

**Complaint Investigation Report
Parent v. Scarborough Public Schools
Complaint 19.102C
Complaint Investigator: David C. Webb
June 14, 2019**

DRAFT

I. Identifying Information

Complainant: [REDACTED] Parent

Respondent: RSU #2
Bill Zima, Superintendent
Deborah Murphy, Director of Special Education

Student: [REDACTED]
DOB [REDACTED]

II. Summary of Complaint Investigation Activities

On April 23, 2019, the Maine Department of Education received this complaint. The complaint investigator was appointed on April 24, 2019.¹

The complaint investigator received 560 pages of documents from the respondents and 110 pages of documents from the Parent. Interviews were conducted with the following people: Mary Bishop, Parent; Deborah Murphy, Special Education Director; Kevin Babcock, Special Education Teacher; Jennifer Waterman, School Guidance Counselor; Rachel Emond, Behavioral Health Professional; and Khara Randall, LCPC (Student’s counselor); Ellen Haney: Behavioral Health Coordinator Supervisor/Case Manager (Sweetser).²

III. Preliminary Statement

The 14-year old Student is in the ninth grade and resides in Richmond with her family. She is the educational responsibility of the Richmond Public Schools (“District”) where she qualifies for special education and related services as a student with multiple disabilities.

This complaint was filed by the Student’s parent (“Parent”) alleging that the District violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the

¹ Although the complaint was filed as a systemic complaint, the information received from the parent failed to sufficiently allege that the District has a policy, practice, or procedure that has resulted in a violation of Part B or Part C of IDEA or Chapter 101, MUSER and is, or has the potential to be, applicable to a group of students, named or unnamed. Accordingly, this case was investigated as a complaint concerning the individual student O.B.

² As per the standards of practice for conducting complaint investigations, the Complaint Investigator used his discretion with regard to witnesses interviews, and therefore not all of the witnesses identified by the parties were interviewed as part of this investigation.

parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on April 29, 2019 alleging 7 separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on May 15, 2019. In addition to the Complaint Investigator, persons present at this meeting included the Parent and Deborah Murphy, Special Education Director.

IV. Allegations

1. Failure to provide the parents with proper prior written notice of the District's proposals regarding the Student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503);
2. Failure to properly identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d);
3. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;
4. Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3);
5. Failure to ensure that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;
6. Failure to ensure that a continuum of alternative placements is available to meet the Student's educational needs in violation of MUSER §X.2.B; and
7. Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I).

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

V. FACTUAL FINDINGS

1. The 14-year old Student is in the ninth grade and resides in Richmond with her family. She is the educational responsibility of the Richmond Public Schools ("District") and she qualifies for special education and related services as a student with multiple disabilities. She is diagnosed with a generalized anxiety disorder, PTSD and ADHD (combined presentation).
2. The IEP developed for the Student on November 27, 2017, as amended on April 2, 2018 and June 7, 2018, provided the following classroom supports and services, supplemental aids, and modifications:

Behaviors:

- Positive/consistent reinforcement;
- Alternate setting as needed for behavioral support;

- Follow behavioral point sheet for redirection;
- Target behaviors that are observable by staff are: talking back to staff in a rude manner; refusing to do work; refusing to follow direction; staff splitting; “junior staffing” other students and arguing with staff on specified direction.
- [The Student] has a daily point sheet where the following 3 target behaviors are rated following staff direction with 2 verbal prompts:
 - Asking for help;
 - Using nice words without tone;
 - Frequent breaks.

Appropriate breaks for [the Student] include by are not limited to:

- Opportunity to color or draw;
- Opportunity to swing, skip or run;
- Opportunity to play pass with weighted ball or bean bag;
- Opportunity for a walk with staff;
- “Deadphones” to wear to have less distraction in the classroom;
- Breaks are also connected to assemblies;
- Stand or move about occasionally;
- space to complete work while standing.

Assessments/Testing/Grading

- Extended testing time;
- word banks provided, multiple choice when appropriate, retests allowed, spelling not graded, test taken orally.

General Assignments

- Allow additional time for completion
- assist with task initiation, assignments completed orally, on tape or dictated
- check work at frequent intervals, shorten assignments, long term assignments broken into segments with due dates.
- Access to enlarged font for the times [the Student’s] prescribed glasses are not in school

Physical/Environmental Modifications

- Seating for optimum attention
- Consider learning combinations of other students when assigning seating.

- Seat student toward the front of the classroom so she is able to see all presented materials.
- Provide [Student] with opportunity to enlarge font.
- [The Student] has glasses which she refuses to wear.

Supplemental service

- Guidance check in 3-4 times per week for emotional and behavioral support;
- Defined limits/expectations;
- Attendance policy waived for tardies [sic] – [the Student] is expected to attend school daily -School and family encourage her to arrive on time – [the Student] struggles with morning routines at home - sleep difficulty noted through doctor's note.

Instructional Strategies

- One-on-one assistance;
- Modified ed tech support in regular ed setting as needed;

Supplemental Service

- Guidance check in 3-4 times per week for emotional and behavioral support (guidance check-in to occur in the special education and regular education rooms);
- Read aloud (for math and ELA, not reading passages) - Text is read aloud to the student by a trained and qualified human reader who follows the administration guidelines provided in the Smarter Balanced Test Administration Manual;
- Separate setting - Test location is altered so that the student is tested in a setting different from that made available for most students.

Specially Designed Instruction

- Reading/ Writing 5 times per Week for 70 minutes
- Math 5 times per Week for 70 minutes
- Consultation
- Speech and Language Services 2 times per Week for 30 minutes

Related services

- Other: Counseling Services

- Guidance Counselor/BCBA 1 time per week for 60 minutes (regular ed and special ed classroom)
3. The Student's annual review IEP was convened on November 8, 2018. Pursuant to the Written Notice prepared in connection with this meeting, the following actions/changes to the Student's IEP were determined by the IEP team:
 - Change testing from alternative assessments to state assessments;
 - Adding transition goals;
 - Adding self-advocacy goals.
 4. The IEP developed for the Student on November 8, 2018, documented the additions with regard to self-advocacy goals as follows:
 - A "life skills" goal was added which specified that the Student "will notify the office 40% of the time (2/5 days of the week, up from 0/5) when she arrives late to school."
 - A Speech/Language goal was added: "By 11/7/2019, given direct speech and language sessions, the Student will accurately sequence 5-10 sentences or steps in order to functionally communicate a real-life event or plan a project, with 90% accuracy over three consecutive sessions and moderate cues..."
 5. The IEP developed for the Student on February 25, 2019 mistakenly listed the Student's age as "16 or older" in the secondary transition section.
 6. In an interview with the Complaint Investigator, the Parent stated that she received *advance* written notice and attended IEP team meetings on October 1, 2018 and November 8, 2018. The Parent stated that she did not receive written notices or IEPs relating to these meetings until February 28, 2019.
 7. In an interview with the Complaint Investigator, the Parent stated that she is "not sure" how the Student's assignment modifications are being addressed, despite requesting this information from the District. The Parent said that although the Student's IEP requires that she have access to a rocking chair, the District has not made clear how or when this could happen. She said that the District has also refused to allow the Student to use her "squishy" therapy ball, and that her teacher won't let her doodle or color in class. Although the Student is not reporting to the Parent that she is unable to complete her assignments on time, the assignments that the Student brings home do not indicate any due date.
 8. The Parent said that she knows about the Student's phone use in class, and has told the Student that it is OK for her to use her phone or to watch an "educational" movie on her phone if the District "is not going to educate you."

9. The Parent said that she disagreed that the IEP support adding “guidance check-in 3-4 times per week” is an appropriate part of the Student’s self-advocacy goal. The Parent agreed that the Student’s IEP contained self-advocacy goals, however she was expecting a separately designated “self-advocacy” goal section within the IEP. The Parent also stated that she didn’t believe that the guidance “check-ins” with Ms. Waterman, the Student’s guidance counselor, were occurring as required by the IEP. She said that she knew this, in part, because there were several occasions this year when the Parent brought the Student to school and Ms. Waterman was not in her office or was in a meeting, and therefore didn’t know if the Student was present in school. The Parent said that the Student’s morning arrival time was sometimes at 10:00 a.m., and sometimes closer to 11:00 a.m. The Parent could not confirm if Ms. Waterman checked in with the Student after she arrived.
10. The Parent stated that she “doesn’t totally disagree” with the Student’s draft IEP developed at the most recent IEP team meeting on May 23, 2019. She said that she objects to any further evaluations of the Student at the current time, in part because she and the Student’s father believe that the Student has recently had a “barrage” of testing, and she doesn’t feel that she should be subjected to more testing.
11. The Parent reported that the Student isn’t currently attending school, but is participating in some math and language arts assignments via the internet by using a program referred to as “Google Hang Out”. The Parent confirmed that the Student is not currently accessing any special education services.
12. Rachel Emond, BHP, is a Direct Support Professional at Bridges of Maine, LLC. Ms. Emond has worked with the Student for approximately one and one half years. In an interview with the Complaint Investigator, Ms. Emond said that she is concerned about the Student’s lack of progress and the District’s failure to follow the IEP. She acknowledged that she has not spoken with any of the Student’s teachers or other school staff, and that her information with regard to the Student’s school experience primarily comes from the Student and her mother.
13. Ms. Emond said that the Student can be “sassy” and that she frequently refuses to go to school or to discontinue her phone use during class. She said that the Parents tried to take the phone away from her for a while, and to “bribe” her with money if she stopped using her phone. Ms. Emond reported that the Parents eventually gave up on trying to restrict the Student’s phone or to force the Student to attend school. Ms. Emond acknowledged that the Student’s lack of academic progress was related to her refusal to attend school,

noting that there is “room for parental improvement” as well as improvement by the District.

14. In an interview with the Complaint Investigator, Deborah Murphy said that the Student’s work level is modified with respect to the quantity of the Student’s work, e.g. the Student would only have two questions to complete while her typically developing peers might have four questions. Ms. Murphy noted that these modifications would not necessarily be obvious to anyone reviewing the Student’s work.
15. Ms. Murphy stated that she has discussed the Student’s cell phone use and work refusal concerns with the Parents, without success. Ms. Murphy acknowledged that the school “falls short” on following the cell phone and electronic device policy to the letter, however she believes that enforcement of this policy would exacerbate the Student’s work refusal and absences.
16. Ms. Murphy reported that the Student’s self-advocacy goals are addressed in the content areas of expressive language, flexible thinking, independently checking in to the office upon arrival, asking for a break and functionally communicating a real-life plan or project. Ms. Murphy reported that the school counselor regularly goes to the Student’s classroom to check in with her. Ms. Murphy said that the clerical errors noted in the complaint will be addressed at the IEP meeting on May 23, 2019.
17. With regard to the Parent’s allegation that she did not receive Written Notices for the October and November IEP team meetings, Ms. Murphy said that she and her staff have historically sent all required documents to the Parents and the Parents have never missed an IEP team meeting. Ms. Murphy said that during October and November of 2018, she was without an administrative assistant for a period of time. Accordingly, she said that it is possible that the notices were not mailed. Ms. Murphy noted, however, that she normally would only check the “date sent to parents” box on the forms if it was in fact sent to the Parents on the stated dates.
18. Ms. Murphy noted that a rocking chair and weighted animals are contained within Mr. Babcock’s room, however the Student chooses not to access them.
19. In an interview with the Complaint Investigator, Kevin Babcock, the Student’s special education teacher, said that her work assignments are modified according to her IEP. For example, Mr. Babcock said that the Student has frequent absences, and when she does show up at school, it is usually at around 10:30 or 11:00, and that she will often leave before the end of the school day. He added that the Student will frequently be on her phone during class or training time, and that the Student is unwilling to discontinue using

her phone when asked. He said that he regularly communicates with the Parents about the Student's phone use and how this is disrupting her ability to access her school work. Mr. Murphy said that he has witnessed the parents arguing during IEP team meetings about whether the Student should be allowed to use her phone during class.

20. Mr. Babcock stated that the Student's reading assignments are set at the second-grade level, her tests are given orally, and she is given fewer questions on tests and assignments. Mr. Babcock said that the Student gets preferred seating and will assertively correct other students who attempt to sit in her designated seat. Mr. Babcock reported that he works closely with the Student's general education teachers and helps the Student complete assignments in the special education resource room. He added that the Student is allowed to take extra breaks when needed, however she rarely asks for them. He said that the Student's assignments are completed in class and that she typically will not be assigned homework.
21. Mr. Babcock said that the Student has access to a rocking chair which is in the corner of his classroom. He said that the Student rarely uses the chair. He said that he has overheard the Parent telling the Student to use the chair, and the Student will refuse, saying "I don't need it."
22. Mr. Babcock said that the Student's IEP Team is recommending further evaluation, including a psychological evaluation to address the concerns regarding the Student's struggles with attendance and engagement with her academic programming.
23. In an interview with the Complaint Investigator, Jennifer Waterman, School Counselor for the District's middle and high school, reported that she has been working with the Student since her sixth-grade year. Ms. Waterman said that although the Student was absent or tardy for many days this school year, she attempted to check in with the Student every day that she attended. She said that the Student did not meet with her in her office, so she would walk to the Student's classroom and invite her to speak in her office or even at a confidential location in the hallway. Ms. Waterman reported that despite her repeated attempts, the Student would typically refuse to talk to her.
24. Ms. Waterman said that she would often bring down art supplies for her to work on, but that the Student would also refuse to use them. She said that Mr. Babcock's room had a rocking chair and access to a weighted ball or bean bag. She also said that Mr. Babcock would frequently invite the Student outside for opportunities to run or walk with staff, for breaks and also space for the Student to complete work while standing.

25. Ms. Waterman said that the Student's work was appropriately modified, with respect to extending completion times, staff assistance, and trying to limit the Student's screen time on her laptop and phone. She said that she attended meetings where the Parents verbally disagreed about limiting the Student's screen time, even though staff was reporting that it was interfering with her ability to access her educational programming and supports. She said that ultimately, the Student continued to bring her phone to school and to use it during class/instruction time.

26. To offer assistance with regard to the Student's absenteeism and work refusal, Ms. Waterman said that the District offered a separate outside counselor through Spurwink, which the District would coordinate. She said that the Parents refused this additional counseling service.

27. On September 25, 2018, the Parent sent an e-mail to Kevin Babcock documenting an exchange of text messages between herself and the Student:

Parent: "I'm not coming to pick you up...the only choice you have is to walk"

Student: "yes you [are]"

Parent: "and I would start before it starts down pouring...I'm having car issues and can't..."

Student: "You [are] picking me up if you don't then I not going to school tomorrow"

28. In an e-mail to Kevin Babcock dated September 26, 2018, the Parent wrote

...I'm still currently fighting with [the Student] to get to school. Lots of disrespect, rude and non-compliant behavior.

29. In an e-mail to the Parent dated October 10, 2018, Kevin Babcock wrote:

She was on her phone until 10:35. At which time she finally allowed me to get some math out for her. She is on level 1 from last week's day of doing nothing all day. Since then she has gone to her afternoon classes only except for when she was absent of course. I have told her that she is doing great going to her outside classes and that if she gives me a little bit of work in the morning as well we can move back up to level 2. Her response was that she doesn't care about moving up but also became very defensive about not touching her laptop. Even though it has been three days, I have chosen not to take it because she is giving me a half day of work and also is working some in the am. If she continues this trend she should be back on level 2 by Thursday I'm hoping. Mr. Orth came at the end of the day yesterday to tell me that there were no issues with Art yesterday and she did a good job.

30. In an e-mail dated October 15, 2018, Kevin Babcock reported (in relevant part) to the Parent:

... With her modified expectations this does mean she is meeting the current IEP goals of giving us partial participation of more than 50%, working towards 80%. If she can do this again tomorrow then I will talk to her about doing a level request and moving up to level 2. It's funny, she seems intent on trying to push me into a fight with taking her laptop but at the same time, she is doing the majority of her work. The only classes she is not making progress in is PE, ELA, and Math (aka, her morning classes).

31. In an e-mail to Kevin Babcock dated October Nov 7, 2018, the Parent stated:

I wanted to email you all and let you know we are stuck as to what to do next with this. We have taken away everything and Paul's on the phone with PD about her school refusal now. We have done numerous in-homes and have section 28 now and she has been in residential and nothing has worked. And we've had case management but they had to close due to insurance saying there was no longer a need for this service. She refuses any school and outside counseling. PD is on their way now. If you all have any ideas we are open to hear them.

32. In an e-mail to Deborah Murphy dated Nov. 8, 2018, the Parent wrote (in relevant part):

... I have the advanced written notice for the Monday October 1st, 2018 meeting that came in the mail but I have no written notice from this meeting. Do you know when the advanced written notice for the 10/01/2018 IEP was sent out and when I can expect it?

There is no documented response from the District with regard to this message.

33. On February 28, 2019, the Student's IEP team met to discuss the Student's refusal to participate in School and her phone use during school hours. During the meeting, the team considered "ways to engage...and connect" with the Student, and possible additional support services. According to the Written Notice prepared in connection with this meeting, "the family shared apprehension with too many providers in the home based on prior experience and are at the point of wanting to keep the environment at home as calm as possible...the family shared that the Student was also refusing to take medication at this time..

34. During the February 28, 2019 IEP team meeting, the District offered the family "special education transportation" for the Student to and from school, however it was determined that the Student would not access the transportation.

35. Khara Randall, LCPC, has provided weekly counseling services through Sweetser for the Student since December, 2018. In an interview with the complaint investigator, Ms. Randall stated that her primary focus in therapy has been to challenge the Student to return to school. She stated that she is also addressing the behavioral concerns relating to the Student and working with communication issues with the Parents. Ms. Randall said that the Parents have tried to impose “consequences” for the Student for her work/school refusal issues, and have “taken everything away” from the Student as a discipline/consequence of her work/school refusals. Ms. Randall said that none of these approaches have worked for the Student on a long-term basis. Ms. Randall said that the family has been dealing with a great deal of stress, including caring for the Student’s older brother who has a severe mental disability and two of the Student’s grandparents who were recently hospitalized with serious health issues.
36. Ms. Randall stated that she believes that the Student’s work refusal is related to her disability. She doesn’t believe the Student needs more psychological evaluations as she has had three psychological evaluations in the last four years, with the most recent assessment completed in February of 2018. Ms. Randall said that she has reviewed the Student’s IEPs, and believes that they are appropriate, although she would like to see more social supports for the Student.
37. Ms. Randall said that she is hearing from the Parents that the District is not following through on certain parts of the Student’s IEP, including the Student’s use of stress balls or using a binder to take to her desk. Ms. Randall has talked briefly with the Student’s special education teacher, most of her information about the Student’s school experience comes from the Student, the Parents and the Student’s case manager.
38. The Student’s IEP team met on May 23, 2019 to address the Student’s refusal to participate in School and the impact on meeting her IEP goals. In a Written Notice prepared in connection with this meeting, the IEP determined as follows:
- A referral for evaluation with regard to the Student’s mental health concerns when written parental consent is provided; (The school recommended a complete psychological evaluation through Spurwink, but the Parents refused to use this evaluator due to prior involvement with another family member.)
 - The Student’s IEP would be amended to add Special Transportation at 10:30 to accommodate the Student’s start of her day;
 - Provide opportunity for programming in another District high school with special transportation;

- Provide current IEP as written;
- Provide opportunity using technology for the Student to interact with staff;
- Addressed IEP clerical concerns and wording concerns
- The IEP team declined to send work home as the Student is not accessing her special education services, which the team feels is necessary in order for her to successfully complete her assignments.

39. In an interview with the Complaint Investigator, Ellen Haney, the Student's Behavioral Health Coordinator, said that she has been working with the Student and the family since the fall of 2018. She said that she has attended several IEP team meetings and has spoken with the Student's case manager, Kevin Babcock. Ms. Haney said that there have been thorough discussions at the team meetings about ways to engage and support the Student with respect to her disabilities, focusing on her attendance and work refusal issues. She feels that the school has followed the IEP and added that she feels Mr. Babcock is "bending over backwards" to address the Student's needs. Ms. Haney said that she feels that the school staff was unaware of many of the Parent's complaints as they were not conveyed at the team meetings that she attended.

40. Ms. Haney said that she understands that the Student's father agrees with limiting the Student's screen-time usage, but that the Student's mother is resistant to restrict her phone or computer. Ms. Haney noted that the Student was previously admitted into a residential treatment facility, and that the Student's mother is especially concerned that enforcing these issues could cause the Student to escalate, and potentially return to residential treatment.

41. Ms. Haney said that the Student needs to have a neuropsychological evaluation to inform future educational placement. She understands that the District has offered to pay and arrange for an outside evaluation provider. At this point, she is aware that the Parents are refusing to do further psychological testing through Spurwink, but she is encouraging the Parents to consider other providers. Ms. Haney said that she asked the family to consider in-home family therapy, however the Parents declined due to past experiences that made them feel shamed.

VI. DETERMINATIONS

1. Failure to provide the parents with proper prior written notice of the district's proposals regarding the Student's educational program in violation of MUSER VI.2.I and MUSER App. I (34 CFR §300.503);

2. Failure to properly identify within the IEP the specific special education services and supplementary aids and services to be provided to the Student in violation of MUSER §IX.3.A.(1)(d);

PROCEDURAL VIOLATIONS FOUND; NO DENIAL OF FAPE FOUND

As set forth in MUSER §§V1.2(I), "The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions" regarding:

- (1) The child's needs and appropriate goals;
- (2) The extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and
- (3) The services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP Team must consider the parents' concerns and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement.

MUSER §§V1.2(I)

Pursuant to MUSER Appendix 1 and 34 CFR §300.503, a school administrative unit must give parents written notice at least 7 days prior to the date the school administrative unit proposes to initiate or to change the provision of a free appropriate public education (FAPE) to a child. Among other requirements, this notice must describe the action regarding the referral, evaluation, identification, programming for a Student.

Determinations with regard to special education services and supports must be made by an IEP Team that includes representatives from the school district and the student's parents. MUSER VI (2)(B). All members of the IEP team, including parents, are equal participants and are charged with making "joint, informed decisions...with regard to the extent to which the child will be involved in the general curriculum and participate in the regular education

environment...” MUSER VI(2)(I)(2). The IEP team, subject to subparagraph (3), must consider the concerns of the parents for enhancing the education of their child. MUSER §IX.3.C(1)(b).

MUSER §IX.3.A (1)(d) defines the term “individualized education program” and provides, in relevant part, that it is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes: ...

- (d) A statement of the special education (Section X of this rule) and related services (Section XI of this rule) and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with (a) and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and non-disabled children in the activities described in this subparagraph;

Required items within an IEP include a student’s present level of academic and functional performance, measurable annual goals, the extent to which a student will participate with non-disabled peers, and a statement of special education and related services that the student needs to meet these goals. MUSER, IX(3)(A)(1).

In the present case, the Parent did not receive Written Notices or copies of the Student’s IEP from the team meetings held in October and November, 2018. Ms. Murphy, the District’s Special Director, said that it is possible that the documents were not mailed as she was without an administrative assistant for a period of time in the fall of 2018.

The Parent’s allegation regarding her non-receipt of this documentation is further supported by an e-mail the Parent wrote to Ms. Murphy dated Nov. 8, 2018, which stated “... I have the advanced written notice for the Monday October 1st, 2018 meeting that came in the mail but I have no written notice from this meeting. Do you know when the advanced written notice for the 10/01/2018 IEP was sent out and when I can expect it?” There is no documented response from the District with regard to this message. The Parent stated that she did not receive written notices or IEPs relating to these meetings until February 28, 2019.

Based on this evidence, it appears more likely than not that the District neglected to provide Written Notice to the Parent in connection with these IEP team meetings. For reasons identified within this report, there is no evidence that the Student was deprived of a FAPE as a

result of the District's failure to send such notices.³ Moreover, between the November 2018 IEP team meeting and the February, 2019 team meeting, there are numerous e-mail communications between the Parent and the District with regard to the Student's educational program and participation in school.⁴

3. Failure to properly develop or revise an IEP thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4) and MUSER §IX.3.C;

NO VIOLATION FOUND

MUSER §VI.2.J.(4) provides that one of the Major IEP Team Responsibilities is to develop or revise an Individualized Education Program as described in IX to provide each identified child with a disability a free appropriate public education. MUSER §IX.3.C provides in relevant part:

C. Development of IEP.

(1) In general.--In developing each child's IEP, the IEP Team, subject to subparagraph (3), must consider:

- (c) The results of the initial evaluation or most recent evaluation of the child; and
- (d) The academic, developmental, and functional needs of the child.

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

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

Congress indubitably desired "effective results" and "demonstrable improvement" for the Act's beneficiaries. *Burlington II*, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency

³ The Parents' primary complaint against the District relates to the Student's IEP not being followed, not to substantive concerns about the special education services or supports identified in the IEP. There is no evidence that the District failed to include within the IEP the determinations made at the Student's November 2018 IEP team meeting.

⁴The District's typo on the February 25, 2019 when it mistakenly listed the Student's age as "16 or older" in the secondary transition section is a de-minimis error which has been corrected in the Student's most recent IEP, and does not result in a violation or a loss of FAPE for the Student.

of educators' policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, "related services," 20 U.S.C. § 1401(17), are required to address a Student's needs. *Irving Independent School Dist. V. Tatro*, 468 U.S. 883, 889-90 (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

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

MUSER §IX.3.C(2)(a) provides that an IEP team for a child whose behavior interferes with his learning must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." MUSER §II.21 defines "positive reinforcement interventions and supports" as "the use of positive techniques designed to assist a child to acquire educationally and socially appropriate behaviors and to reduce patterns of dangerous, destructive, disruptive or defiant behaviors." The definition further notes that these techniques may be based upon results of a functional behavioral assessment.

In the present case, the IEPs developed for the Student in the relevant time periods identify her evaluation history and contains a range of behavioral and academic accommodations and supports. Additional counseling support and other accommodations were added to help address the Student's work refusal issues as a result of the November, 2018 IEP team meeting. The IEP team met again on February 28, 2019 to address the Student's work refusal and discussed ways to engage...and connect" with the Student, and to consider additional support services and special transportation for the Student. The Parents were apprehensive to have any further providers in the home, and said that the Student would likely not access any special transportation. At the May 23, 2019 IEP team meeting, the District requested a further neuropsychological evaluation for the Student through an outside provider which the Parents have refused.

4. Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3);

NO VIOLATION; NO DENIAL OF FAPE FOUND

MUSER §IX.3.B(3) provides in relevant part as follows:

Each school administrative unit shall implement a child with a disability's Individualized Education Program as soon as possible following the IEP Meeting but no later than 30 days after the IEP Team's initial identification of the child as a child with a disability in need of special education and supportive services... If a school unit is unable to hire or contract with the professional staff necessary to implement a child's Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options.

In this case, the Parent alleges that the Student's IEP wasn't followed in a number of areas, including the Student's work not being modified, the Student not having access to a rocking chair, swing, coloring books or other supports, and the failure of the Student's guidance counselor, Ms. Waterman, to regularly check in with the Student as required by her IEP.

The Parent said that she came to the conclusion that the Student's work wasn't being modified due to the District failing to provide information to her about how the work is modified, and times when the Student has called her saying that she "feels rushed" to complete the work, and that her teachers are not giving her sufficient time to complete her work. The Parent reports that when the Student's work is brought home, there is typically no indication of how the assignment is modified nor is there any assignment due date indicated on the paper.

With regard to the counseling check-in, the Parent reported several occasions this year when the Parent brought the Student to school and Ms. Waterman was not in her office, and therefore didn't know if the Student was present in school. The Parent acknowledged that she could not confirm if Ms. Waterman checked in with the Student after she arrived.

Kevin Babcock, the Student's special education teacher, said that the Student's work assignments are modified according to her IEP. Mr. Babcock said that the Student gets preferred seating and will assertively "correct" other students who attempt to sit in her designated seat. Mr. Babcock reported that he works closely with the Student's general education teachers and helps the Student complete her assignments in the special education resource room. He added that the Student is allowed to take extra breaks when needed, however she rarely asks for them. He said that the Student's assignments are completed in class and that she typically will not be assigned homework.

Mr. Babcock said that the Student has access to a rocking chair which is in the corner of his classroom. He said that the Student rarely uses the chair. He said that he has overheard the Parent telling the Student to use the chair, and the Student will refuse, saying "I don't need it."

Ms. Waterman said that although the Student was absent or tardy for many days this school year, she attempted to check in with the Student every day that she attended. She said that the Student did not meet with her in her office, so she would walk to the Student's classroom and invite her to speak in her office or even at a confidential location in the hallway. Ms. Waterman reported that despite her repeated attempts, the Student would typically refuse to talk to her.

Ms. Waterman said that she would often bring down art supplies for her to work on, but that the Student would also refuse to use them. She said that Mr. Babcock's room had a rocking chair and access to a weighted ball or bean bag. She also said that Mr. Babcock would frequently invite the Student outside for opportunities to run or walk with staff, for breaks and also space for the Student to complete work while standing.

Ms. Waterman said that the Student's work was appropriately modified, with respect to extending completion times, staff assistance, and trying to limit the Student's screen time on her laptop and phone.

While it is apparent that the Student's IEP has not achieved ideal results, there is no doubt that the Student's lack of progress is directly related to her work refusal and lack of attendance.

In *Pocono Mountain School District*, Pennsylvania State Educational Agency, 114 LRP 23161 (April 11, 2014), a hearing officer found that a Pennsylvania school district appropriately responded to the truancy of a kindergartner with epilepsy and anxiety disorder, even though the reasons for the child's frequent absences was not always clear. In the *Pocono Mountain* case, the school district responded to the student's sporadic attendance in numerous ways, including assigning an individual to monitor the student for seizure activity, developing a seizure action plan, and placing the student in a small-group setting. *Id.*

In present case, the Student's IEP team addressed the Student's absenteeism and work refusal issues during and between meetings in October and November, 2018 and February and May of 2019. The IEP team modified the Student's IEP to provide additional supports and services for her emotional and behavioral issues needs. In addition, the District has recommended additional evaluations and counseling supports for the Student, which the Parents have refused.

It appears that the Parent's claims regarding the District's attention to the Student's IEP is largely based on incorrect assumptions about how staff are working with the Student. The Student's teacher, counselor and special education director all reported that the accommodations and supports in the IEP were consistently made available to the Student when she was present in school. Ellen Haney, the Student's outside behavioral health coordinator at Sweetser, said that there have been thorough discussions at the team meetings about ways to engage and support the Student and that Mr. Babcock is "bending over backwards" to address the Student's needs.

5. Failure to ensure that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;

6. Failure to ensure that a continuum of alternative placements is available to meet the Student's educational needs in violation of MUSER §X.2.B.

NO VIOLATION; NO DENIAL OF FAPE FOUND

MUSER §VI.2.I provides that the SAU has ultimate responsibility to ensure that the child's placement is in the least restrictive educational placement. MUSER §X.2.B further defines the criteria for the determination of the Least Restrictive Environment and provides:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [20 USC 1412(a)(5) and 34 CFR 300.114]

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

MUSER §X.2.B. further provides:

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

In this case, the Student's IEP determined that she should spend 75% of her time with non-disabled peers. During the times that the Student attended school this year, she chose to spend time in the special education room. As noted above, the District has appropriately responded to the Student's attendance and work refusal issues with a variety of different proposals, accommodations and supports. In addition, the Student's special education teacher said that he works closely with the Student's general education teachers and helps the Student complete assignments in the special education resource room.

Parent has also alleged that the District has failed to provide a suitable space for counseling where the Student feels safe. As noted, Ms. Waterman said that the Student did not meet with her in her office, so she would walk to the Student's classroom and invite her to speak in her office or even at a confidential location in the hallway. She reported that despite her repeated attempts, the Student would typically refuse to talk to her.

7. Failure to adequately consider the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I).

NO VIOLATION FOUND

MUSER §§VI (2)(B) and (H) provide, in relevant part, that the IEP team must include the child's parents who must be afforded the opportunity to participate in all IEP team meetings.

The IEP team must consider the concerns of the parents for enhancing the education of their child. MUSER §IX.3.C(1)(b). The IEP Team should work toward consensus, but the SAU [District] has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive educational placement. MUSER VI(2)(I).

In the present case the Parents have been active participants at all of the Student's IEP team meetings, including the meeting on April 2, June 7, October 1, 2018, November 8, 2018 and February 28, 2019.⁵ All of the Written Notices generated from these meetings provide detail with regard to the Parents' concerns and requests.

The Parent alleges in her complaint that the Student's November 8, 2019 IEP did not contain a self-advocacy goal, nor was there a separately designated "self-advocacy" goal section within the IEP.

The Student's IEP on November 8, 2018 added a "life skills" goal which specified that the Student "will notify the office 40% of the time...when she arrives late to school." In addition, a Speech/Language goal was added stating that the Student "will accurately sequence 5-10 sentences or steps in order to functionally communicate a real-life event or plan a project, with 90% accuracy over three consecutive sessions and moderate cues..."

As noted, MUSER §§V1.2(I), requires the IEP team to make joint, informed decisions regarding the child's needs and appropriate goals. In the present case, the Student's IEP team discussed and then added to the Student's IEP the self-advocacy goals in the appropriate sections of the IEP. There is no requirement under MUSER or IDEA that a separate "goal section" be identified in the IEP.

The Parties are encouraged to agree on a qualified individual to conduct a psychological evaluation with regard to the Student's mental health and behavioral concerns and to convene an IEP team meeting within 30 days of said evaluation to discuss further modifications, placement and accommodations to the Student's IEP to address ongoing work refusal and attendance concerns.

⁵ While the Student's father occasionally attended the Student's IEP team meetings, he was not able to attend all of them due to his work schedule. The Student's mother was present at all IEP team meetings.

VII. CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. Written assurance from the Superintendent that a plan is in place for backup coverage is available in order to ensure MUSER and IDEA paperwork is done correctly when the special education administrative assistant is unavailable;
2. The statement of assurances should be submitted to the Department by September 15, 2019.