

Complaint Investigation Report

██████████ v. Harpswell Coastal Academy

January 14, 2020

Complaint # 20.047C

Complaint Investigator: Julia N. Pothén, Esq.

Date of Appointment: November 21, 2019

I. Identifying Information

Complainant: ██████████, Parent

██████████

Respondent: Harpswell Coastal Academy
Scott Barksdale, Head of School
9 Ash Point Road
Harpswell, ME 04079

Deryl Holt, Director of Special Education

Student: ██████████

DOB ██████████

II. Summary of Complaint Investigation Activities

On November 20, 2019 the Maine Department of Education received this complaint. The complaint investigator was appointed on November 21, 2019. Therefore, the current investigation covers the time period of November 20, 2018 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 521 pages of documents from Harpswell Coastal Academy. The investigator also received 202 pages of documents and 95 additional email communication chains from the complainant. Interviews were conducted with the Student's parents on December 23, 2019 and with the Student's caseworker at Independence Association on January 7, 2020. On December 20, 2019, the following school staff were interviewed at Harpswell Coastal Academy: the Director of Special Education; the Head of School, the Student's Special Education Teacher; the Student's Speech/Language Pathologist; the Student's Educational Technician (1-1 Paraprofessional); the Student's Current Affairs General Education Teacher, and an

Education and Human Resources Specialist from Drummond Woodsum law firm.¹ The complaint investigator reviewed all documents, email chains, information, and responses provided by the parties.

III. Preliminary Statement

The Student is 18 years old. The Student's parents ("Parents") have legal guardianship of the Student, who qualifies for special education and related services based on a variety of diagnoses that have an adverse impact on education, including Tourette Syndrome, specific learning disability, and autism spectrum disorder, bipolar disorder, unspecified anxiety disorder, mood dysregulation disorder, and expressive language disorder. is currently enrolled at the Harpswell Coastal Academy in Harpswell, Maine as a 12th grade student. The Student resides with parents in Maine.

This complaint was filed by the Student's parent ("Parent") alleging that Harpswell Coastal Academy ("Charter School") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the Parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on December 3, 2019, alleging five violations of the MUSER. A telephonic Complaint Investigation Meeting was held on December 4, 2019. A revised Allegations Letter was sent to the parties by the complaint investigator on December 12, 2019, alleging nine total violations of the MUSER.

Although the regulatory time frame for the present complaint investigation extends from November 20, 2018 to present, the scope of this investigation is somewhat limited by the procedural history of the Parent's prior due process complaint. Back on July 25, 2019, the Parent filed a prior complaint on behalf of the Student with the Maine Department of Education against Harpswell Coastal Academy, alleging ten violations of the MUSER. See Complaint Investigation #20.007C. On September 20, 2019, the Maine Department of Education published a Complaint Investigation Report, finding non-compliance on the part of the Charter School with respect to six of the ten violations. Harpswell Coastal Academy was then ordered to complete a corrective action plan, which includes a requirement that the Charter School provide 50 hours of compensatory education to the Student prior to May 15, 2020. The previous complaint was investigated by complaint investigator, Jeannette Sedgwick. The present complaint investigator has thoroughly reviewed the complaint, documentation, information, and responses from Complaint Investigation #20.007C in order to ascertain which of the present allegations, if any, were previously addressed. A number of the allegations in the present complaint

¹As per the standards of practice for conducting complaint investigations, the Complaint Investigator used her discretion with regards to which witnesses were interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation.

investigation overlap with the allegations from the previous complaint, and with respect to the repeated issues, the complaint investigator has only considered the Charter School's conduct from the date of the previous determinations (September 20, 2019) to the present. With respect to new allegations that were not addressed in the prior complaint investigation, the regulatory time frame of November 20, 2018 to present is applicable.

IV. Allegations

The Parent alleged that the Charter School did not provided a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because of the following nine violations:

- A. The school staff and administration have not followed the Student's positive behavioral support plan. MUSER IX(3)(C)(2)(a).
- B. The Student's behavioral needs have not been addressed and have prevented the Student from accessing [REDACTED] education in order to advance appropriately toward [REDACTED] annual goals. MUSER IX(3)(C)(2)(a).
- C. The school staff and administration have not implemented the Student's IEP with respect to Specially Designed Instruction. MUSER IX(3)(B)(3).
- D. The school staff and administration subjected the Student to disciplinary procedures in a different manner or for a different duration as the procedures would be applied to a child without disabilities. MUSER XVII(1)(C); MUSER I(2).
- E. The Student's removal from school constituted a disciplinary change of placement for which no manifestation determination review was held. MUSER XVII(1)(E).
- F. The Student was not educated in the least restrictive environment (LRE) when [REDACTED] received tutoring services at Southern Main Community College. MUSER X(2)(B).
- G. The Student did not receive transportation for a period of approximately two weeks during the 2019-2020 school year. See MUSER XI, "Related Services."
- H. The school staff and administration have not taken prompt and appropriate action in response to incidents of bullying, which has affected the Student's ability to access a free appropriate public education. MUSER I(2); MUSER II(13); 34 CFR 300.101(a).

- I. The school staff and administration did not provide advanced written notice about whether an attorney was present at an individualized education program team meeting; specifically, the Student's parents were not notified that a representative from the school's attorney's office was present at an IEP team meeting. MUSER VI(2)(A).

V. Factual Findings

1. The Student is 18 years old, and ■ is currently enrolled at the Charter School in Harpswell, Maine as a 12th grade student. The Student resides with ■ Parents in Phippsburg, Maine.
2. The Student began attending the Charter School during the 2018-2019 school year after receiving education in a day treatment program that focused on behavioral interventions. The Student attended the Charter School for one day each week, beginning in October 2018, until ■ began attending the Charter School full-time in February 2019.
3. The Parents have legal guardianship over the Student, who qualifies for special education and related services based on a variety of diagnoses that have an adverse impact on ■ education, including Tourette Syndrome, specific learning disability, and autism spectrum disorder, bipolar disorder, unspecified anxiety disorder, mood dysregulation disorder, and expressive language disorder.
4. The most recent educational evaluations conducted by the Charter School, dated May 29, 2019, show the Student's below average cognitive abilities, as measured by the Kaufman Test of Educational Achievement, second edition (KTEA-II). The Student was assessed in the 9th percentile for reading index, the 14th percentile for letter/word identification, and the 10th percentile for reading comprehension. In math, the Student scored in the 14th percentile for math index, the 14th percentile for applied problems, and the 16th percentile for calculation. The Student's written language index was scored in the 25th percentile.
5. The most recent Functional Behavioral Assessment ("FBA") was also completed in May 2019; however, at that time, the Parents expressed concerns about the FBA's accuracy due to the limited number of

observations of the Student that were conducted prior to May 2019.² The FBA noted that the Student's disruptive behavior in the classroom appeared to be an effort to be more disruptive than █ peers or an attempt to make █ peers laugh. Additionally, the FBA recognized the Student's motivation to disrupt the classroom in order to maintain control, even when adults were making reasonable requests of the Student.

6. The FBA was used to create a Positive Behavioral Support Plan ("PBSP") for the Student, which originally came into effect on June 14, 2019. The PBSP has been amended multiple times since its original implementation, with the most recent amendment occurring on November 29, 2019.
7. The Student's most recent Individualized Education Program ("IEP"), dated January 14, 2019, and amended on June 14, 2019, August 26, 2019, October 22, 2019, and November 26, 2019, requires 30 minutes per week of Specially Designed Instruction in literacy (reading and writing), 30 minutes per week of Specially Designed Instruction in math, 30 minutes per week of Speech/Language Services, 30 minutes per month of Speech/Language consultation, 30 minutes per week of Social Services, and Extended School Year ("ESY") Services. █ IEP specifies that the Student currently spends 94.5% of █ educational time with non-disabled children.
8. The Student's IEP also requires a number of supplementary aids and services, including, but not limited to, 1:1 adult support throughout █ day, a PBSP, frequent supervised motor breaks, extended time for work, separate break locations, and visual aids.
9. The most recent IEP is markedly different than the IEP the Student had when █ entered the Charter School from the day treatment program in February of 2019. █ prior IEP noted that the Student's social communication, language processing, and executive functioning skills were inadequate to navigate academic expectations, make or maintain friends, or to avoid unnecessary conflict. The Student's IEP from █ day treatment program contained the following: Specially designed instruction for 29.5 hours each week, social work services for 30

² See paragraph 21 below for more information about updates to the Student's FBA that have occurred during the 2019-2020 school year.

minutes each week, and speech and language consultation for 60 minutes each month, and ESY services. Due to [REDACTED] placement in a day treatment program, the Student spent 0% of [REDACTED] educational time with non-disabled peers.

10. In July 2019, the school administration and staff discussed an Accountability Plan for the Student. The Student's plan was not completed during the IEP team process. School staff stated that accountability plans are used with various students at the Charter School in order for students to be more supported in becoming responsible for their actions and learning. The Student's Accountability Plan involved the Student taking responsibility for using harassing and sexually charged language with peers and staff. Citing concerns about the potential impact of this Accountability Plan, the Student's parents did not send the Student to ESY programming in 2019. Complaint Investigation Report #20.007C found that any Accountability Plan developed by the Charter School for the Student must be created and refined within the IEP team process.
11. The Parent's feel that the Student's inappropriate verbal interactions are part of [REDACTED] disability and that [REDACTED] need for instruction in social skills are not being met by the school.
12. The IEP team met on August 26, 2019, prior to the start of the 2019-2020 school year. According to Written Notice, a number of important amendments were made to the Student's IEP, including adding bi-polar disorder to the Student's multiple disabilities eligibility and adding specially designed math instruction back into the Student's IEP.
13. The Parents indicated during an interview with the complaint investigator that the Student was having significant difficulty adjusting to new medications over the summer months after a new diagnosis with bi-polar disorder in July 2019.
14. School staff reported to the complaint investigator that the Student began the 2019-2020 school year with significantly fewer behavior challenges than [REDACTED] ended the previous school year with. The Student still struggled with a number of interfering behaviors, such as inappropriate sexual behaviors and harassing comments directed at peers and school staff. Nevertheless, during the first few weeks of the school

year, the Student was generally able to be successfully redirected by [REDACTED] 1-1 Educational Technician, by another staff member, and/or through the use of [REDACTED] PBSP.

15. Unfortunately, after a few weeks into the 2019-2020 school year, the Student's disruptive behaviors became more significant, and all staff members interviewed reported that the Student had become increasingly non-compliant, defiant, aggressive, disengaged, and dysregulated. The most challenging behaviors continued to be: the use of explicit sexualized language directed at students and staff; the use of explicit sexualized gestures and vocalizations; and addressing students and staff with demeaning language that targeted marginalized racial or other minority groups.
16. The Student has also expressed pervasive discontent with [REDACTED] Charter School environment to school staff, to [REDACTED] peers, and to [REDACTED] Parents. The Student has repeatedly requested to go to another school, to get rid of [REDACTED] 1-1 Education Technician, to have a shortened school day, and to receive tutoring services outside of school. The Parents believe that these requests have been fueled by the Charter School staff's choices to inappropriately discuss alternative educational options with the Student outside the presence of the parents and outside the IEP team process. The Charter school staff consistently and independently reported that the Student repeatedly asks them questions about [REDACTED] educational options because [REDACTED] is unhappy at the Charter School. The staff members explained that they engage with the Student in these conversations only to the extent required to communicate empathy and support for the Student's needs.
17. Although the Student's PBSP offers [REDACTED] the opportunity to earn rewards of [REDACTED] choosing, such as free time outside or social time with a peer, the Student has rarely earned rewards. Additionally, there has been an ongoing disagreement during the 2019-2020 school year between Charter School staff and the Parents about which rewards should be implemented as part of the PBSP.
18. All Charter School staff interviewed by the complaint investigator demonstrated a high degree of familiarity and fluency with the Student's current PBSP, including the Student's Daily Point Sheets and Daily Behavior Summary Sheets. All school staff and administrators

confirmed that the PBSP, in its various iterations, has been used every day since the start of the 2019-2020 school year, in every educational setting. The Student's Daily Point Sheets and Daily Behavior Summary Sheets have been shared with the Student's parents on a daily or weekly basis.

19. The Student's Speech/Language Pathologist noted during an interview with the complaint investigator that the Student seems disconnected from and unmotivated by the rewards offered by ■■■ PBSP. The Student's Certified Special Education Teacher agreed that the Student is not actively participating in ■■■ PBSP, and the Student is only willing to engage in academic work about 50% of the time. The Student's 1-1 Educational Technician explained that the Student's behaviors have escalated throughout the school year, yet she always aims to "hit the reset" button every day to give the Student a new opportunity to engage with the PBSP and earn a possible reward.
20. The Parents have expressed three major concerns with respect to the Student's PBSP. First, the Parents reported that the PBSP is being implemented without rewards. Second, the Parents reported that the PBSP is being implemented improperly because the school staff repeatedly fails to recognize and record the misbehavior of the Student's peers, which precipitates the Student's disruptive behaviors. Finally, the Parents have alleged that various Charter School staff members are either making mistakes or being intentionally dishonest with respect to the information on the Student's Daily Point Sheets.
21. At the request of the Parents, the psychologist who conducted the FBA completed four additional observations of the Student at different times of the day and in different classroom settings in September and October 2019. According to Written Notice, an updated FBA was reviewed by the IEP team on October 22, 2019, and changes were made in the Student's PBSP to reflect the new recommendations. One notable change is that the Student now has two opportunities to earn a reward – first for ■■■ behavior in the morning, and then again for ■■■ behavior at the end of the school day. Shortly after the October 22, 2019 IEP meeting, the Charter School staff began using revised PBSP tracking sheets.

22. During the October 22, 2019 IEP team meeting, new speech and social work goals were adopted to reflect the Student's needs, and the IEP team revised the Student's transition plan. Due to behavioral data indicating high levels of non-compliance with adult directives and other behavior concerns, the IEP team also discussed possible alternative locations for the Student to work without distractions from peers. The team agreed that the Student could access quiet work spaces at Southern Maine Community College ("SMCC"), which is located within walking distance from the Charter School. The IEP team agreed that the Student could go to SMCC with ■ 1:1 Educational Technician (or another staff member) if the Charter School staff believed it would be beneficial for the Student.
23. Prior to the completion of the meeting, the IEP team was forced to adjourn at 5:45pm on October 22, 2019 due to a number of participants needing to leave, including the Student's mother and Student's case worker. Due to difficulties with scheduling (the Student's parents and the Student's case worker were unavailable to meet earlier than 4:30pm on any given day), the next IEP team meeting could not occur until November 26, 2019.
24. Prior to the IEP meeting on October 22, 2019, there had been a disagreement between the Special Education Director and the Parents about whether an Education and Human Resources Specialist from Drummond Woodsum law firm would attend the IEP meeting. The Parents were not provided with 7 days notice of the specialist's attendance, and they objected to her presence. The Parents also felt that the specialist's connection to the Charter School's law firm was inappropriate, particularly because the connection was not disclosed to them by the Charter School's Special Education Director. Instead, the specialist was described to the Parents by email as a "facilitator." As a result of this dispute, the Education and Human Resources Specialist from Drummon Woodsum law firm did not attend the IEP meeting on October 22, 2019 (nor did she attend the following IEP meeting on November 26, 2019).
25. On October 29, 2019, multiple children at the Charter School reported a rumor to the Head of School. The rumor alleged that the Student had threatened to bring a gun to school the next day. The Head of School promptly investigated the rumor; he determined the story to be false

almost immediately. Out of an abundance of caution, the Head of School reported the rumor to the local police, and he contacted the Parents.

26. The local police investigated the rumor immediately. The Student and ■ parents cooperated fully with the investigation, and the local police also promptly determined that the rumor was unfounded. The Student was never disciplined with respect to the rumor, and the Head of School remains certain that the rumor was false. The Head of School was unable to accurately pinpoint the person or persons who initiated the rumor, and as a result, none of the Student's peers have been disciplined for initiating and/or spreading this false rumor about the Student.
27. Based on a request from the Head of School on October 29, 2019, the Student's parents agreed to keep the Student home from school the next day, on October 30, 2019.
28. An IEP team meeting was not convened at this time to discuss any change in placement or programming for the Student, and no Written Notice was issued. Nevertheless, on October 31, 2019, the Student did not return to ■ Charter School program. Instead, the Student was educated separately from ■ peers at SMCC primarily by ■ 1-1 Education Technician (or by other staff members, including ■ Certified Special Education Teacher, who visited him at SMCC). The Student continued to receive ■ education in isolation from ■ peers at SMCC until December 2, 2019.
29. The Charter School and the Parents disagree about whether there was an agreement to educate the Student at SMCC from October 31, 2019 to December 2, 2019. The Parents reported to the complaint investigator that they initially acquiesced to the Student's placement at SMCC on October 31, 2019 because they were offered no other options. The email communications during this time period between the Head of School and the Parents suggest that the Parents were, at times, willing to keep the Student at SMCC because ■ safety could not be assured at the Charter School. However, simultaneously, the Parents were increasingly concerned about their ■ isolation, ■ lack of access to ■ full educational program, and ■ perception that he was being punished for a false rumor. The Parents also expressed deep frustration that the Head

of School was unable to assure the Student's safety at the Charter School.

30. The Parent filed the present complaint with the Maine Department of Education on November 20, 2019.
31. The Student began transitioning back to the Charter School environment on November 22, 2019, but the Student did not return to [REDACTED] full regular schedule at the Charter School until December 2, 2019.
32. Transportation services are not provided as part of the Student's IEP. During the time when the Student was educated at SMCC, the Student's parents provided transportation for the first six school days. After that, Charter School staff provided transportation for an additional 8 school days. The Student began riding the Charter School bus again on December 2, 2019.
33. While the Student was being educated at SMCC, the Charter School administration and staff took multiple steps to address and dispel the false rumor within the school community. First, the Head of School spoke to individual students, their families, and the police. On October 29, 2019 at 5:51pm (just hours after the rumor was reported to him), the Head of School sent an email to the Charter School's students, staff, and families, stating: "We have investigated [the safety concern] thoroughly and have determined that it was based on an unfounded rumor." The Head of School never described the specific rumor in this email communication or in any later communications, nor did he share the Student's name. The Head of School later explained to the Parents that he hoped to avoid spreading the false rumor further by leaving out the specific details.
34. Later the same evening, on October 29, 2019 at 9:53pm, the Head of School sent a second email to the Charter School's students, staff, and families, stating that it was safe to come to school the next day and that the local police would be present on campus to make everyone feel as safe as possible. The email stated, "We have addressed [the safety concern] appropriately."
35. On November 1, 2019, the Charter School's "Weekly News and Notes," addressed the incident again, emphasizing that: 1) it is always

appropriate for students to report safety concerns, but 2) once those concerns have been reported, rumors should not be spread on social media. The note continued, “Not only can this cause potentially unfounded rumors and fear to spread, but it can cause actual harm.”

36. The Head of School also worked with Charter School staff to develop specific talking points about the rumor for discussion on November 5, 2019 during “crews,” which is similar to a homeroom setting. The talking points focused on two main messages. First, staff members were asked to emphasize that the rumor was untrue and unfounded; second, staff members were told to remind students that spreading a false rumor makes the community less safe for everyone.
37. On November 8, 2019, the Charter School hosted the local police department for a community-wide discussion about the false rumor. The police reemphasized the fact that the rumor was unfounded, and the police explained that social media conversations were creating a significant problem in the community.
38. The Parents remain deeply dissatisfied by the Charter School’s response to the rumor. They believe the Head of School never *directly* communicated that the rumor was false, which allowed the rumor to continue to circulate and to gain momentum. In the weeks following October 29, 2019, the false rumor was spread throughout the Student’s hometown, and the rumor made it to both of the Parents’ workplaces.
39. By email to the Parents on November 21, 2019, the Head of School offered to send another letter to the school community, re-emphasizing again that the rumor was unfounded. By then, Parents felt too much time had passed for such a letter to be productive. The Head of School also offered to bring in an outside facilitator into the Charter School to support a restorative activity for the school community, but the Parents also declined this suggestion.
40. None of the Charter School administrators or staff who were interviewed by the complaint investigator reported witnessing bullying of the Student, related to the October 29, 2019 rumor or otherwise. However, all of the staff members interviewed by the complaint investigator noticed that the Student has experienced increased social isolation and ostracization after returning to the Charter School on December 2, 2019.

The Charter School staff members believe that the Student's social isolation is not solely the result of the rumor from October 29, 2019, but rather, the Student's ostracization seems to be the result of a series of events where the Student has engaged in bullying, harassing, and objectionable behavior towards [REDACTED] peers and towards staff members. As some of the Charter School staff members described, the rumor on October 29, 2019 seemed to be the last straw for some of the Student's peers. As a result, some students still choose to believe the October 29, 2019 rumor, despite being told repeatedly by the Charter School staff and the police that the rumor is untrue.

41. On November 26, 2019, the IEP team met again and made various amendments to the Student's IEP. The team agreed to make a number of changes to the Student's PBSP, including adding a section on the Daily Points Sheets for staff members to note a description of the environment when a disruptive behavior occurs. The IEP team also agreed to formally add SMCC as an accommodation to the Student's IEP as an alternative place for quiet study.
42. Near the end of the school day on December 10, 2019, after being antagonized by a peer, the Student used inappropriate and discriminatory language in the school hallway. The language used by the Student falls under the section of [REDACTED] PBSP regarding, "Disrespecting boundaries and the civil rights of others (i.e. harassment based on socioeconomic status, race, gender, religion, sexual orientation)." When prompted to stop by numerous staff members, the Student continued. When [REDACTED] Certified Special Education Teacher asked him to stop, the Student directed the same offensive language directly towards that teacher, in a harassing manner. In line with the Charter School's discipline policies and in line with the language in the Student's PBSP, the Student received an in-school suspension for the following day. The next school day was an early release day, so the Student served [REDACTED] in-school suspension in a quiet study area at the Charter School for approximately 2 hours and 45 minutes. Despite numerous other reported behavior issues at the Charter School, this is the only occasion during the entire 2019-2020 school year where the Student has been suspended.
43. During an interview with the complaint investigator, the Parents expressed concern about the December 10, 2019 suspension. The peer who antagonized the Student on December 10, 2019 was not suspended,

despite the fact that the peer also used profanity and demeaning language directed at the Student. The Parents feel that the Student is being targeted and discriminated against by the Charter School's administration.

44. The Head of School, however, explained that the Student's December 10, 2019 suspension was necessary because of the particular language that the Student used, which was specifically discriminatory and harassing based on the civil rights of others regarding sexual orientation. Due to that distinction in the Student's language choice and due to the fact that the Student was given multiple prompts in an effort to redirect the Student, the Head of School determined that the an in-school suspension was an appropriate consequence for the Student, yet not an appropriate consequence for the peer who antagonized the Student.
45. The Student's Certified Special Education Teacher reported to the complaint investigator that she has delivered specially designed instruction ("SDI") to the Student for the entirety of the 2019-2020 school year, both in a separate classroom and in the general education setting. She continued to deliver SDI during the time period when the Student was educated exclusively at SMCC. The Special Education Teacher estimates that the Student receives significantly more hours of SDI per week than is called for by [REDACTED] IEP because she works with the Student for two hours per week during a supported study period. During Trimester 1, the Student also received support during [REDACTED] financial literacy class. During Trimester 2, the Student now receives support in [REDACTED] food science course, and [REDACTED] Special Education Teacher also teaches the Student's English course.
46. The specific content of the Student's SDI is less clear. The Parents reported that, despite repeated requests, the Charter School staff has been unable to provide examples of the SDI that the Student receives. School staff acknowledged during interviews with the complaint investigator that they do not prepare specifically designed lesson plans to meet the Student's individualized needs. Instead, the staff shared examples of graphic organizers that were utilized to assist the Student with writing prompts, as well as an individually-crafted writing outline template to narrow the focus of the Student's senior paper. The Charter School staff also explained that the Student occasionally needs help

breaking down specific components of ■■■ classroom assignments. School staff universally expressed a belief that the Student is capable of completing both math and writing assignments successfully but that the Student is not motivated to do so.

47. The Student's attendance records indicate that the Student is regularly picked up from school early by ■■■ parents. These early dismissals have occurred with even greater frequency since October 29, 2019. The Charter School staff and administration explained to the complaint investigator that the Student is not being asked to leave school on those occasions. However, when the Student becomes dysregulated, ■■■ often calls ■■■ parents and demands to be picked up from school. At times, when the Student has been dismissed from school early by ■■■ parents, the Student missed ■■■ scheduled SDI or other services provided for in ■■■ IEP, such as Speech/Language services and Social Work services. Similarly, when the Student is dismissed from school early, ■■■ loses the opportunity to fully engage with ■■■ PBSP.

Other relevant facts are included in the determinations below.

VI. Determinations

- A. The school staff and administration have not followed the Student's positive behavioral support plan. MUSER IX(3)(C)(2)(a). **COMPLIANCE FOUND.**
- B. The Student's behavioral needs have not been addressed and have prevented the Student from accessing ■■■ education in order to advance appropriately toward ■■■ annual goals. MUSER IX(3)(C)(2)(a). **COMPLIANCE FOUND.**

The first two allegations are connected, and they will be addressed together. The prior due process case, Complaint Investigation Report #20.007C, investigated an allegation by the Parent that the Student's IEP Team had not considered the use of positive behavioral interventions and supports, and other strategies to address the Student's behavior. Specifically, the prior complaint alleged that the school had not created a behavioral plan for the Student that addressed ■■■ needs. On September 20, 2019, the Charter School was found to be acting *in compliance* with MUSER IX(3)(C)(2)(a) & MUSER IX(3)(C)(2)(b). Therefore, with respect to these two allegations regarding the Student's PBSP and the Student's behavioral needs, the present complaint will look at the period of time from September 20, 2019 to present.

Children in Maine, ages birth to twenty who have disabilities, may not be excluded from the benefits of services to which they are entitled under the IDEA. 34 CFR 300.34; MUSER XI. The Department of Education shall ensure the provision of appropriate services regardless of the nature and severity of the child's disability of developmental delay. MUSER I(2).

In the present complaint, the Student's extensive behavioral needs are well documented in [REDACTED] IEP and in [REDACTED] educational assessments. In particular, the Student's need for constant negative reinforcement is a function of [REDACTED] disability that is well documented in the IEP and previous FBAs. MUSER IX(3)(C)(2)(a) requires the IEP team to consider certain special factors. Particularly, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."

The Department notes that the Student's actions in the school have created an unhealthy environment for both the Student and [REDACTED] peers. The Student's racist and sexual comments have had an extremely negative affect on the Student's own learning, peers' responses to the Student, and the school climate. Despite these obstacles, the Charter School has taken a great deal of care to consider the use of positive behavioral interventions and strategies to address the Student's behavior and communication needs. During interviews, Charter School staff consistently and accurately referenced the Student's PBSP, demonstrating a school-wide practice of an individualized approach to the Student's behavioral needs. At the request of the Parents, the FBA which was originally completed in May 2019, was updated with additional observation data in September and October 2019. The IEP team then met with the evaluator, reviewed the amended FBA, and made amendments to the Student's PBSP based on that new data in both October 2019 and November 2019.

The Parents have expressed concerns that the Charter School is implementing the PBSP solely as a means of discipline, without the use of positive rewards. However, the Student has been able to access rewards of [REDACTED] choosing during the entirety of the 2019-2020 school year, such as free-time outside or social time with a peer. Furthermore, after the September 20, 2019 Department rulings, the Charter School has not attempted to implement an Accountability Plan for the Student outside the IEP process.

Additionally, due to concerns by Charter School staff that the Student is not motivated sufficiently by the particular rewards offered by the PBSP, the Charter School has proposed that additional positive rewards be considered. As demonstrated by their email communications with the Charter School staff, the Parents have been reluctant to approve the addition of any new rewards to the PBSP. Notably, after discussing the fact that the Student has not been regularly successful in earning rewards through [REDACTED] PBSP and after receiving new data from the updated FBA, the IEP team amended the Student's PBSP on October 22, 2019 to allow the Student to have two opportunities each day to earn positive rewards.

The Parents have also expressed repeated concerns that the PBSP is not being implemented properly by Charter School staff because the Student's Daily Point Sheets and Daily Behavior Summary Sheets only identify the negative behaviors of the Student, without noting the contributing behaviors of the Student's peers that precipitate [REDACTED] disruptive conduct. Similarly, the parents have asserted that the Charter School staff members make frequent mistakes on the Student's Daily Point Sheets and/or intentionally record inaccurate information on the Student's Daily Point Sheets in a discriminatory fashion

Review of regular email communications between the Parents and the Charter School staff reveals that the Charter School staff has been readily available to the Parents for detailed discussions about the environmental influences on the Student's disruptive behavior. The Head of School has been responsive to the Parent's requests for more information about individual behavioral disruptions. On November 29, 2019, at the request of the Parents, the IEP team made further amendments to the PBSP, allowing for additional, designated space on the Student's Daily Point Sheets for a description of the environment when the Student's disruptive behaviors occur.

Finally, there is no basis for the complaint investigator to conclude that the Charter School staff has been dishonest or inaccurate in their observations of the Student's behavior. To the contrary, the Student's teachers appeared to be fully committed and invested in the Student's educational success. The Student's Daily Point Sheets and Daily Behavior Summary Sheets also indicate that the Charter School staff have been diligent and professional in implementing the Student's PBSP.

The Parents also raised a concern about the Charter School staff repeatedly discussing options for the Student's educational program with the Student, outside of the presence of the parents or the IEP team process. The Parents believe that these conversations have undermined the PBSP and the Student's educational program because it has caused the Student to disengage, to fixate on other educational options, and to become dysregulated at school. Specifically, the Parents assert that the Student's Speech/Language Pathologist, the Student's Social Worker, and the Student's 1-1 Educational Technician have all communicated with the Student about other options for [REDACTED] educational programming, such as other schools or an abbreviated school schedule.

Based on interviews and documents provided by the Charter School, the staff credibly and consistently explained to the complaint investigator that the Student, who is 18 years old and increasingly frustrated by [REDACTED] social isolation at the Charter School, has presented questions to them about [REDACTED] educational options due to the Student's dissatisfaction. The staff members have responded to the Student's questions in an effort to show empathy and support for the Student's concerns. There is no evidence to suggest that the Charter School staff has undermined the Student's PBSP or educational program by offering the Student suggestions about leaving the Charter School's program.

As a result, the Charter School has complied with law and regulation regarding these allegations.³

- C. The school staff and administration have not implemented the Student's IEP with respect to Specially Designed Instruction. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

Complaint Investigation Report #20.007C also investigated an allegation by the Parent that the Student did not receive specially designed instruction in reading, writing, and math, as specified in the IEP. On September 20, 2019, *non-compliance* was found with respect to MUSER IX(3)(B)(3), and corrective action was ordered. Therefore, the present complaint will look at the period of time from September 20, 2019 to present.

MUSER II(37) defines special education as follows:

Special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability...Special education includes each of the following if the services otherwise meet the requirements of the first paragraph: speech-language pathology services, travel training, and vocational education. Special education does not include general education procedures that are a part of formal general education intervention as elsewhere referenced in these rules.

Id. (internal citations omitted).

Despite the finding of *non-compliance* in September 2019, the Charter School appears to have made few changes with respect to the delivery of the Student's specially designed instruction.

The Charter School staff stated that the Student was receiving [REDACTED] specially designed instruction for academics both in a special education setting and within the general education classroom. The Student's schedule demonstrates that [REDACTED] receives academic instruction in a special education setting for at least two hours per week during [REDACTED] supported study period. Additionally, the Student receives support from [REDACTED] Certified Special Education Teacher in multiple general education classes. However, Charter School staff did not explain how specially designed academic instruction was given or

³ The Parents also raised a concern that the Charter School did not properly administer the Student's medications 4 out of 5 school days during the week of October 7, 2019, which impacted the Student's behavior and prevented him from accessing [REDACTED] educational programming. While the Parent's concern is likely accurate, the Charter School quickly addressed the medication administration issues. Therefore, considering the entirety of the time when the Student was attending school during the 2019-2020 school year, the school has complied with MUSER IX(3)(C)(2)(a).

how the instruction was individualized to meet the Student's academic needs. Rather, staff indicated that the extra academic support the Student was given equaled specially designed instruction. For example, Charter School staff shared examples of blank graphic organizers and individualized writing outlines that were provided to the Student to access and break down █ curriculum. Yet, the Charter School staff could not clearly produce for the Parents or clearly articulate during interviews how individualized academic instruction was delivered through special education services.

With respect to mathematics, in August 2019, the IEP team added 30 minutes per week of specially designed math instruction back into the Student's IEP. Still, Charter School staff explained that the Student was relatively strong in █ math skills, and if motivated to work, █ could access the general math curriculum with the support of a teacher who could break the problems into chunks or break the process into multiple steps. While the Student is clearly in need of this additional academic support, extra academic support does not equate to specially designed math instruction.

The Charter School has not complied with special education law and regulation regarding this allegation.⁴

- D. The school staff and administration subjected the Student to disciplinary procedures in a different manner or for a different duration as the procedures would be applied to a child without disabilities. MUSER XVII(1)(C); MUSER I(2). **COMPLIANCE FOUND.**

Complaint Investigation Report #20.007C investigated multiple allegations related to the Charter School's use of disciplinary procedures. Specifically, Complaint #20.007C considered whether the Charter School's creation and implementation of an individualized Accountability Plan outside the IEP process was a violation of MUSER. On September 20, 2019, the Department determined that the appropriateness of an Accountability Plan must be considered within the IEP team, within the context of the Student's IEP. Therefore, with respect to this allegation regarding the Charter School's disciplinary practices with respect to the Student, the present complaint will look at the period of time from September 20, 2019 to present.

Districts may discipline students who receive special education and related services. The IDEA and MUSER provide specific procedures for disciplinary actions that create a change in placement, such as long-term suspensions and expulsions. See MUSER XVII(1). If a child with a disability violates the school code, and that violation is determined *not* to be a manifestation of the child's disability, the District may apply discipline in "the same manner and for the same duration as the procedures would be applied to children without disabilities." MUSER XVII(1)(C).

⁴ The Student's excessive early dismissals from school undoubtedly impact the Student's ability to receive the current benefits of █ programming, including █ SDI.

Although the Parents have expressed concern about the Student's in-school suspension being unfairly applied on December 10, 2019, the due process complaint process established by the IDEA and MUSER does not include a review of a school's individual disciplinary actions. Here, the Charter School has not subjected the Student to disciplinary removals in excess of 10 school days during the 2019-2020 school year, and thus, the manifestation determination process outlined by MUSER XVII has not been triggered. There is no evidence to find that the Charter School violated regulatory requirements in administering disciplinary procedures to the Student.

- E. The Student's removal from school constituted a disciplinary change of placement for which no manifestation determination review was held. MUSER XVII(1)(E).
NO FINDING.

Because this allegation refers specifically to the Student's removal from the Charter School between October 29, 2019 and December 2, 2019, the timing of the prior due process matter, Complaint Investigation Report #20.007C, has no impact on this allegation.

The parties agree that the Student's removal from school following the rumor on October 29, 2019 was not due to a disciplinary change of placement, formal or informal. In fact, it was clear almost immediately to the Head of School that the Student did not engage in any misconduct. Although the Student was asked to remain home from school on October 30, 2019, the Head of School insisted that this was not a disciplinary action or a suspension. The local police also verified on October 29, 2019 that the Student made no threat, and the rumor was indeed, false. As such, this allegation of a "disciplinary change of placement" does not apply to the facts of this complaint, and no finding is made. Instead, the Student's change of placement, which occurred outside the IEP process will be analyzed as an ancillary issue to the next allegation below.

- F. The Student was not educated in the least restrictive environment (LRE) when he received tutoring services at Southern Main Community College. MUSER X(2)(B). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

Ancillary Issue: Decisions about educational services and placement occurred outside the IEP team process. MUSER VI(2)(I). Specifically, the Student's placement was changed to a full-day tutoring program at SMCC outside of the IEP team process. **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

Because these allegations refer specifically to the Student's removal from the Charter School between October 29, 2019 and December 2, 2019, the timing of the prior

due process matter, Complaint Investigation Report #20.007C, has no impact on these allegations.

MUSER VI(2)(I) outlines the IEP decision making process:

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 children'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."

Id.

In *Endrew F. v. Douglas Cty. Scho. Dist.*, 137 S.Ct. 988 (2017), the Court found that an IEP must be created in such a way that the Student is able to make progress in accordance with [REDACTED] own unique needs. Id. at 999. The IEP team is tasked with considering the child's academic growth, the child's progress towards grade-level proficiencies, the child's behaviors that may interfere with their growth, and additional information and input provided by the child's parents. See MUSER V(2)(B); MUSER VI(2)(J).

In the present complaint, there is no dispute that the Student was removed from [REDACTED] regular educational setting at the Charter School and provided with tutoring at SMCC following the rumor on October 29, 2019 until December 2, 2019. The Student primarily received tutoring from his 1-1 Educational Technician, and the Student's Certified Special Education Teacher also visited the Student at SMCC to provide instruction. The Student continued to receive Speech and Language services and Social Work services while at SMCC.

Although the Charter School argues that the Student's programming at SMCC was a "mutually agreed upon temporary arrangement to provide an opportunity for emotions to cool on all fronts," the Charter School concedes that this decision was made outside the IEP team process. Additionally, the Charter School agrees that no Written Notice for the change in placement was provided as required by MUSER IX(3)(C)(4).

The Parents dispute the fact that tutoring at SMCC was an agreed-upon arrangement. Instead, the Parents state that they initially acquiesced to the Student's placement at SMCC on October 31, 2019 because they were offered no other options. The email communications during this time period between the Head of School and the

Parents suggest that the Parents were, at times, willing to keep the Student at SMCC because [REDACTED] safety could not be assured at the Charter School. However, simultaneously, the Parents were increasingly concerned about their son's isolation, [REDACTED] lack of access to [REDACTED] full educational program, and [REDACTED] perception that he was being punished for a false rumor.

The dispute between the Charter School and the Parents about whether the placement at SMCC was mutually agreed-upon underscores the purpose for the IEP Decision-Making process as outlined in MUSER VI(2)(I). Because there was no IEP team meeting, there was no mechanism for the various IEP team members to assess whether the tutoring placement at SMCC was designed based upon the Student's unique needs, there was no conversation about how and when the Student could access [REDACTED] peers, and no opportunity to consider additional services that the Student might require at SMCC to achieve [REDACTED] education goals. Additionally, there was no formal means for the Parents to present as equal partners in the decision about the Student's placement or in the discussion about whether tutoring at SMCC constituted the Student's least restrictive environment. Importantly, there was no Written Notice, which would have allowed the Parents to voice an objection or note their agreement, depending on the outcome of the IEP discussion.

Tutorial instruction is not to be used to replace specialized instruction to students with disabilities. See MUSER VI(2)(L). The Department issued guidance about tutoring on November 17, 2017: "When students are out of school because of discipline, an abbreviated school day, or medical reasons, tutoring may be provided as a short-term measure to ensure that students receive instruction. Tutoring is not specially designed instruction. Schools should make every effort, including re-entry plans and proposals for definitive placements, to ensure that students with disabilities are enrolled and attending school." *Tutoring for students who receive special education*, available at <https://mainedoenews.net/2017/11/15/tutoring-for-students-who-receive-special-education/>.

Additionally, the IDEA only contemplates an "interim alternative education setting" after a child has been disciplined or after a child faces a medical issue. See 34 CFR 300.530; 34 CFR 300.531; MUSER XVIII(1)(B, G); MUSER XVII(2). In this Student's case, the Charter School did not offer tutoring to the Student because of discipline or a medical reason. The documentation also does not show that the District offered tutoring because of an abbreviated school day.⁵

⁵ As noted above, there is no documentation that the Student's IEP team met or discussed the change in the Student's educational placement following the rumor on October 29, 2019. Even if the Student's educational needs warranted an abbreviated school day and/or tutoring, the IEP team did not document the regulatory compliance: addressing how the Student would meet learning results and access the general curriculum and IEP; developing a plan to return to a full-time school day as soon as possible; or documenting the basis for the determination of an abbreviated school day and/or tutoring based on the Student's individual needs. MUSER VI(2)(L).

Children with disabilities must be educated in the least restrictive environment, with children who are not disabled, in a regular education environment, to the maximum extent appropriate. 34 CFR 300.114; MUSER X(2)(B); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir., 2004). MUSER X(2)(B) elaborates further:

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 education environment shall occur only when the nature and 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.

Id.; 20 USC §1412(a)(5); 34 CFR 300.114.

The mandate for the least restrictive environment has been described by the U.S. Supreme Court as “embodying a ‘preference’ for ‘mainstreaming’ students with disabilities in ‘the regular classrooms of a public school system.’” *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621 (1st Cir. 2019) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202-03 (1982)). See *Andrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017). Nonetheless, the IDEA's preference for mainstreaming “is not absolute.” *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014).

Children with disabilities are entitled to access a continuum of alternative placements that are available to meet a child’s special education needs. 34 CFR 300.551. The placement decision must be based upon the child’s IEP and must be as close as possible to the child’s home. 34 CFR 300.552; MUSER X(2)(B).

In the present complaint, the Student was removed from [REDACTED] educational placement where [REDACTED] previously spent 94.5% of [REDACTED] educational time with non-disabled children to an entirely restrictive setting where he spent 0% of [REDACTED] educational time with any peers at all. This placement change occurred outside of the IEP team process, without regard for regulatory compliance for tutorial instruction arrangements, and without consideration of the Student’s individual educational needs or consideration for his LRE. As a result, the Charter School did not comply with law or regulation regarding these allegations.

G. The Student did not receive transportation for a period of approximately two weeks during the 2019-2020 school year. See MUSER XI, “Related Services.”

NO FINDING. NO DENIAL OF FAPE FOUND.

The issue of transportation was not raised during Complaint Investigation #20.007C. Therefore, the present complaint investigation considers the time period from November 20, 2018 to present.

At no point during the Student's enrollment at the Charter School has transportation services been included as a related service in the Student's IEP. At the November 26, 2019 meeting, the IEP team discussed transportation services and determined that the Student does not require specialized transportation to access [REDACTED] programming. Because transportation falls outside the scope of the Student's IEP, the transportation arrangement between the Parents and the Charter School between October 29, 2019 and December 2, 2019 is not governed by MUSER. Therefore, evidence gathered in this investigation does not support a finding for this allegation.

- H. The school staff and administration have not taken prompt and appropriate action in response to incidents of bullying, which has affected the Student's ability to access a free appropriate public education. MUSER I(2); MUSER II(13); 34 CFR 300.101(a). **NO FINDING. NO DENIAL OF FAPE FOUND.**

Complaint Investigation Report #20.007C investigated an allegation by the Parent that the Student was the target of bullying such that it affected the Student's ability to access a free appropriate public education. On September 20, 2019, the Department found *no finding* and *no denial of FAPE* on this allegation with respect to MUSER I(2); MUSER II(13); 34 CFR 300.101(a). Therefore, with respect to this allegation regarding the Charter's school's response to bullying, the present complaint will look at the period of time between September 20, 2019 and the present.

As evidenced by email communications between the Parent and the Head of the School, the Charter School has been responsive and proactive about addressing allegations of bullying against the Student during the 2019-2020 school year. A few examples are included here for illustration of the open line of communication between the Head of School and the Parent.

In September 2019, the Parent emailed the Head of School about a peer who was allegedly smiling and staring at the Student, while laughing with other peers. The Head of School offered to speak to the peer individually, but the Parent declined an invitation for the Head of School to meet with the Student and the peer together to mediate the disagreement.

In October 2019, the Parent raised a concern about Charter School staff using the term "SPED" to refer to Special Education students. Although the Student was not offended by the terminology, the Parent felt that the term was derogatory and harmful to the larger school community. The Head of School addressed the issue with Charter School staff, and he agreed with the Parent that jargon needs to be abandoned and updated as soon as it becomes hurtful or demoralizing.

Later in October 2019, the Parent raised a concern about a conflict at school between the Student and multiple peers. The Head of School emailed the Parent with a detailed description of the events that took place and a description of the Charter School's

disciplinary response towards all three individuals who were involved, including the Student.

Each of these incidents was handled professionally and directly by the Head of School, and there is no further email communication between the Head of School and the Parent to suggest that the Charter School's actions did not appropriately and proactively address each allegation of bullying.

The most serious incident of bullying against the Student relates to the false rumor that was spread on October 29, 2019. Although the false rumor has deeply impacted the Student and his family, the interviews and documents reviewed by the complaint investigator establish that the Charter School took prompt and appropriate action when faced with a safety concern.

The Head of School's first email communication to students, staff, and families was sent just hours after the October 29, 2019 rumor was reported to him. The first communication was clear and definitive, stating that the safety concern was "based on an unfounded rumor." The subsequent communications from the Head of School were designed to directly target the ongoing nature of the rumor, specifically instructing students and family not to spread rumors on social media. The Charter School involved the local police, both to investigate, dispel, and monitor the rumor, and the police spoke directly to the student community on November 8, 2019 in an attempt to confirm that the rumor was false and to stop the social media uproar that followed the false rumor.

Understandably, the Parents remain deeply dissatisfied because the October 29, 2019 rumor has severely and negatively impacted their lives and their [REDACTED] life. However, the Head of School's attempts to address the problem further by sending another communication or by engaging in a restorative justice activity at school were not appealing to the Parents, largely due to the Parents' fear that further attention to the rumor would simply make things harder for the Student.

In conclusion, the evidence gathered in this investigation does not support a finding for this allegation.

- I. The school staff and administration did not provide advanced written notice about whether an attorney was present at an individualized education program team meeting; specifically, the Student's parents were not notified that a representative from the school's attorney's office was present at an IEP team meeting. MUSER VI(2)(A). **NO FINDING. NO DENIAL OF FAPE FOUND.**

This allegation refers specifically to the IEP team meeting on October 22, 2019, so the timing of prior due process case, Complaint Investigation Report #20.007C, has no impact on this allegation.

In relevant part, MUSER VI(2)(A) requires that Advance Written Notice be

provided to a child's parents at least 7 days prior to an IEP meeting when "the school administrative unit will have an attorney present at the individualized education program team meeting." Id.

Because the Education and Human Resources Specialist from Drummond Woodsum law firm never attended an IEP team meeting after the Parent objected to her presence, there is no need to analyze this allegation further or make a factual finding as to whether the Education and Human Resources Specialist was a legal representative for the Charter School. The evidence does not support a finding for this allegation.

VII. Corrective Action

1. The Student's IEP team must convene to determine a plan for Specially Designed Instruction (SDI) that is in keeping with the Student's current needs and that allows the Parents to have regular access to the Student's SDI curriculum.

Written notice from this meeting must be provided to the Department by **February 15, 2020.**

2. The Charter School must provide a total of 65 hours of compensatory education to the Student (inclusive of the 50 hours owed to the Student from the September 20, 2019 Complaint Investigation Report). The school must provide services that address the Student's academic, functional, behavioral, and transition goals. The compensatory services must be provided in addition to the Student's existing educational program. Services must be provided by a certified special educator or an educational technician with oversight by a certified special educator specifically for these services. **The school will choose the provider and provide documentation of the provision of these services to the Department by May 15, 2020.**

Dated: January 14, 2020