (Tr. Folk 46). She believed that she tried to capture the essence

of the IEP Team's determinations, but relied on others' notes from the meeting and not the tape recording of the meeting. (Tr. Folk 38). Nevertheless, she was open to including that phrase in the annual IEP because after hearing the recording, she realized how important it was to the Parents and Ms. Steege. (Tr. Folk 38).

24. Ms. Folk did not include ESY services in the annual IEP because the frequency and intensity of those services had not been determined at the IEP meeting. (Tr. Folk 25, 42-43). She believed that the IEP Team understood that the Student would be getting ESY services for the 2018 summer, but that the IEP Team would decide frequency and intensity at a later date when the District would be attending the IEP meeting. (S-23).
25. Ms. Folk also believed that she did not have the authority to manually write in IEP determinations that would override the electronic, fill-in-the-blank version of the IEP form provided by the Maine Department of Education. (Tr. Folk 115-116).
26. On October 5, 2017, the Mother emailed Ms. Folk asking when the IEP document would be ready. Ms. Folk replied that it should be out the following day. (P-17).
27. Both the WN and the IEP were sent to the Parents on October 10, 2017. (P-18; S-25). They were not sent to the District. (P-18; Tr. Macri at 127:20-21).
28. On October 10, 2017, the Mother and Ms. Folk exchanged emails. The Mother asked why ESY services were not in the IEP, stating that the Team had agreed that it was necessary even though the frequency was to be determined and discuss at a later date. (P-19). Ms. Folk replied, "I'll get back to you with answers to your questions as soon as I am able." (P-19).
29. Ms. Folk testified that she was unsure about how to answer the Mother's questions and was waiting to hear from the CDS attorney for advice. She stated that the Parents filed the Hearing Request before she could get back to them to answer questions about the IEP and was advised not to respond after that point. (Tr. Folk 26-28). She stated that she had guidance not to reply to emails without counsel. (Tr. Folk 112).

30. On October 11, 2017, the Parents received a proposed agreement from the District outlining the terms of the Student's education if they filed for due process after the transition into public school in the District. (P-21).
31. On October 18, 2017, a day after the Hearing Request was filed, Ms. Folk and Ms. Steege emailed the Mother and answered her questions posed in her email, dated October 10, 2017. With respect to ESY, Ms. Folk stated that since a Hearing Request had been filed, CDS would wait to address it in the due process forum. (S-26).
32. The Mother and Ms. Folk both had been in contact with Ms. Macri from the District to inform her that CDS had agreed to provide SDI and related services to the Student at MM through April 20, 2018. (Tr. Mother, Folk, Macri).
33. The Mother continued to communicate with Ms. Macri into October 2017 regarding the Student's transition into the District. (P-25).
34. A resolution session was held on November 7, 2017. (Parents' Brief, p. 27).

### **III. POSITIONS OF THE PARTIES**

**Issue 1:** Did CDS violate the IDEA by failing to add the phrase "at risk" in Section 5A of the Student's Individual Education Plan ("IEP"), dated September 29, 2017?

The Parties stipulated to a settlement on this issue at the due process hearing. The Parties agreed to modify the annual IEP, page 4, at Section 5A – Present Level of Academic Performance to read as follows:

There are no special education needs in his academic areas at this time. He is at risk for a specific learning disability. His skills will be monitored through the curriculum in the classroom.

(Tr. 52).

**Issue 2:** Did the IEP Team agree to include Extended School Year (“ESY”) services in the IEP, dated September 29, 2017?

### The Parents’ Position

The Parents argue that on September 29, 2017, the IEP Team agreed to include ESY Services in the Student’s annual IEP. The Parents argue that CDS committed a procedural violation of the IDEA by not including ESY services in the annual IEP. They urge that the violation is serious enough to warrant a finding of a substantive violation because without ESY services, the Student will regress in his progress on his IEP goals during the summer. They also assert that the unilateral decision to terminate ESY services, contrary to the IEP Team’s determination, is evidence that CDS failed to ensure that the Parents had a meaningful opportunity to participate in the IEP decision-making process.

The Parents request that the remedy for the failure to include ESY in the annual IEP is to require ESY services for the Student through August 2018, and to include 270 hours of SDI, 9 hours of speech therapy, 9 hours of occupational therapy, 12 hours of BCBA consultation, and transportation services.

### CDS’ Position

CDS argues that the WN specifically explains that the Student is eligible for ESY services. It asserts that testimony of witnesses agreed that the frequency and intensity of ESY services were going to be determined at a later date. It surmises that the IEP Team’s decision to determine frequency and intensity at a later date was, in itself, a decision not to make a determination on this point at that time. It urges that because of this missing information, ESY could not be included in the IEP. It states that the issue was going to be revisited later in the year once more information was available to inform the IEP Team regarding the parameters of the ESY services. Therefore, it argues that there was no violation for not including it in the annual IEP.

**Issue 3:** Did CDS fail to develop an annual IEP that included special education and related services for a full year?

### Parents' Position

The Parents argue that CDS unilaterally changed the time frame during which the Student was to receive SDI and related services in his annual IEP. They assert that the IEP Team agreed to have SDI and related services run from September 29, 2017 through June 30, 2018, the last day of the MM school year. They urge that while CDS may no longer be responsible for providing a FAPE to the Student after April 20, 2018, it is still responsible for creating an annual IEP. Citing MUSER VI.2.C.(2)(b) and (c).

The Parents argue that CDS: 1) unilaterally disregarded the determination of the IEP Team and predetermined the contents of the IEP; 2) disregarded the Parents' participation in the IEP process; and 3) failed to abide by the statutory IEP team processes, all of which violate the IDEA.

The Parents urge that these alleged procedural violations have the cumulative result of preventing the Student from receiving a FAPE. They also urge that the IEP itself prevents the Student from receiving a FAPE after April 20, 2018 because there are no educational services scheduled after that point that would enable the Student to achieve his annual IEP goals.

### CDS' Position

CDS argues that the required elements of an IEP for a child aged 3 to 20 are limited, citing MUSER IX.3.A.1. It asserts that while an IEP is in effect for 365 days, there are no requirements that an IEP provide services for a full 365 days, nor could there be, given the differing needs of individuals with disabilities, since each IEP is individualized.

However, CDS believes there may have been a procedural violation by allowing the IEP Team to extend SDI and related services to June 30, 2018, when it was not authorized to make that decision without participation and agreement by the District. It suggests that a remedy would be an order to convene a transition IEP Team to decide on SDI and related services for the Student.

**Issue 4:** Did CDS fail to allow the Parents to meaningfully participate in determining the Student's special education instruction and related services in the IEP decision-making process to develop the Student's IEP, dated September 29, 2017?

#### Parents' Position

The Parents argue that CDS violated the IDEA's mandate to ensure parental participation in the IEP process by unilaterally removing ESY services from the IEP, changing the service dates, and choosing not to respond to the Parents' emails seeking clarification of the language in the annual IEP prior to the filing of the Hearing Request. They also believe that CDS worked with the District without the participation or knowledge of the Parents by contacting Ms. Macri to discuss the terms of the IEP when she was not an official member of the IEP Team and the Student was not enrolled in the District. They urge that these alleged procedural violations were serious impediments to the Parents' opportunity to meaningfully participate in the decision-making process, resulting in the denial of FAPE to the Student.

#### CDS' Position

CDS argues that it has gone beyond its requirement to make sure the Parents have been able to participate in the IEP process. It notes that it continued to support a placement of the Student at MM when it was not required to do so. It claims that it made sure that the Parents' concerns were discussed at the two-hour IEP Team meeting on September 29, 2017. It noted that Ms. Folk continued to make sure the Parents' concerns were discussed at this meeting.

CDS argues that there is no evidence that it predetermined the contents of the annual IEP. It asserts that the Parents' suggestion that it colluded with the District in managing the IEP process is without record evidence. It cites testimony from Ms. Macri and Ms. Folk, who said they did not communicate with each other on the contents of the Student's education, other than an update from Ms. Folk to Ms. Macri to let her know about the duration of compensatory placement at MM.

## IV. LEGAL FRAMEWORK

The Individuals with Disabilities Education Act (IDEA), along with corresponding federal and state statutes and regulations, requires school districts to provide every student who is eligible for special education instruction and services with a free appropriate public education (“FAPE”) designed to meet their unique needs and prepare them for employment and independent living. 20 USC 1400(d)(1)(A).

The IEP is “the centerpiece of the statute’s education delivery system for disabled children.” *Honig v. Doe*, 484 U. S. 305, 311 (1988). A comprehensive plan prepared by a child’s IEP Team (which includes teachers, school officials, and the child’s parents), must be drafted in compliance with a detailed set of procedures. 20 C.F.R. §1414(d)(1)(B). These procedures emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances. 20 C.F.R. §1414, *et seq.* The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child. (*Board of Educ. v. Rowley* 458 U.S. 176, at 181). The IDEA requires that every IEP include “a statement of the child’s present levels of academic achievement and functional performance,” describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” and set out “measurable annual goals, including academic and functional goals,” along with a “description of how the child’s progress toward meeting” those goals will be gauged. 20 C.F.R. §§1414(d)(1)(A)(i)(I)–(III). The IEP must also describe the “special education and related services . . . that will be provided” so that the child may “advance appropriately toward attaining the annual goals” and, when possible, “be involved in and make progress in the general education curriculum.” §1414(d)(1)(A)(i)(IV).

It is important to highlight that the IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. *Andrew F. v. Douglas County School District RE-1*, 137 St. Ct. 988, 1000-1001 (2017), citing §§1414(d)(1)(A)(i)(I)–(IV), (d)(3)(A)(i)–(iv).

The Supreme Court has set up a two-part analysis for determining whether an IEP is appropriate. The first inquiry is to determine whether the IEP was developed in accordance with the IDEA's procedural requirement. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural inadequacies a) impeded the child's right to a FAPE; b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or c) caused a deprivation of educational benefits. The burden is on the family to show "the harmfulness of the claimed procedural violations." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1<sup>st</sup> Cir. 1990), See 20 U.S.C. § 1415(f)(3)(E)(ii); MUSER XVI.15(A)(2). Where procedural violations are alleged, a court's review "must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective." *Roland M.*, 901 F. 2d at 994.

If the procedures were adequate, then the next level of inquiry is whether the IEP was designed to be "reasonably calculated to enable the student to make progress appropriate in light of his circumstances." *Andrew F.* at 1000-1001. It must be "individualized to the child's unique circumstances." *Id.*, at 988, 1000-1001, citing 34 C.F.R. § 1401 (29). Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether it is ideal. (*Rowley*, *supra*, 458 U.S. at 206-207).

The Court in *Rowley* did not provide concrete guidance with respect to a student who is not fully integrated into the regular classroom and not able to achieve on grade level because the student in that case was fully mainstreamed into the regular classroom. The Court in *Andrew F.* stated that if it is not a reasonable prospect for a student to be fully integrated into the regular classroom and not able to achieve on grade level, "(h)is educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Id.* at 988, 1000.

While the Court in *Andrew F.* clarified the standard to be used in reviewing the appropriateness of an IEP, it declined to draw a "bright-line rule" for determining whether it is "reasonably calculated" to enable a student to make progress "appropriate" in light of his

circumstances. Instead, it instructed that courts (and hearing officers) must not substitute their own notion of sound educational policy for those of school authorities, which they review. *Id.*, citing *Rowley*, 458 U.S. at 206. However, “a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the student to make progress appropriate in light of his circumstances” *Id.*

The First Circuit has weighed in further on what an appropriate IEP could look like. It stated:

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act set more modest goals: it emphasizes appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation.

*Lenn v Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993); *Roland v. Concord Sch. Comm.*, 910 F.2d 992 (1<sup>st</sup> Cir. 1990). In determining whether an IEP is reasonably calculated to enable a student to make progress appropriate in light of his circumstances, those circumstances are viewed as a “snapshot” in time of the Student’s educational progress at the time the IEP Team decides what is appropriate. *Roland M.*, 919 F.2d at 992.

Finally, a student’s educational program must be delivered in the least restrictive environment in which the child can receive educational benefits. This means that to the “...maximum extent appropriate,” the student must be placed in settings that provide access with non-disabled peers. See 20 U.S.C. 1412(a)(5)(A); 34 C. F.R. s 300.114(a)(2)(i); MUSER X.2.(B). This obligation must make a "continuum" of placement options available for the student, ranging from mainstream public school placements through placement in special day schools, residential schools, home instruction, and hospital placement. See 34 C.F.R. 300.115, 300.116(c), (e); MUSER X.2.(B). In determining the least restrictive appropriate placement, "correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities... To determine a particular child's place on the continuum, the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement.” *Roland M.*, 910 F.2d at 993 Parents are an essential part of any group making the placement decision. 34 CFR 300.116 (a)(1); 34 CFR 300.501 (c);

and 71 Fed. Reg. 46,585 (2006). "Consistent with (34 CFR 300.501 (c)), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 CFR 300.327.

Maine has implemented the Maine Unified Special Education Regulations ("MUSER") that guides the enforcement of the IDEA. It is the IEP Team that is responsible for the development or revision of an IEP. MUSER § VI.2.J(4). It enforces the requirement that the IEP team must include parental participation and emphasizes the school's role to encourage parents to be a full participant in the IEP Team process. MUSER VI.2.H.

Maine organized the delivery of FAPE by age group. MUSER VIII. For children 3 to 5 FAPE is provided by Child Development Services ("CDS")<sup>5</sup>. MUSER II, VIII. A specific process is designed for transitioning children from CDS into public school. MUSER VI.2.C.2. During the year before the child enters public school, CDS must convene the IEP team to design the annual IEP and, thereafter, a transition IEP meeting in the spring. MUSER VI.2.C.2.(a), (c). The education of children who turn five years old on or after October 15<sup>th</sup> become the responsibility of the public school district in which they live. However, CDS must continue to provide a FAPE for children who have already turned five years old if the IEP team determines that it is in the best interest of the child to not begin kindergarten until the following year. MUSER VIII. Also, CDS remains responsible for ESY services that are specified on a child's IEP until the start of the regular school year in which the child is eligible for enrollment in the public school. MUSER VI.2.C.(2)(b). In addition a determination about ESY must be made at every IEP meeting for young children ages 3-5 in the CDS System. MUSER X.2.A.(7).

## **V. DISCUSSION AND CONCLUSIONS**

An understanding of the circumstances leading up the dispute in this case starts with the fact that CDS was under an order to provide five months of compensatory education ("CE") to

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<sup>5</sup> Maine's CDS, and its regional sites, are considered State Intermediate Educational Units (IEUs). MUSER II. IEUs are included in the definition of a State Administrative Units, the entities responsible for delivering FAPE to students. MUSER II.

the Student, pursuant to the decision in case 17.042H. In scheduling the CE, the Parents and CDS reached an agreement to have the Student enroll in MM on August 14, 2017. The agreement also limited CDS' responsibility to provide SDI and related services to April 20, 2018. As such, both the Parents and CDS agreed to communicate this arrangement with the District because, technically, the Student's education would have become the District's responsibility in the fall of 2017, since he turned five years old on [REDACTED]. As a result of this agreement, CDS continued to act as the Student's provider of FAPE under the IDEA and as governed under federal regulations and MUSER. This included scheduling and conducting the Student's annual IEP meeting in September 2017, as well as a transition IEP meeting to occur in the spring of 2018. At the transition IEP meeting, CDS and the District will determine any changes to the annual IEP, which will travel with the Student to the District or to whatever public school in which he enrolls. At the time of the due process hearing, the Student was not enrolled in the District, therefore no one from the District was technically a member of the Student's IEP Team. These are the circumstances under which the allegations in this matter arose.

**Issue 2a:** Did the IEP Team agree to include Extended School Year ("ESY") services in the IEP, dated September 29, 2017?

I find that the IEP Team agreed on September 29, 2017, to include ESY as part of the Student's annual IEP programming. Ms. Steege stated that she believed he would need ESY services based upon what she knew of the Student. Ms. Folk reiterated three times that the IEP Team agreed that the Student will need ESY services and that he was eligible for those services. The IEP also decided that the frequency and duration of ESY services were to be decided later in the year, when the team had a better idea of what the Student would need. There was no discussion that ESY services should not be in the Student's IEP. The discussion of ESY is only reflected in the WN. The WN is part of the Parents' procedural safeguard rights that informs them of the reasons for approving or not approving any proposal or recommendations made by the IEP Team. 34 CFR §300.503. It is not meant to be a substitute for the IEP document.

The IEP document is not meant to be formulaic and rigidly drafted. While the State of Maine has SAUs use an electronic IEP to make it easier to fill out the form itself, it is also a form that can be modified manually by the IEP Team to design the individualized program for a

student. In this case, the Student's IEP Team agreed to include ESY services, but also agreed to decide on the frequency and intensity when the Team had more information based upon his progress during the school year. As CDS stated, this was a determination made by the IEP Team. As such, it must be reflected in the IEP. Therefore, I find that CDS failed to include ESY services in the IEP, as well as information about the frequency and intensity of it.

**Issue 2b:** If so, did CDS fail to include ESY services in the IEP dated September 29, 2017, in violation of the IDEA?

I find that a procedural violation of the IDEA occurred when CDS failed to include ESY services in the IEP. The circumstances of the events giving rise to the allegations are important but not determinative. While it is of note that the Parents and CDS agreed to end CDS' responsibility to provide a FAPE to the Student on April 20, 2018, there was no such agreement to waive CDS' responsibility for implementing the Student's IEP as it was designed and agreed upon by the IEP Team. MUSER X.2.A.7 specifically states that:

ESY services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324 and IX.3 of this rule, that the services are necessary for the provision of FAPE to the child. In implementing the requirements of this section, SAUs may not limit extended school year (ESY) services to particular categories of disability, or unilaterally limit the type, amount, or duration of those services. [34 CFR 300.106]

In *Reyes v. New York City Dept. of Educ.*, 760 F.3d 211, 220-221 (2d. Cir. 2014), the Second Circuit Court of Appeals determined that the Office of State Review ("OSR") erred when it credited testimony of a school witness who explained that while there was a recommendation to provide for only three months of 1:1 paraprofessional support, the IEP team did not include it based upon the "understanding" that the student's need for additional support would be reassessed and expanded as needed. The Court found that it was inappropriate to take into account the possibility of mid-year amendments in determining whether an annual IEP as originally formulated was substantively adequate. "The IDEA provides for the amendment of an IEP in the middle of the school year with the parent's consent and according to a statutorily prescribed process." *Id.*, Citing 20 U.S.C. § 1414(d)(3)-(4). "An IEP that contemplates or implies the possibility of amendments is therefore not substantively different from an IEP that is silent

on the issue. If the school district were permitted to rely on the possibility of subsequent modifications to defend the IEP as originally drafted, then it could defeat any challenge to any IEP by hypothesizing about what amendments could have taken place over the course of a year. Such an approach would, we think, undermine a core purpose of the IDEA: to ensure an orderly annual review of a child's needs and to provide for them in a comprehensive plan." *Id.*

The Court went on to opine that if it were to accept the school's argument that there was the possibility of a later amendment to the IEP, then parents could effectively be required to consider the likelihood of mid-year amendments in evaluating their child's IEP. "This approach would create significant uncertainty regarding what special education and related services the child would actually receive over the course of the academic year." The Court ultimately reversed the OSR's findings and upheld the hearing officer's decision that the student needed a higher level of services than provided in the annual IEP. *Id.*

Similarly, MUSER is clear that, along with goals and the description of the specially designed instruction and related services, the IEP Team must determine the "anticipated" services a student may need. MUSER IX.3.A.1.g.

I find that CDS violated the IDEA and MUSER by failing to include ESY services in the Student's annual IEP dated September 29, 2017. The IEP Team agreed on September 29, 2017, that ESY services needed to be part of his programming in order to make progress on his annual goals as described in his annual IEP. The rationale for not including it, based upon the view that CDS could not be part of the annual IEP because frequency and intensity of the services needed to be determined at a later IEP meeting, lacks merit. As in *Reyes*, by not including ESY in the annual IEP, the Parents and those that will be responsible for the Student's education are left wondering whether the IEP Team will amend the IEP to include it. While the WN included language about ESY services, it is not legally binding. It is a vehicle to notify parents to explain why, or why not, the IEP team approved or denied services. The IEP document is the legally binding document that can be enforced.

Furthermore, there is no statutory or regulatory requirement that prevents the IEP Team from adding more information in the IEP than what is minimally required. The IEP form must be individualized to include SDI and related services that the IEP Team finds necessary in order to provide a FAPE to the Student. I find that the IEP form itself does not override the IEP Team's decision about what services must be included in the IEP.

I find that CDS was obligated to write the IEP in conformity with the IEP Team's determination to include anticipated ESY services into the IEP and therefore violated MUSER § VI.2.J(4) when it failed to do so.

**Issue 2c:** If so, does the failure to include ESY services in the Student's IEP prevent the Student from receiving a FAPE?

Substantive harm from procedural violations of the IDEA and accompanying regulations occurs only if the preponderance of the evidence indicates that the procedural inadequacies: (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit. 34 C.F.R. § 300.513(a)(2).

Courts have reiterated the concept that procedural violations will undermine an IEP only 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. See *Roland M.*, 910 F.2d at 994; *see also DiBuo v. Bd. of Educ.*, 309 F.3d 184, 190 (4th Cir.2002) (noting that courts must assess whether a procedural violation compromised a student's right to a FAPE or whether it was a mere technical contravention of the IDEA ). *Kasenia R. ex rel. M.R. v. Brookline School Dist.*, 588 F. Supp. 2d 175 (D. N. H. 2008); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir.2001) (citations omitted); *D.S. v. Bayonne Bd. of Education*, 602 F.3d 553, 564-67 (3d Cir.2010) ("A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits."); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-12 (5th Cir.2003) ("[P]rocedural defects alone do not constitute a

violation of the right to a FAPE unless they result in the loss of an educational opportunity.”); *C.H. v. Cape Henlopen School Dist.*, 606 F.3d 59, 67 (3<sup>rd</sup> Cir. 2010).

A violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE before there can be an entitlement to equitable relief. *DiBuo, supra*.

I find that CDS committed a procedural violation by not including ESY in the annual IEP, pursuant to the determination of the IEP Team. Therefore, I find that the annual IEP, without ESY services, is not calculated to enable the Student to make progress appropriate in light of his circumstances. However, I find that the flawed IEP has not prevented the Student from receiving a FAPE because ESY services have not yet occurred as of the time of this hearing.

**Issue 2d:** If so, what shall be the remedy?

I find that CDS must amend the annual IEP to include ESY services, and a statement that frequency and intensity shall be discussed at the transition meeting.

**Issue 3a:** Did CDS fail to develop an annual IEP that included special education and related services for a full year?

There is no dispute that the annual IEP is effective from September 29, 2017 through September 28, 2018. However, SDI and related services are scheduled only through April 20, 2018. I find that CDS failed to draft the annual IEP to include programming through June 30, 2018, as agreed upon by the IEP Team.<sup>6</sup>

CDS claims that the IEP Team was not authorized to make determinations of services past April 20, 2018, without participation by the District. This is based upon the agreement it made with the Parents to have its responsibility end on April 20, 2018. However, the agreement

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<sup>6</sup> The MM staff at the IEP Team meeting on September 29, 2017 were unable to give an exact date on which the MM school-year ended except to say that it was at the end of June, either on June 29<sup>th</sup> or 30<sup>th</sup>. For purposes of this decision, I find that MM school-year ends on June 30<sup>th</sup> based upon the testimony of Ms. Steege and Ms. Pion.

between CDS and the Parents is separate and apart from the IEP process. MUSER requires that if the student will be transitioning to public school from CDS, an annual IEP will be developed before a transition IEP meeting takes place. (MUSER § VI.2.C.2(c). CDS understood this and scheduled the Student's annual IEP Team meeting to develop the annual IEP. This is the IEP that the Student would carry with him to public school, along with any amendment made at a transition meeting between the District and CDS sometime between April 1st and June 15th, 2018. (MUSER § VI.2.C.2(c). Until such time that the District becomes involved in the IEP process, CDS had no choice but to draft the IEP according to the determinations made by the IEP Team.

I find that that CDS did not have unilateral authority to end the Student's SDI and related services on April 20, 2018. If Ms. Folk needed to have the IEP Team discuss this further, then she should have raised it at the annual IEP meeting on September 29, 2017. She chose not to do so. If she needed to have the District staff present at the annual IEP meeting in order to make sure services would continue with the District after April 20, 2018, then she should have made sure someone from the District was present. However, she chose to schedule the meeting on a day the District was unavailable. If she needed to reconvene the IEP Team to discuss the matter and allay her confusion, she could have done so.<sup>7</sup>

As in *Reyes*, the IEP Team, including the Parents, cannot rely on the probability that the Student's SDI and related services would continue to the end of the 2017-2018 school year. The Parents will be working under a cloud of uncertainty until this matter is settled. If something goes awry, such as a move by the Parents, a new school district may believe they are not obligated to continue implementing the Student's IEP because all instruction and services ended on April 20, 2018. Clearly, the IEP Team did not intend to leave a gap in services when it adjourned on September 29, 2017.

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<sup>7</sup> I agree with the District that while the IEP document itself is updated annually, the duration of SDI and related services is a determination made by the IEP team at the annual IEP meeting.

**Issue 3b:** If so, did CDS violate the IDEA?

Based upon the above, I find that the CDS committed a procedural violation of the IDEA by drafting the IEP to provide SDI and related services only through April 20, 2018, contrary to the IEP Team's determination to continue them through June 30, 2018. Therefore, I find that the annual IEP, as written, is not calculated to enable the Student to make progress appropriate in light of his circumstances because SDI and related services end prematurely on April 20, 2018.

**Issue 3c:** If so, did the violation prevent the Student from receiving a FAPE?

I find that the flawed IEP has not prevented the Student from receiving a FAPE up to this point since the Parents have not complained that the SDI and related services are inappropriate. However, measures are necessary to correct the procedural violation.

**Issue 3d:** Remedy

I find that the annual IEP must be corrected to reflect that SDI and related services are to be provided through June 30, 2018.

**Issue 4a:** Did CDS fail to allow the Parents to meaningfully participate in determining the Student's special education instruction and related services in the IEP decision-making process to develop the Student's IEP, dated September 29, 2017?

I find that CDS conducted the IEP meeting on September 29, 2017, with the full participation of the Parents. The Mother was engaged in the two-hour discussion. She asked questions, commented on specific areas of the IEP being discussed, and had her concerns addressed throughout the meeting.

After the annual IEP meeting, communication with Ms. Folk became problematic for the Parents. She submitted several questions to CDS staff on October 10, 2017, after receiving the IEP and WN. Among other issues, she specifically asked why ESY services and language regarding the SLD were not included in the annual IEP. Ms. Folk and Ms. Steege responded to the Mother on October 18, 2017, one day after the Parents filed the Hearing Request. Each of the

concerns was addressed, except for ESY services. Ms. Folk stated only that CDS would respond to the ESY issue as part of the due process hearing.

While the delay in CDS' response to the Parents was extremely frustrating, I do not find that it was a procedural violation. While it would have been better form if CDS had contacted the Mother sooner than October 18, 2017, there is sufficient evidence to show that the Parents have been active participants throughout the IEP process, and that there was no intention on the part of CDS to exclude them.

Given the context of the circumstances, vis-à-vis the agreement between the Parents and CDS, it is clear that they understood that CDS' services would end on April 20, 2018. While it was a mistake not to include ESY in the IEP, CDS did not intentionally exclude the Parents in the IEP decision-making process about ESY services. The fact that those services were included in the WN is evidence that CDS understood that the Student was eligible for ESY services.

The Parents also argue that by changing service dates outside of the IEP Team process, the Team impeded their participation in the process. However, CDS and the Parents understood that CDS services would end on April 20, 2018. While CDS should not have included that date in the IEP, the inclusion did not impact the Parents' participation in the IEP process. CDS and the Parents understood the limited time frame of CDS' responsibility. CDS engaged in good-faith negotiations with them about it. The Parents agreed with it. Therefore, it can be understood why CDS included April 20, 2018 as the end date for services, despite being a technical violation. Therefore, I find that CDS did not fail to engage and persuade the Parents to be involved in the decision-making process.

Furthermore, the record is insufficient to find that CDS was working with the District apart from the IEP Team. Both the Parent and Ms. Folk acknowledged that they made Ms. Macri aware of the Student's status with CDS. There is no evidence that Ms. Macri was involved in making programming decisions outside of the IEP Team process.

Therefore, I find no violation of the IDEA with respect to the Parents' participation in the IEP process.

## **VI. REMEDY**

I find that a corrective action plan is necessary to remedy the procedural violations in this matter. CDS must take the following action within 7 days of the receipt of this Decision and Order:

1. Include ESY services in the Student's annual IEP and indicate that the frequency and duration will be determined by the IEP Team at the transition meeting;
2. Change the dates of SDI and related services to end on June 30, 2018, per the determination of the IEP Team;
3. Schedule a transition meeting during the month of April 2018 in order to determine any amendments to the annual IEP. Ensure that all necessary IEP members are present;
4. Notify the Due Process Office in writing immediately after each one of these actions has been taken. (Email notification is sufficient.)

It is so ORDERED.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Hearing Officer  
January 26, 2018