

Complaint Investigation Report

Parents v. R.S.U. #73

July 12, 2012

Complaint #12.093C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parents
Address
City

Respondent: Robert Wall, Superintendent
9 Cedar St.
Livermore Falls, ME 04254

Special Services Director: Tina Collins

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on May 15, 2012. The Complaint Investigator was appointed on May 16, 2012 and issued a draft allegations report on May 18, 2012. The Complaint Investigator conducted a complaint investigation meeting on June 12, 2012 (rescheduled from May 25, 2012 at the Complainants' request), resulting in a set of stipulations. On June 19, 2012, the Complaint Investigator received a 4-page memorandum and 105 pages of documents from the Complainants, and received a 10-page memorandum and 409 pages of documents from R.S.U. #73 (the "District"). Interviews were conducted with the following: Tina Collins, special education director for the District; Annie O'Shea, school nurse for the District; Jacqueline Kilbreth, school nurse for the District; Diane Berry, teacher for the District; Pamela Allen, educational technician ("ed tech") for the District; Darlene Hayden, BSN RN, in-home nurse; and the Student's mother.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Multiple Disabilities (Other Health Impairment and Speech or Language Impairment). This complaint was filed by the student's mother and father (the "Parents"), the

Student's parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide supplementary aids and services since September 1, 2010 in the nature of climate/temperature control technology to enable the Student to be involved in and make progress in the general education curriculum and to be educated with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d);
2. Failure to provide a free appropriate public education by forcing the Student to leave school before the school day has ended due to high indoor temperatures and/or humidity in violation of MUSER §II.14 and 34 CFR §300.101(a);
3. Failure to provide education in the least restrictive environment by removing the Student from a non-climate controlled general education "specials" classroom and placing him in a climate-controlled special education classroom in violation of MUSER §X.2.B.

V. Stipulations

1. Air conditioning is provided to the Student only in his special education and xx classrooms.
2. During very warm weather, the Student is regularly removed from classrooms without air conditioning and taken to an air conditioned room.

VI. Summary of Findings

1. The Student lives in Jay with the Parents, and recently completed xx at Jay Elementary School (the "School"). He began receiving special education services through xx prior to xx under the category Multiple Disabilities, and attended his xx program at the School.
2. The Student's IEP Team met on April 12, 2010 to plan for the Student's transition into xx. The school nurse, Jackie Kilbreth, reported that the Student had an Individualized Health Plan ("IHP"), but that the School needed documentation from the Student's physician as to the Student's medical needs. The Student's xx teacher reported that the Student sometimes got tired by the end of the day. It was noted that the Student often spent recess indoors during hot or cold weather.
3. The Student's IEP dated April 12, 2010 provided for specially designed instruction, speech/language service (direct and consultative), OT, PT, special transportation (a bus with a wheelchair lift) and nursing services consultation. Section 9 of the IEP stated that the Student would be spending 40% of his time at school with non-disabled children. Section 8 of the IEP provided the following physical/environmental modification: "Exempt from gym and [the Student] will participate within the self-contained recess when not hot/winter weather outside."

4. During the summer, Ms. Kilbreth continued to request medical documentation from the Parents to inform the IHP. On September 1, 2010, the Student's physician faxed a letter to the School that stated "it is important [for the Student] to maintain hydration and be in a controlled temperature environment. Generally this would involve the need for air conditioning [{"AC"}] when the weather is hot and humid." Based on this information, the District authorized the purchase of two air conditioners, one for the xx classroom and one for the special education classroom.

5. The Parents refused to send the Student to school until the AC units were installed. At a staffing meeting on September 3, 2010, the Parents requested that AC units be provided in all the Student's school settings including the bus, cafeteria and all specials and therapy rooms. The District refused to provide those additional units, saying that there were relatively few days in the school year when temperature would be an issue, and that staff would monitor the Student when he was outside of the classroom and return him to a classroom with AC if he showed signs of becoming overheated.

6. The AC units were installed and the Student returned to school on September 13, 2010. Later, when the District felt that it was receiving unclear information from the Student's mother regarding the Student's needs as to temperature and humidity levels, the District wrote to the Student's physician requesting clarification. The Physician responded that the Student's "health is more rapidly and profoundly effected [sic] by overheating or being chilled than other children's health. However, there is no way to give exact temperature parameters for rooms for him. It will depend upon his health that day, metabolic state, room temperature and humidity. Teachers and ed techs will need to monitor him for flushed cheeks, general temperament and well being. Not an exact science."

7. The District convened the Student's IEP Team on September 29, 2010 for an IEP Team meeting and Section 504 Team meeting. The Team determined that the Student qualified for a Section 504 Plan to address medically necessary accommodations. The IHP was also reviewed and revised. The Section 504 Plan provided "Use of AC units in primary classroom space (reg ed classroom and special ed classroom) to provide constant room temperature as much as possible on hot/humid days. Reduce student exposure when in areas of building that do not have air conditioning by moving the student to a space within the building that has air conditioning (including office area)." The IHP provided "Provide constant room temperature as much as possible; use of AC in the classroom fall & spring as needed; heat in winter; offer fluids and notify nurse if student exhibits signs of overheating such as flushed skin color and fussiness." The IEP continued to provide that the Student "will participate within the self contained recess when not hot/winter weather outside."

8. During the 2010-2011 school year, there were a few occasions when the Student was removed from music or art class to the special education classroom due to concerns about the rooms becoming too warm. When that happened the Student would complete his assignment or else participate in activities that were related to that specials class. The Student did not miss any of his library or computer specials classes. The Student was absent from school a total of 59 days during that year.

9. The IEP Team met to conduct the annual review on April 11, 2011. The Parents did not raise any concerns regarding the AC units or other temperature-related concerns. The IEP dated April 11, 2011 provided that the Student would spend 44% of the day with non-disabled children.

10. On June 2, 2011 the Student's mother complained that the AC units had not been operating and the Student had become overheated. Ms. Collins confirmed that the AC units had been operating throughout the day.

11. The Parents decided to retain the Student in xx for the 2011-2012 school year. On September 14, 2011 the Student's Section 504 Team met to review the Section 504 Plan and the IHP. The Team determined to reduce the duplication between the two plans by having only health-related items in the IHP and classroom-related items in the Section 504 Plan. The Section 504 Plan provided for "use of the AC units in the primary classroom space (regular ed and special ed classroom) to provide constant room temperature as much as possible on hot/humid days. Reduce student exposure when in areas of the building that do not have AC by moving the Student to a space within the building that has AC (including office area). Refer to student IHP as needed. Contact school nurse regarding any health related concerns." The IHP provided "Offer fluids and notify nurse if student exhibits signs of overheating (flushed skin color and fussiness). Pink cheeks = overheating." The two plans were attached to the IEP so that all three documents could be viewed together.

12. At the September 14th meeting, the Student's mother said that the Student had been experiencing diarrhea, and wondered whether the water at the School could be the cause. It was agreed that the Student's mother would send the Student to school with bottled water and Gatorade. When the diarrhea continued, the Student's mother stated that she believed it was being caused by the Student's time spent in the non-AC specials rooms (the Student was scheduled for specials from 8:35 a.m. to 9:20 a.m. each morning), and that she would keep the Student out of school until the District resolved the Student's diarrhea issue. The Student was kept out of school for five days.

13. In January 2012, the Student underwent back surgery and was medically cleared to return to school on January 30, 2012. The Parents, however, insisted that the Student's physician sign off on the Student's revised IHP and would not return the Student to school until that was accomplished. After making certain revisions (not related to room temperature), the physician, Stephen Jacobs, M.D., signed the Plan on March 1, 2012. In his cover letter, Dr. Jacobs wrote that he had also written something about AC on the Plan, but then realized that the reference to AC was in the 504 Plan and so he crossed out what he had written. The Parents' attorney then wrote to the District directing that additional language about AC be added to the IHP, and stating that the Student would not return to school until it was done.

14. On March 6, 2012, Dr. Jacobs wrote to the District that he would like the IHP to state "if the day is warm or humid, then [the Student] should be in an AC room and continue use of AC for the remainder of the day." The Student's IHP was amended to read "Consistent with 504 plan, in hot/humid weather [the Student] will remain within the targeted rooms within the school that have AC. Signs that it is sufficiently hot/humid are: red face, irritability & blood

pressure above normal. Offer fluids and notify nurse if student exhibits signs of overheating. Pink Cheeks = Overheating. Measure BP as needed.” Dr. Jacobs signed the revised IHP on March 13, 2012, and the Student returned to school.

15. On March 16, 2012 the Student was sent home early because he appeared to be unwell after lunch. The nurse checked his blood pressure and temperature and they were both fine. The Student’s mother reported to the Student’s teacher, Diane Berry, that the Student had not been well the night before. Although the Student’s mother claimed that there had been no AC in the Student’s classrooms, the AC units were running in both classrooms.

16. During the 2011-2012 school year, the Student did not go to music class twice and art class twice due to temperature-related concerns. He was given work related to those subjects to do in his classroom. He did not miss any days in library or computer class. The Student was absent from school a total of 64 days that year.

17. During an interview conducted by the Complaint Investigator with Diane Berry, Ms. Berry stated the following: She is a special education teacher at the School, and was the Student’s teacher this year. There has been AC in her room during the entire year, as well as an AC unit in the regular xx classroom. Any time that the building was warm or humid, the Student was kept in one of those classrooms. The AC units are always on and set for a constant temperature (68°), and they were active for all but the coldest days of the year. The Student began the day in the AC, and then had art and music early in the morning. It was seldom too warm in those rooms, but she went into those rooms to make sure it was cool enough. Ms. Allen would check the lunchroom, and sometimes asked her to check that room too.

She and Ms. Allen were always looking for signs that the Student was becoming too warm, and if they saw that they would remove him to her classroom. There were only a few days when that became necessary. The specials rooms rarely were warm in the early morning, and the lunchroom (the Student ate lunch at 10:50 a.m.) is a very large space so it stays fairly cool. When the Student came back from lunch on warm days he seemed fine. On days when the Student had to eat lunch in her room, he was allowed to have other students eat there with him. There were a few days when the Student’s mother said that the Student had to stay in AC all day. On hot or humid days, she would check the OT and PT rooms as well, or the therapists would come to her and say that their room was too warm. Then the Student would receive his therapy in the classroom.

She doesn’t recall any days when the Student left a non-AC space and appeared to be ill. There were no days when the Student became lethargic and unable to attend to task after being out of the AC. There were days, however, when the Student was ill and then it turned out to be pneumonia. Towards the end of the school year the Student was on new medication, and the nurse had to check his blood pressure; there was never any indication that his blood pressure was elevated.

One day, the whole school went to see a play in the high school cafeteria. The District tries very hard to include the Student in activities. There was a fan set up for the Student, and he

was seated near the fan. Ms. Allen and the School principal were there and were monitoring the Student.

There were days when the Student acted out, but he was in the AC when he was doing it and sometimes it started early in the morning. Even on days when he was kept in AC the whole day he acted out, and during the cold weather days as well. Sometimes if the Student didn't want to do an activity he would act out. It seemed that as the year went on and the Student became more comfortable in the classroom he allowed himself to exhibit that behavior more often.

The staff wants the Student to be comfortable, happy and safe. Everyone was very cautious with him, and would report to the Parents if there was anything about the Student that looked "off"; they tried to be proactive. The Student missed a lot of school when he had his back surgery, and that had a huge impact on him. She doesn't believe that temperature-related issues interfered with the Student making good progress, but all that time out of school did.

16. During an interview conducted by the Complaint Investigator with Pamela Allen, Ms. Allen stated the following: She is an ed tech for the District, and worked one-on-one with the Student this year. She constantly monitored the Student for signs of overheating. Most of the time, if the Student is getting overheated he gets pink cheeks. It's very apparent, and happens quickly. The Student can also get cranky and tired. When she saw any of these things she would put the Student in front of the AC. The Student always seemed to cool down once he was next to the AC. It happened on some warm days, but not very often. It happened sometimes if the Student was working on the other side of the classroom, away from the AC, and she put him in a chair right next to the AC. It more often happened in the other rooms without AC. In the whole year, it only happened once or twice in the art room and once or twice in the music room. There were other days when the Student's mother wanted him to remain in AC the whole day, and sometimes she didn't think that was necessary.

She almost always brought the Student to the lunchroom, except those days when the Student's mother wanted him to stay in AC. The lunchroom is a really big room and has never gotten too hot. She has never had to remove the Student from the lunch room because he was getting overheated. On one day when he was being restricted to rooms with AC, the Student got really upset that he couldn't eat with his friends, so he was allowed to eat with a friend in the classroom.

She is careful not to overdress the Student. On one occasion the Student's mother wrote in the home/school notebook that when she picked up the Student at school he had his jacket on and was warm. She knew that she had brought the Student to the nurse without his jacket on, and the nurse told her that she hadn't put the jacket on either. As soon as the Student comes to school she takes off his jacket or sweatshirt. Some days, if the Student isn't warm and is getting ready to leave for the day she will put on him what he was wearing when he came in. She never puts on his jacket or sweatshirt if it's a hot day.

She doesn't believe that on any of the days when the Student's mother was asked to come get him because he was ill that it was due to overheating. Some days the Student just seemed really tired or had a headache. She would take the Student to the nurse to check his blood

pressure, and then they called the Student's mother and let her decide whether she would come and get him. At the beginning of the year, the Student had diarrhea, but he was in front of the AC and was not too hot. At first the Student's mother thought it was the water, but then she decided it was the heat.

With regard to the Student's acting out behavior at the end of the year, she was monitoring the Student for overheating during that period of time the same way that she had done all year. It wasn't cranky behavior like he was overheated, and it was all the time, even in the AC. The week before the April vacation, when it wasn't particularly warm weather, the Student was being defiant, telling her "No" and misbehaving. Even during breakfast, when the Student had been in AC since he got to school, the Student was already acting out.

It has been stressful working with the Student because the Student's mother is always telling them that they were doing things wrong. She knew that no matter what she did the Student's mother would criticize. One day the Student's mother would thank them for calling her about the Student, and the next day she would criticize them for calling her.

17. During an interview conducted by the Complaint Investigator with Tina Collins, Ms. Collins stated the following: With the involvement of the District's attorney, it was decided to develop a 504 plan for the Student's accommodations concerning climate issues as those accommodations were related to the Student's medical condition rather than his educational disability.

The AC in the two classrooms was always thermostatically set to be activated when the temperature in the rooms exceeded 68°, but the staff, especially beginning in March 2012, became so overly cautious that they would operate it manually even on days that the temperature of the room did not get that high. They were reacting to the Parents' constant criticism of how they were treating the Student.

After the revisions to the IHP in March 2012, staff continued to allow the Student to attend his specials classes in the specials rooms and to eat in the lunchroom providing that the rooms felt comfortable. Ms. Allen and the teachers would monitor the Student for signs that he was overheating and remove him to Ms. Berry's room if they saw any of those signs. If the Student's mother said that the Student had to stay in the AC all day, then the Student did not go to the specials classes or the lunchroom.

18. During an interview conducted by the Complaint Investigator with Annie O'Shea, Ms. O'Shea stated the following: She is a registered nurse, and was a school nurse at the School this past year. Over the course of the year she checked the Student's blood pressure on many occasions (he went on a new medication in April that can affect blood pressure, so she was monitoring it regularly), and his blood pressure was never elevated. She never saw the Student, whether in her office, in a classroom or elsewhere, looking like he was overheated.

The Student was in AC pretty much all day, and if Ms. Allen ever had a question about his health, she brought the Student to the nurse's office. Ms. Allen did that twice during the year, both times when the Student was not paying normal attention in the classroom. On those

occasions the Student seemed a little off, not as chatty as he is normally. He did not appear to be overheated, however – he wasn't sweating and his temperature and pressure were both normal. She believes that the Student had been in the AC classroom when Ms. Allen decided to bring him to the nurse's office. Both times she called the Student's mother to let her know what she saw, and the Student's mother came to pick him up. Those are the only times of which she is aware when the Student went home early for health-related reasons (other than to go to a doctor's appointment).

Other than a few hot days in March, spring this year had been fairly cool, and the building temperature stayed in the comfortable range. She recalls a time when the Student's mother claimed that the Student was wearing his sweatshirt when she came to collect him at the nurse's office, but she doesn't think that the Student was wearing his sweatshirt in her office.

19. During an interview conducted by the Complaint Investigator with Jacqueline Kilbreth, Ms. Kilbreth stated the following: She is a registered nurse with 35 years of experience, and was school nurse in the School during the 2010-2011 school year and for about 3 months (end of September through end of November) during the 2011-2012 school year. During that time, she never saw the Student displaying signs that he was overheated, and was never called to attend the Student because he was overheated. She had occasion to check the Student's blood pressure on several occasions, and saw no changes in his pressure. There were a few days, not many, when the Student came to her office because he was not feeling well or had hurt himself, but he was not showing any signs of overheating. She never was in one of the Student's rooms and felt that the temperature was very high.

She had several conversations with Dr. Hamilton and Dr. Jacobs. Dr. Hamilton explained that the Student was receiving medication to control his blood pressure, and that part of the effort to control blood pressure included keeping the Student relatively cool when it was excessively hot. There was nothing said about diarrhea. The doctors never really provided medical parameters for the Student, but she researched Williams Syndrome when the Student first came to the School. It is not mainstream nurses' knowledge that overheating can cause diarrhea, even in a child with Williams Syndrome. If the Student became warm and was brought into an AC room to cool down, she is not aware how this could cause the Student to have diarrhea later in the day.

20. During an interview conducted by the Complaint Investigator with Darlene Hayden, Ms. Hayden stated the following: She is a registered nurse, and has been working in the Student's home since 2008. She is there from 2:00 to 7:00, four days a week. When the Student is overheated, he gets diarrhea and his blood pressure goes up. He also gets irritable and lethargic, his color looks "off" and he won't eat. She thinks that School personnel would see those signs if they were looking. If it's hot enough that the Student needs AC, then he needs to stay in the AC. Going in and out of AC disregulates him and is taxing to his system.

She is usually there to get the Student off the bus when he comes home from school. There were three to five times this past spring when the Student came home from school overheated, and more than 10 days over the whole year. This only happened a couple of days during the 2010-2011 school year, but a lot more often this year. There is no AC on the bus, and she

can't say whether the Student got overheated on the bus or before. She doesn't think, however, that the Student would have diarrhea from just a 20 minute bus ride, although it could make his blood pressure rise. Sometimes he gets off the bus on a warm day and he is wearing a coat.

In February the Student had diarrhea. It could be that the classroom was hot, or it could have been his diet, or she thought it could have been the water. The Student did get pneumonia at some point during the year.

She has been in the Student's classroom on two occasions. She once attended a meeting at the School and the Student was in the special education classroom. There was no AC in the room and the room felt warm to her, but that might have been during the 2010-2011 school year before the District installed the AC. The other time was on Grandparents Day and there was no AC in the regular education classroom, although it wasn't warm that day. She hasn't been in the school on a hot and humid day.

The Student can exhibit acting out behavior even on cold days. It could be the result of his not eating regularly. Also, if the Student gets overstimulated he can act out; someone laughing loudly can be enough to trigger this reaction.

20. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: There have been days when the Student comes home from school and he has cramps, diarrhea and is lethargic. Heat is usually the only thing that gives the Student diarrhea, unless they were giving him fruit juice (which he's not supposed to have). She has gone to pick the Student up at school and he is warm to the touch. She went to get the Student in the nurse's office and his face was red and he was wearing a sweatshirt. Staff members complain that the Student is throwing tantrums, but this means that they are either not feeding him regularly or else the AC is not on. Towards the end of the school year, she sent a note in to Ms. Berry asking if the AC had been on all day. Ms. Berry wrote back yes, but then she said that the Student had gone out of the AC to eat lunch. She told Ms. Berry that wasn't supposed to happen, and Ms. Berry asked for a doctor's note telling her that. She sent the note in an e-mail.

She received a phone call on the last day of school that the Student had fallen. It was 70° and 83% humidity so the Student should not have been going outdoors, but the Student had sunblock on when she went to pick him up. There were also hot days in March 2012 and she got a call to come pick up the Student. When she asked Ms. Allen whether the AC was on, Ms. Allen said they didn't have it.

She agreed that the Student could receive PT, OT and speech in the classroom on hot days, but they didn't always do that. During the last two weeks of school they took the Student to see a play at the high school and there was no AC. He had severe diarrhea when he got home. When the Student was getting diarrhea and the nurse told her that the AC was on, she thought that the water might have been causing it. She sent the Student to school with bottled water, but sometimes he came home and the water was still in his lunchbox.

Usually when she gets a call to pick up the Student they will say that he's been in AC all day, but they let him out to go to a specials class, the lunchroom or therapy and said they monitor him. Staff says that it's not so warm in the morning, but it might be very humid. When the Student gets overheated and then they put him back in the AC he's already started to cramp and get diarrhea. The Student dehydrates easily.

When school began in September 2011, for the first 10 days or so nobody was able to tell her whether there was AC in the rooms. They finally said they had them, but they weren't prepared with AC for the first day of school. Then there were 10 days or so when the Student either had to come home early or else he came home at the regular time with diarrhea. Staff members said that maybe it was an illness, but when the Student came home and sat in the AC, he became normal. Usually, the only time the Student has diarrhea or is lethargic or irritable is when he's been in heat and humidity.

On June 8, 2012, she got a call from the nurse that the Student had a rash on his back that looked like a heat rash. She asked whether the Student was in the AC and he wasn't. The day started out around 60°, but it warmed up quickly. By the time the Student came home he was faint. They probably let him go to the lunchroom and then put him back in the AC.

VII. Conclusions

Allegation #1: Failure to provide supplementary aids and services since September 1, 2010 in the nature of climate/temperature control technology to enable the Student to be involved in and make progress in the general education curriculum and to be educated with other children with disabilities and with non-disabled children in violation of MUSER §IX.3.A(1)(d)

Allegation #2: Failure to provide a free appropriate public education by forcing the Student to leave school before the school day has ended due to high indoor temperatures and/or humidity in violation of MUSER §II.14 and 34 CFR §300.101(a)

NO VIOLATION FOUND

As the Student prepared to transition from xx to xx, the District sought documentation from the Parents regarding the Student's medical needs, including his needs relating to environmental factors. The District did not receive such documentation until September 1, 2010 and, based upon that information, the District promptly placed an order for two AC units. It must be noted in this regard that the Student had participated in XX in the same school building during the preceding year without the presence of any AC. The District ultimately provided the AC units in the two classrooms on September 13, 2010.

Since that time, the two AC units have been present in the classroom during the two school years in question. They are programmed to maintain the room temperature at 68°, and thus go into operation whenever the temperature exceeds that level, or when staff members manually turn them on.

The more difficult aspect of this issue is the Parents' contention that the Student was made ill due to the District's refusal to provide AC in the Student's specials classrooms and lunchroom, and that the Student consequently had to leave school early or was kept from attending school. On the one hand, staff members reported convincingly that the Student was continuously monitored for signs of overheating, and that when he exhibited those signs (which was not often) he was promptly placed next to the AC and then seemed to be fine. The staff did not see a connection between the Student's appearing ill on occasion and his being exposed to non-AC settings. There was no evidence that the Student's blood pressure was elevated while at school, one of the symptoms of the Student's being overheated, and the school nurses did not observe other signs that the Student was overheated.

On the other hand, the home nurse reported a significant number of days when the Student returned from school with symptoms that she associated with his being overheated, most particularly diarrhea. The Student's mother reported going to the School and finding the Student warm to the touch and flushed, and the Student returning home from days when he was in a non-AC setting (as when he attended a play at the high school), and experiencing diarrhea.

Ultimately, it is the Parents' burden to prove their contentions.¹ It is difficult to reconcile the reports of School staff with those of Ms. Hayden and the Student's mother, although both the Student's mother and Ms. Hayden acknowledged that there were other possible causes for the Student's diarrhea, principally dietary in nature. The Student's mother's credibility was not helped by her insistence that the Student's acting out behavior was necessarily related to exposure to non-AC settings, when Ms. Hayden agreed with School staff that such behavior did not appear to necessarily correlate with climactic conditions, and could be triggered both by diet and by sensory overload. On balance, the Parents did not sustain their burden to prove that the school time missed by the Student was causally related to the absence of AC in the specials rooms and lunch room.

It must be noted that implementation of the Student's IHP and 504 Plan² is inherently problematic. The Plans call for the Student to remain in the rooms with AC during "hot/humid weather." Hot/humid weather is not quantified; in fact, the IHP correlates "sufficiently" hot/humid weather with symptoms exhibited by the Student. This is consistent with Dr. Jacobs (who signed off on the IHP³)'s September 20, 2010 statement that "there is no way to give exact temperature parameters for rooms for him. It will depend upon his health that day, metabolic state, room temperature and humidity. Teachers and ed techs will need to monitor him for flushed cheeks, general temperament and well being. Not an exact science,"

¹ The U.S. Supreme Court has held that, in the context of a due process hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The reasoning of that decision applies equally well to the complaint investigation process, placing the burden of proof on the Parents.

² The use of a Section 504 Plan to record accommodations required by a student who has an IEP is improper. In *Letter to Wilson*, 43 IDELR 165 (OSEP December 15, 2004), OSEP opined that for "students found eligible for services under the IDEA, any accommodations deemed necessary for the student to receive FAPE under the IDEA must be included on the child's IEP...regardless of whether IDEA-eligible students were also covered by Section 504."

³ There is no legal requirement that a physician sign off on an IHP. It is the school nurse who typically develops the IHP based upon information provided by the physician.

but seemingly inconsistent with Dr. Jacobs' March 6, 2012 statement that "if the day is warm or humid, then [the Student] should be in an AC room and continue use of AC for the remainder of the day." This discrepancy has led to confusion and misunderstanding between the parties. The Parents believe that there are days when the temperature and humidity levels dictate that the Student should be kept in AC at all times, without first observing signs in the Student that he is overheated; the District, on the other hand, believes that staff members are permitted to assess the conditions in the non-AC rooms and, if they deem them to be acceptably comfortable, bring in the Student and then monitor for the tell-tale signs.

Allegation #3: Failure to provide education in the least restrictive environment by removing the Student from a non-climate controlled general education "specials" classroom and placing him in a climate-controlled special education classroom in violation of MUSER §X.2.B

NO VIOLATION FOUND

The concept of "least restrictive environment" is applicable to the educational placement offered by a school district. Here, the Parents do not take issue with the Student's placement. Rather, they complain that the District is not implementing the IEP in regard to placement, specifically, that the Student is not receiving all of his specials classes with his non-disabled peers as provided in his IEP. With regard to allegations of a failure to implement a provision of the IEP, a finding of violation requires sufficient evidence of a "material failure" to implement, which requires more than a "minor discrepancy" between the services provided and the services required by the IEP. See *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir. 2007). See also *Mr. and Mrs. C v. Maine S.A.D. No. 6*, 49 IDELR 36 (D.Me. 2007).

The evidence uncovered by this investigation shows that the Student received art and music in the special education classroom rather than with his non-disabled peers at most two times each during each of the two years under consideration. There was no evidence that the Student failed to receive computer or library class with his non-disabled peers on any occasion. These few instances constitute a minor discrepancy between the program described in the IEP and the one actually delivered to the Student. This is in contrast to the student in the case cited by the Parents, *Espino v. Besteiro*, 520 F. Supp. 905, 553 IDELR 124 (S.D. Texas, 1981), where the student was placed in a plexiglass cubicle in order to receive AC and the court found that the student was missing out on a "great deal of class interaction and group participation." *Id.*⁴

VIII. Corrective Action Plan

As no violations were found, none is required.

⁴ *Espino* is also of questionable authority as it was issued before the Supreme Court's decision in *Rowley v. Bd. of Education*, 458 US 176, 102 S. Ct. 3034 (1982), and the court employs as a standard whether the student was "being provided an opportunity for maximization of his social interaction skills." *Espino, supra*.

