

Complaint Investigation Report
Interested Parties v. Lewiston Public Schools
May 1, 2020

Complaint # 20.055CS

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: January 21, 2020 regarding the initial complaint; February 4, 2020 regarding the second and third systemic complaints.

I. Identifying Information

Complainants: (“Interested Party 1”)

(“Interested Party 2”)

(“Interested Party 3”)

Respondent: Lewiston Public Schools
Todd Finn, Superintendent
36 Oak Street
Lewiston, ME 04240

Pamela Emery, Director of Special Services

Students: (“Student 1”)

DOB:

(“Student 2”)

DOB:

DOB: (“Student 3”)

DOB: (“Student 4”)

DOB: (“Student 5”)

DOB: (“Student 6”)

DOB: (“Student 7”)

DOB: (“Student 8”)

Other unnamed students at School potentially impacted by the District’s practices at School.

II. Summary of Complaint Investigation Activities

On January 17, 2020, the Maine Department of Education received a Systemic Complaint Request against Lewiston Public Schools from Interested Party 1, who is a staff member at School. Therefore, the current investigation covers the time period of January 17, 2019 to present. See MUSER XVI(4)(B)(3).

Systemic complaints are those that allege that a school district has a policy, practice, or procedure that has resulted in a violation of the Maine Unified Special Education Regulations (“MUSER”) and is, or has the potential to be, applicable to a group of students, named or unnamed. After the receipt of Interested Party 1’s systemic

complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on January 28, 2020, detailing four alleged systemic violations of the MUSER.

Interested Party 1 also specified multiple named students whose educational rights were allegedly impacted by the systemic violations, including Student 1, Student 2, Student 3, Student 4, Student 5, Student 6, and Student 8. The complaint investigator held two separate telephonic Complaint Investigation Meetings on Monday, January 27, 2020 and on Wednesday, January 29, 2020. A revised Allegations Letter was sent to the parties by the complaint investigator on January 30, 2020, further clarifying the four alleged violations of the MUSER.

On February 3, 2020, the Maine Department of Education received two additional Systemic Complaint Requests against Lewiston Public Schools from Interested Party 2 and Interested Party 3. Interested Party 2 and Interested Party 3 are also staff members at School, and many of the allegations made by Interested Party 2 and Interested Party 3 overlap with one another and with the original allegations made by Interested Party 1. The three Interested Parties also named some of the same students in their complaints. Considering the common respondent, the overlapping allegations, and the common named students, the Maine Department of Education elected to consolidate all three systemic complaints as Complaint #20.055CS. Due to the exceptional circumstance of three systemic complaints being joined together, and without objection from the Interested Parties or the District, the complaint investigator and the Department of Education adjusted the regulatory deadlines to reflect the later filing date of February 3, 2020. See MUSER XVI(4)(A)(2)(a).

After receipt of Interested Party 2's and Interested Party 3's systemic complaints and supporting documents, two additional Draft Allegations Letters were sent to the appropriate parties by the complaint investigator on February 11, 2020. Interested Party 2 alleged that the District committed one systemic violation of the MUSER, in addition to four violations of the MUSER that were specific to one individual child, Student 7. Interested Party 3 alleged that the District committed one systemic violation of the MUSER, which impacted the educational rights of Student 8, and three violations of the MUSER that were specific to one individual child, Student 7. The complaint investigator

held three separate additional telephonic Complaint Investigation Meetings, on February 12, 2020 (two meetings) and on February 13, 2020.

Although the regulatory time frame for the present complaint investigation extends from January 17, 2019 to present, the scope of this investigation is somewhat limited by the procedural history of a prior due process complaint. Back on June 14, 2019, Interested Party 1 filed a prior systemic complaint against the Lewiston Public Schools, alleging five systemic violations of the MUSER. See Complaint Investigation #19.122CS. The previous complaint was investigated by complaint investigator, Jeannette Sedgwick, Esq. During the course of Attorney Sedgwick's investigation, the District came forward with a proposal to resolve the systemic complaint in accordance with MUSER XVI(4)(a)(1).

On August 6, 2019, the Maine Department of Education published Complaint Investigation Report #19.122C, accepting the District's proposed resolution and outlining the steps for the District to remedy previous non-compliance. The District submitted to monitoring by the Department of Education for compliance with the corrective action plan, which included crafting a description of the District's practice for written notices, providing compensatory education for special education students who transferred into the District during the 2017-2018 school year, providing compensatory counseling services for one student who did not receive those services, organizing training with respect to the intersection between the Response to Intervention Program and School's child find responsibilities, and reforming the self-contained K-2 program at School with the assistance of the Center for Children with Special Needs.

The present complaint investigator has thoroughly reviewed the complaint, documentation, and other information from Complaint Investigation #19.122C in order to ascertain which of the present allegations, if any, were previously addressed. Three of the allegations in the present complaint investigation overlap with the allegations from the previous systemic complaint, and with respect to the repeated issues, the complaint investigator has only considered the District's conduct from the date of the previous determinations (August 6, 2019) to the present. With respect to new allegations that were

not addressed in the prior complaint investigation, the regulatory time frame of January 17, 2019 to present remains applicable.

The complaint investigator received and reviewed 418 pages of documents from Lewiston Public Schools. These documents include Individualized Education Plans (“IEPs”) and other relevant documentation, such as Written Notices and Evaluations, for the individually named students. Additionally, these documents include the District’s response to the allegations, along with details about the District’s practices, policies, and procedures at _____ School. The investigator also received and reviewed 109 pages of additional documents from the three complainants.

Interviews were conducted between March 4, 2020 and April 15, 2020. The complaint investigator interviewed all three Interested Parties, the Special Education Director, the Assistant Special Education Director, and the Clinical Supervisor for Lewiston Public Schools. The following school staff at _____ School were interviewed: the Principal, the Special Education Supervisor, the former Special Education Supervisor, the Response to Intervention (“RTI”) Coordinator, a School Psychologist, a Licensed Clinical Social Worker, two current Special Education Teachers, two General Education Teachers, and two former Special Education teachers. The complaint investigator also reached out to additional school staff members who were unavailable to be interviewed.¹ The complaint investigator reviewed all documents provided, considered all information collected through interviews, and evaluated all written responses provided by the parties, including a request by the District to dismiss certain allegations.

¹As per the standards of practice for conducting complaint investigations, the complaint investigator used her discretion with regards to witnesses interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation. Additionally, due to school building closures as a result of the COVID-19 pandemic, the complaint investigator made significant efforts to obtain home contact information for various potential witnesses. However, not all individuals were available at home, not all individuals provided home contact information, and not all proposed witnesses consented to be interviewed. To ensure that a thorough and complete investigation would occur during the exceptional circumstances of a school closure, the publication deadline for this report was extended by 30 days until May 1, 2020. At the time of publication, the complaint investigator feels confident that all her investigative resources have been exhausted to obtain complete information about the allegations raised by the three Interested Parties in Complaint #20.055CS.

III. Preliminary Statement

This consolidated systemic complaint involves eight named students who currently attend or previously attended _____ School in _____, Maine. The eight named students are between the ages of _____ and _____ years old and between the _____ grade and the _____ grade. Seven of the eight students currently attend _____ School, and one student has been placed at _____ School. Six of the eight students are eligible for special education services due to a qualifying disability, and the other two named students are currently being evaluated for special education services. The systemic complaint also references alleged educational harm to various other unnamed students at _____ School.

These consolidated complaints also set forth one individual claim (as opposed to a systemic one) that the District has not provided a free appropriate public education (“FAPE”) to Student 7. See MUSER II(13); 34 CFR 300.101(a). That individual claim about Student 7 is examined separately from the systemic allegations in Section X of this report.

Beyond the individually named students, this consolidated systemic complaint alleges that the District is utilizing policies, practices, or procedures at _____ that violate the MUSER and have the potential to cause educational harm to _____ School’s student population. This complaint has only examined the District’s policies, practices, and procedures at _____ School; therefore, the determinations in this report do not reflect on the District’s practices at other Lewiston Public Schools.

IV. Consolidated Allegations

Interested Party 1, Interested Party 2, and Interested Party 3 have set forth the following allegations²:

- A. The District has a practice at the _____ School of missing regulatory deadlines, specifically deadlines for providing parents with IEPs and

² To the extent that the allegations were duplicative or repetitive across each interested party’s complaint, the complaint investigator has consolidated the allegations for the sake of efficiency and clarity.

Written Notices and deadlines for IEP review and revision. MUSER IX(3)(G); 34 CFR 300.503; MUSER App. 1 at 220; MUSER IX(3)(D)(1).

- B. The District has a practice at the _____ School of not providing counseling and speech services to students who have these services listed on their IEPs, specifically with regards to Student 1, Student 3, Student 4, and Student 8. MUSER IX(3)(B)(3).
- C. The District has a practice at the _____ School of not implementing transfer students' IEPs immediately upon entering the District, specifically with regards to Student 2, Student 3, Student 4, and Student 8. MUSER IX(3)(B)(5).
- D. The District has a practice at the _____ School of over-utilizing Response to Intervention (RTI) instead of timely referring students to special education, specifically with regards to Student 5 and Student 6. MUSER IV(2)(C-F); OSEP Memorandum 11-07 (January 21, 2011).
- E. The District has a practice at the _____ of not providing Educational Technicians, 1:1 support, and adult support to students who require such services as part of their IEPs. MUSER IX(3)(B)(3).
- F. The District has not provided Student 7 with a free appropriate public education ("FAPE") (see MUSER II(13); 34 CFR 300.101(a)) because of the following:
 - 1. The District failed to review and revise Student 7's IEP after being presented with concerns about the Student's lack of progress in the general education curriculum. MUSER IX(3)(D)(1)(b).
 - 2. The District did not ensure that Student 7's level of functioning was properly evaluated when a Vineland Behavior Assessment was scored without proper protocol or documentation by a psychologist during the Student's IEP meeting. MUSER V(2)(C)(1).
 - 3. The District did not provide a copy of the Student's Vineland Behavior Assessment Report to the Student's parents at least 3 days prior to the IEP Team Meeting at which the evaluation was discussed. MUSER V(4)(G); MUSER VI(2)(A).
 - 4. The District did not ensure that the Student's full IEP was accessible to each teacher responsible for its implementation. MUSER IX(3)(B)(4).
 - 5. The District did not follow regulatory procedures regarding Written Notices for Student 7's IEP meetings. 34 CFR 300.503; MUSER App. at 220.

V. MISSING REGULATORY DEADLINES

A. Factual Findings

1. Interested Party 1 alleges that the School has a systemic practice of missing regulatory deadlines, specifically, deadlines for providing parents with IEPs and Written notices and deadlines for IEP review and revision. See MUSER IX(3)(G); 34 CFR 300.503; MUSER App. 1 at 220; MUSER IX(3)(D)(1).
2. More specifically, Interested Party 1 states in her complaint, “IEP’s are submitted for approval within 14 days by case managers to [Local Education Agency (“LEA”)] and approximately 20 IEPs have gone beyond the 30 days to submit to parents in 2019. Many IEP meetings are past due – to include triennials, annuals, and initial, some are months past due. Written Notices [are] not being sent out or [are] going way past the deadline.”
3. Because this specific allegation was not addressed in the prior systemic complaint #19.122C from June 2019, the present investigation considers the full regulatory time frame of January 17, 2019 to present for the allegation that the District has a practice of missing regulatory deadlines.
4. As determined through interviews, both the District’s and School’s staff members fully understand the procedural requirements regarding special education deadlines, as set forth by the MUSER.
5. Specifically, all staff members interviewed were familiar with the MUSER requirements that a complete copy of a child’s Individualized Education Program (“IEP”) must be provided to the child’s parent within 21 school days of the IEP meeting during which the IEP was developed. See MUSER IX(3)(G).
6. Staff were also aware of their responsibilities to send complete and accurate Written Notices of the IEP team’s determinations seven days prior to the date by which a proposed change takes effect or by which the District declines to make a proposed change. See MUSER App. 1 at 220.
7. Additionally, District and school staff demonstrated a proper understanding of the review and revision process for students’ IEPs, including the requirement that each student’s IEP be revisited at least annually and the requirement that necessary student re-evaluations must occur at least every three years. See MUSER IX(3)(D)(1); MUSER V(1)(B)(2)(b).
8. Finally, District and school staff were well-versed with all regulatory deadlines associated with initial evaluations (often referred to as “Child

Find” responsibilities) and deadlines for the formulation of a new IEP after a referral to special education has been accepted. See MUSER V(1)(A)(3)(a)(i).

9. Further, as reflected by staff members’ knowledge during interviews, both the District and administrators at _____ School have communicated clear policies to their special education case managers about the proper procedure for meeting the MUSER’s regulatory deadlines.
10. For example, all current and former special education teachers who were interviewed explained the same process for drafting IEPs and for creating Written Notices. After an IEP Team meeting, each case manager at _____ School is responsible for creating a draft Written Notice within 48 to 72 hours of the meeting. The notice must accurately summarize any action or inaction regarding the child’s referral, evaluation, identification, programming, or placement as proposed by the IEP team. See MUSER App. 1 at 220.
11. Similarly, all current and former case managers who were interviewed reported that, after an IEP Team meeting where an IEP is created, adopted, or amended, the student’s case manager is responsible for drafting the new IEP within 7 to 14 days. See MUSER IX(3)(G).
12. After a Written Notice or IEP draft is completed, the case manager is also responsible for uploading the new document into Adori,³ which is a web-based IEP software and special education management system. Adori then automatically notifies the Special Education Supervisor at _____ School that a document has been uploaded for review, and the Supervisor can access the documents directly to make changes. As an added procedural protection, the case manager is also responsible for notifying the Special Education Supervisor by email that a new document has been uploaded and ready for review.
13. At _____ School, the Special Education Supervisor is then expected to review and revise the aforementioned documents, as needed, seeking clarification about any necessary changes from the student’s case manager or other members of the IEP team, before finalizing the documents and forwarding them to the child’s parents in accordance with the regulatory deadlines.
14. Historically, the Special Education Supervisor at _____ School has had significant secretarial assistance to complete these tasks on time and in an organized fashion.

³ Although the name of the IEP software and special education management system has changed recently, special education teachers and administrators still refer to the system as “Adori.” As such, “Adori” is the terminology used in this complaint investigation report.

15. Despite a widespread understanding of the MUSER’s regulatory deadlines and the District and the school administration’s clear procedural expectations regarding those deadlines, all School staff members interviewed reported a significant breakdown in the process with respect to the 2019-2020 school year.
16. The current Special Education Supervisor started her new position at School in August 2019, and she described significant difficulties during the start of the 2019-2020 school year with meeting various regulatory deadlines. Despite School’s best efforts to fill a number of vacancies, the Special Education Supervisor did not have consistent, reliable secretarial support to run reports regarding upcoming deadlines or to assist with the mailing of paperwork to families during the start of the 2019-2020 school year.
17. When interviewed by the complaint investigator, School’s Principal also recognized that various regulatory deadlines were missed unintentionally, especially during the start of the 2019-2020 school year. The Principal noted that the front office was also dealing with the vacancy of a critical secretarial position. Nonetheless, the Principal made a number of key procedural changes⁴ to ensure compliance with students’ special education rights, and the Principal began to take a more active role in the supervision of the Special Education office in an attempt to avoid regulatory violations.
18. All six teachers who were interviewed (four Special Education teachers/case managers and two General Education teachers) reported a concerning trend of Written Notices and IEPs not being sent to parents by the regulatory deadlines, particularly during the entirety of the 2019-2020 school year.
19. Specifically, the Special Education case managers observed that, even though they continued to meet their deadlines for submitting drafts of IEPs and Written Notices in Adori and for notifying the Special Education Supervisor that those documents were available for review, the Special Education Supervisor did not respond consistently to email communications and did not finalize Written Notices or IEPs within the regulatory deadlines.
20. Multiple Special Education teachers also explained that the problem with meeting deadlines was not typical practice for School in prior years.

⁴ For example, the Principal created a new system for the review of all incoming student files at ; despite the large volume of incoming and outgoing students, the Principal himself now reviews and completes a standardized checklist for every new file for a transfer student, in part to verify whether or not the student received special education services at or previous school. This procedure will be discussed further in Section VII regarding “Transfer Students.”

21. Frequently, when the case managers later signed into Adori, they reported that the software indicated that the Special Education Supervisor was not reviewing, revising, and approving those documents in time to send them to parents by the required regulatory deadlines. Two current Special Education teachers reported that they contacted the District's Special Education Director and the District's Special Education Assistant Director regarding their concerns about outstanding document obligations. According to their interviews, the District was required to step in multiple times to assist with reviewing documents and sending out overdue Written Notices and IEPs to families.
22. Among the documents that the complaint investigator reviewed regarding the eight named students, many deadlines for Written Notices and IEPs were observed to be overdue.⁵
23. The District and _____ School staff both explained to the complaint investigator that a number of positive procedural changes have occurred recently, including the hiring of a key secretarial staff member to work with the Special Education Supervisor. The Special Education Supervisor indicated that things are moving in the right direction now, and she believes that _____ School can meet all special education regulatory deadlines going forward.

B. Determination:
Systemic Violation Found Regarding Practice of Missing Regulatory Deadlines.

The District moved to dismiss this systemic allegation regarding regulatory deadlines, alleging that Interested Party 1's complaint failed to meet the pleading

⁵ For examples of Written Notices and IEPs that were not provided to parents in a timely fashion, see Student 1's Written Notice sent on 6/18/19, regarding an IEP Team meeting from 6/6/19; Student 1's Written Notice mailed on 10/24/19, regarding an IEP amendment occurring on 9/30/19; Student 2's Written Notice sent on 9/24/19, detailing a transfer meeting on 9/10/19; Student 4's Written Notice sent on 11/17/19, regarding an IEP Team meeting from 10/3/19; Student 8's Written Notice sent on 4/9/19, after the IEP meeting occurred on 3/28/19; Student 8's Written Notice sent on 1/22/20, describing a transfer meeting where an IEP amendment occurred on 1/3/20; Student 5's Written Notice sent on 12/16/19, from a special education referral meeting on 11/4/19; Student 6's Written Notice sent to parents on 1/26/20 from a special education referral meeting on 1/15/20; Student 7's IEP created at evaluation meeting on 12/20/18, and sent to parents on January 29, 2019. Unfortunately, many of the meetings listed above were held without the a parent present (due to the parent's unavailability or due to the School's inability to make contact with parents), rendering the timing of Written Notice and/or copies of IEP amendments even more critical to a parent's ability to participate in the IEP team process and to advocate for his or her child's educational rights.

standards set forth in the MUSER. Specifically, the District argued that a complaint must contain both a statement of the alleged violation, and “the facts on which the statement is based.” MUSER XVI(4)(B)(2)(b).

In complaint 20.055CS, without specifying the names of individual students, Interested Party 1 specifically states the following facts about the District’s regulatory deadline violations: “IEP’s are submitted for approval within 14 days by case managers to [Local Education Agency (“LEA”)] and approximately 20 IEPs have gone beyond the 30 days to submit to parents in 2019. Many IEP meetings are past due – to include triennials, annuals, and initial, some are months past due. Written Notices [are] not being sent out or [are] going way past the deadline.” As a result of these specific factual details in the complaint, the complaint investigator finds that Interested Party 1’s complaint satisfies the requirements of MUSER XVI(4)(B)(2)(b). Notably, there is no requirement that a complainant name any specific student/s when making a systemic allegation.

Based on the interviews conducted and the documents provided, there are significant and concerning indications that the District has failed to consistently meet various regulatory deadlines required by the MUSER during the 2019-2020 school year. Of course, all evidence suggests that this practice is entirely unintentional, possibly situational (due to staffing shortages), and not representative of a larger policy failure by the District or by School. Nevertheless, the frequency by which deadlines have been missed in the 2019-2020 school year, in particular, deadlines for providing parents with IEPs and Written Notices, as well as the consistent admissions by School and District staff that deadlines were not being successfully met, establishes a practice at School that has resulted in a systemic violation of MUSER IX(3)(G), 34 CFR 300.503, and MUSER App. 1 at 220.⁶

Without more individual examples of students whose annual IEP reviews were overdue or examples of students whose triennial re-evaluations were not conducted in a timely fashion, there can be no determination that the District systemically violated those deadlines set forth in MUSER IX(3)(D)(1) and MUSER V(1)(B)(2)(b). Still, the extent

⁶ Although the relevant time period to review this allegation was January 17, 2019 to present, information gathered during interviews suggested that the District was largely successful in meeting regulatory deadlines during the previous school year, despite a handful of examples found of non-compliance during the end of the 2018-2019 school year.

of other regulatory deadline violations suggests that the District needs to overhaul the implementation of its procedural expectations at _____ School and create a new accountability system to ensure that special education deadlines are all being met, including annual and triennial obligations.

Finally, Interested Party 1 alleged a systemic practice by the District of missing initial evaluation deadlines for new referrals for special education services. See MUSER V(1)(A)(3)(a)(i). This allegation is better addressed below in Section “VIII. Response to Intervention” because it involves discussion of Student 5 and Student 6, who are named in that allegation.

VI. COUNSELING & SPEECH SERVICES

A. Factual Findings

1. Interested Party 1 also alleges that the District has a practice at the _____ School of not providing counseling and speech services to students who have these services listed on their IEPs, specifically with regards to Student 1, Student 3, Student 4, and Student 8. See MUSER IX(3)(B)(3).
2. As part of systemic complaint #19.122CS, Interested Party 1 previously raised the allegation that the District was not providing counseling and/or social work services to students who have these services listed on their IEPs. As a result, with respect to the current allegation that students are not being provided counseling services, this investigation will only examine the time period of August 6, 2019 to present for potential violations of the MUSER.
3. The issue of speech services was not addressed in the prior systemic complaint #19.122CS, so the present investigation considers the full regulatory time frame of January 17, 2019 to present. Nonetheless, no facts were offered to the complaint investigator regarding any issues with the provision of speech services prior to the start of the 2019-2020 school year at _____ School. Therefore, practically speaking, the scope of the investigation regarding speech services is also limited to the 2019-2020 school year.
4. **Student 1** is _____ years old. _____ attends the _____ grade at _____ School, and _____ lives in _____, Maine. The District is responsible for Student 1’s educational programming. _____ is eligible for special education services under the Specific Learning Disability category.

5. At an annual IEP review for Student 1 on June 6, 2019, the IEP team noted that Student 1 was dealing with significant anxiety in the classroom. Specifically, Written Notice indicates that Student 1 was shutting down, requesting extra bathroom breaks, and crying, especially during specially designed instruction (“SDI”) for reading. Student 1 was also experiencing frustration with push-in services, being dismissive, and being defiant with staff. licensed clinical social worker, who was present at the IEP Team Meeting on June 6, 2019, recommended adding a counseling session for 30 minutes per week to Student 1’s IEP.
6. In accordance with the District’s policies, the IEP team immediately referred Student 1 to a special education clinician for a social work evaluation to determine whether counseling should be added to IEP.
7. According to emails provided by the District, Student 1’s social work assessment began before the end of the 2018-2019 school year. The evaluator listed Student 1’s specific struggles as frequent bathroom breaks due to the Student’s anxiety about having an accident at school, frequent missed school days, crying, fear, anxiety, and a resistance to being pulled out for special education services. The clinician wrote to the former Special Education supervisor at School at the end of the 2018-2019 school year, “So, again, I didn’t get the chance to observe [Student 1] but sounds like is struggling with anxiety and could have 1x30 counseling on IEP to work on this and help focus on academics better. We can wait to reassess in the fall as well.” See Email from Special Education Clinician, dated September 6, 2019, referencing information forwarded to the Former Special Education Supervisor at the end of the 2018-2019 school year.
8. Student 1’s IEP was not amended during the 2018-2019 school year.
9. On September 6, 2019, the Special Education Clinician continued her assessment of Student 1, and communicated more information to Special Education supervisor. The clinician learned from Student 1’s new teacher that Student 1 was already struggling and becoming upset in the classroom. Student 1’s licensed clinical social worker also reported to the Special Education Clinician that Student 1 was now having anxiety about using the public restroom and was requesting to use the nurse’s bathroom. The Special Education Clinician observed Student 1 during lunch and at the end of the day in her classroom and stated, “[Student 1] didn’t seem very anxious during these 2 observations but sounds like mornings have been most difficult, and I know reading/special ed pull out times were difficult for last year.” See Email from Special Education Clinician to Special Education Supervisor, dated September 6, 2019.

10. Twelve days later, the Special Education Supervisor passed along that information about Student 1 to the District's Clinical Supervisor. The Clinical Supervisor responded the next day, stating, "So I'm torn on this one because there does seem to be a lot of level of anxiety, though [redacted] is identified as SLD, but being pulled out of class seems to be anxiety provoking in and of itself, so I'm concerned about pulling [redacted] out more for counseling. I think I will talk to [the special education clinician] today about pulling [Student 1] 1-2 times to see if [redacted] is willing to attend a session, able to engage in a session, before we add it [to [redacted] IEP]." See Email from District Special Education Clinical Supervisor, dated September 19, 2019.
11. On September 27, 2019, parental consent was obtained and Student 1's IEP was amended without an IEP meeting to include social work services once per week for 30 minutes, to begin on September 30, 2019.
12. **Student 3** is [redacted] years old. [redacted] attends [redacted] grade at [redacted] School, and [redacted] lives in [redacted], Maine. The District is responsible for Student 3's educational programming. [redacted] is eligible for special education services under the Speech/Language Impairment category.
13. Student 3 transferred to [redacted] School from [redacted] on May 8, 2019. Student 3 immediately began receiving some special education services, including Speech and Language services.
14. On June 12, 2019, Student 3's IEP team convened for a Transfer Meeting. The team largely adopted the Student's IEP from [redacted]. Student 3's new IEP, dated June 18, 2019, provides for 30 minutes of Speech and Language services per week and 30 minutes of Counseling per week.
15. The District concedes that Student 3 did not begin receiving Counseling services upon enrollment at [redacted] in May or after [redacted] transfer meeting in June 2019. Additionally, the District concedes that Student 3 did not begin receiving Counseling services at the start of the 2019-2020 school year.
16. Due to a shortage of special education clinicians available at [redacted] in the Spring of 2019, Student 3 was initially referred to an outside agency, [redacted], to conduct school-based counseling. However, Student 3's counseling never started, and no follow-up was done by the District to determine the status of the [redacted] referral.
17. On November 7, 2019, Student 3's mother spoke to the Principal at parent/teacher conferences. She inquired about Student 3's Speech and Counseling services. The Principal contacted the Special Education

Supervisor to review Student 3's file. At that point, the Special Education Supervisor realized Student 3 was not receiving counseling from .⁷

18. Almost a month later, on December 2, 2019, arrangements were made for Student 3 to begin counseling services with a special education clinician at the school. Student 3 is currently being offered compensatory services for missed counseling sessions as calculated by the District.⁸
19. Due to the issues discussed below, the District also concedes that Student 3 did not receive any Speech and Language services between the start of the 2019 school year and January 2020. To be clear, however, Student 3 did receive Speech and Language services and the end of the 2018-2019 school year upon transfer to School. Speech and Language services only stopped after the speech therapist resigned unexpectedly in August 2019. The District has offered Student 3 compensatory hours for those missed Speech and Language sessions as well.
20. **Student 4** is years old. attends the grade at School, and lives in , Maine. The District is responsible for Student 4's educational programming. is eligible for special education services under the Other Health Impairment category.
21. Student 4 transferred to School at the start of the 2019-2020 school year from School.
22. Upon transfer to School, Student 4 was entitled to 30 minutes per week of social work/counseling services. However, those services did not begin at the start of the school year.
23. On September 25, 2019, the Student was in In-School Suspension ("ISS") for an aggressive incident against another student. A general education clinician observed that Student 4 was highly dysregulated during ISS, and the clinician contacted the Special Education Supervisor by email to ask that Student 4's counseling services be started immediately in accordance with IEP from .
24. Student 4 began receiving counseling the next day on September 26, 2019. No compensatory services have been offered by the District for the weeks missed.

⁷ There is a factual dispute about the cause of the delay in Student 3's referral. The Special Education Supervisor states that she first learned that the referral was unsuccessful in November 2019. However, other persons interviewed argued that reached out to the Special Education Supervisor to obtain better contact information for Student 3's parents prior to November 2019. This factual dispute does not need to be resolved to determine whether Student 3 is entitled to compensatory services.

⁸ The District has offered Student 3 compensatory counseling for 7.5 hours of missed services.

25. There is no indication that a transfer meeting was held for Student 4.
26. Instead, Student 4's IEP team met for the first time on October 3, 2019 for an annual review of IEP.
27. **Student 8** is currently years old. During the 2018-2019 school year, Student 8 was a student at School. At that time, Student 8 lived in , Maine, and the District was responsible for educational programming. is eligible for special education services under the Specific Learning Disability category.
28. As part of the proposed resolution for systemic complaint #19.122CS, the District agreed to provide Student 8 with compensatory counseling services for missed sessions. The District agreed to hold an IEP meeting by September 15, 2019 to determine the number of hours of counseling that were missed between scheduled start date for counseling on May 20, 2019 and the end of the 2018-2019 school year.
29. However, Student 8 transferred to School at the start of the 2019-2020 school year.
30. The Special Education Supervisor reports that, upon learning about Student 8's transfer to School, she left a voicemail message for someone at , extending an offer to provide Student 8's compensatory counseling services out-of-district. The Special Education Supervisor did not receive a return phone call, and she did not follow up with anyone at School.
31. On November 7, 2019, Student 8 transferred back to School as a -grade student. It appears that Student 8 did not receive any special education services at all during time at School because special education file never left School.
32. The Principal reported during an interview with the complaint investigator that Student 8 came back to on November 7, 2019, without the proper transfer process. Rather than being re-enrolled at school by a parent, Student 8 simply showed up one morning on the school bus.
33. The student's education file from School appears to have been received at School on November 21, 2019, as indicated by the signature and date of a secretarial staff member. On December 1, 2019, the Principal reviewed Student 8's education file and noticed a reference to an IEP. No IEP was included within the file.

34. As a result, upon return to School on November 7, 2019, it appears that Student 8 did not begin receiving any of the services on prior IEP, including counseling services.
35. During the week of December 9, 2019, Student 8 began receiving counseling services.
36. According to Written Notice, dated February 5, 2020, which details an amendment to Student 8's IEP without an IEP team meeting, Student 8 was provided compensatory counseling sessions for a 4-week delay in services. It is unclear how this delay was calculated because a 4-week delay in services does not account for both the missed services during the 2018-2019 school year and the missed counseling services during the 2019-2020 school year.⁹
37. During the interview process for this complaint investigation, the District's Clinical Supervisor explained the process by which counseling can be added as a related service on a child's IEP in Lewiston Public Schools. Additionally, the District provided the complaint investigator with a written policy, entitled, "Adding Counseling as Related Service."
38. In sum, under the written policy, the District has determined that all requests to add counseling to a student's IEP must be sent to a special education clinician to perform an informal social work assessment. According to the written policy, the assessment includes 2 to 3 observations of the student and/or sessions, an interview with IEP team members, and a review of the students' records, including IEP goals, data, and evaluations.
39. In speaking to the Clinical Supervisor, she likened the process of an informal social work assessment to a referral for Occupational Therapist ("OT") evaluation to determine whether or not a student would benefit from the related services of an OT on his or her IEP.
40. The District's written policy states that the clinical assessment is done "to determine if counseling as a related service is educationally relevant," whether there is "a clear purpose for the service," and whether counseling is "educationally necessary." Further, the written policy sets forth four potential outcomes for a social work assessment.
41. First, if the special education clinician recommends adding counseling to the IEP, "and if the team is in agreement," the IEP is amended. Second, if the special education clinician recommends against adding counseling to the IEP, and the family is unwilling to allow non-IEP counseling, "the Team should explore other options for teaching skills." Third, if the clinician recommends *against* adding counseling to the IEP, but the clinician determines that the

⁹ The lapse in Student 8's other special education services, specifically specially designed instruction, is discussed in the section below in, "VII. Transfer Students."

student has needs that would benefit from counseling not related to IEP, the District's policy states, "Counseling is not added to IEP. Referral is made to outpatient or school-based services." Finally, as a fourth option, if the special education clinician feels that a student needs counseling related to his or her IEP "but there are also extensive needs beyond the IEP...., Team makes referral to school-based counseling such as ."

42. In addition to the four scenarios prescribed above, the District's written policy also states, "Counseling is a related service, and there should be evidence first that student cannot access IEP without it, before adding. As such SDI should be attempted first after eligibility, collect data, and then review whether SDI is effective and whether counseling is needed to access IEP."
43. During interviews, multiple teachers and staff members expressed frustration with the length of the District's process to add counseling to a student's IEP, even in circumstances where the whole IEP team agrees that counseling should be added as a related service.
44. Consistent with the written policy described above, the District's Clinical Supervisor explained during her interview with the complaint investigator that, even if a child has been working with a licensed clinical social worker who is present at her IEP team meeting, and that clinician is recommending counseling as a related service on the student's IEP, the referral process for a social work assessment is still necessary to determine whether there is a connection between the need for counseling and the Student's ability to access his or her education. In short, a clinical social worker may not have sufficient background in special education to determine whether a nexus exists between the need for counseling and a student's particular disability.
45. With respect to Speech and Language services, the District admits that it was unable to hire a speech therapist at the start of the 2019-2020 school year.
46. The former speech therapist providing services to School resigned without notice to the District on August 15, 2019, only two weeks prior to the start of the new school year.
47. The District posted the position immediately. Unfortunately, the position remains open and continues to be posted on Frontline, Serving School, and School Spring. All staff members interviewed expressed deep regret and ongoing stress about filling this position as soon as possible, and the complaint investigator has no doubt that the District's efforts to recruit a capable speech therapist have been exhaustive.
48. In the fall of 2019, the District contracted with Sandcastle, an outside provider, to begin Speech and Language services with some special

education students. Additionally, on December 2, 2020, the District began providing Speech and Language services through an online program called Presence Learning for the remaining students who were not receiving Speech and Language services as required by their IEPs.

49. At this time, all students who require Speech and Language services on their IEP are receiving speech therapy, and the District has taken steps to ensure that students who lost time are being provided with compensatory services through Presence Learning.

B. Determinations

Systemic Violation Found Regarding the District’s Written Counseling Policy.

No Systemic Violation Found Regarding the Provision of Counseling Services.

No Systemic Violation Found Regarding the Provision of Speech Services.

With respect to the provision of counseling services to special education students, this investigation must consider two separate issues. The first issue is whether or not, as in the case of Student 1, the District’s written policy for adding counseling to a Student’s IEP effectively denies a student from receiving counseling that would otherwise be provided on IEP. The second issue is whether or not, as in the case of Student 3, Student 4, and Student 8, the District’s organizational practices at School have systemically prevented students from accessing counseling services as provided by their IEPs.

First, the District’s written policy entitled, “Adding Counseling as Related Service,” violates MUSER in its current form and constitutes a systemic violation of students’ rights to receive related educational services because the written policy circumvents the IEP Team Decision-Making Process and dictates a particular outcome.

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 his or her own unique needs. Id. at 999. Of course, it is the IEP team that is best situated to consider the child's unique needs, including 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).

As written, the District's current policy mandates that an informal social work assessment must be completed prior to adding counseling as a related service on a student's IEP. Student 1's case is a helpful example to demonstrate how this mandate might effectively hijack the IEP decision-making process. In Student 1's case, the District's policy requiring a social work assessment held firm even in a scenario where Student 1 was already working with a licensed social work clinician and where the student's IEP team, which included the student's licensed clinician, had concluded based on behavioral observations and data that Student 1's anxiety was actively preventing from accessing education, in particular specially designed reading instruction.

For another example of a situation where the District's current policy, as written, could create a denial of counseling services determined to be necessary by the student's IEP team, consider a student who previously had counseling as a related service, but the IEP team removed that service due student progress and growth. If the same student soon began to struggle academically due to observed and documented depression, the student's IEP team should be permitted to consider promptly adding back counseling as a related service without an additional informal social work assessment.

Another example where the District's current policy could circumvent the IEP process includes a student who is actively engaged in counseling as part of a Response to Intervention ("RTI") program. If the student is later found to be eligible to special education services, and his RTI counselor/social worker presents data to the IEP team demonstrating a disability-related need for counseling, the current written policy would tie the IEP Team's hands. Specifically, the written policy provides, "SDI should be

attempted first after eligibility, collect data, and then review whether SDI is effective and whether counseling is needed to access IEP.”

Additionally, the District’s current policy, as written, problematically determines the outcome of the student’s IEP outside the IEP team process. To be specific, the District’s written policy prescribes four possible outcomes, yet none of the outcomes consider the possibility that the IEP team may review and contemplate the results of a social work assessment, but ultimately disagree with the clinician’s findings. The language in the current written policy presumes that the IEP team will adopt the evaluator’s recommendation, without recognizing that the IEP team, according to MUSER, is best-situated to consider all aspects of the student’s educational plan and whether or not a related service is necessary to achieve a student’s goals.

With respect to Student 1, the District Clinical Supervisor sent an email to the Special Education Supervisor, stating, “So I’m torn on this one because there does seem to be a lot of level of anxiety, though [Student 1] is identified as SLD, but being pulled out of class seems to be anxiety provoking in and of itself, so I’m concerned about pulling out more for counseling. I think I will talk to [the special education clinician] today about pulling [Student 1] 1-2 times to see if [Student 1] is willing to attend a session, able to engage in a session, before we add it [to IEP].” See Email from District’s Special Education Clinical Supervisor, dated September 19, 2019. In this example, the debate about Student’s 1 counseling needs is occurring by email between the District’s Clinical Supervisor and the Special Education Supervisor, neither of whom provide direct services to Student 1. That debate is appropriately handled within the IEP process by the entire IEP team, which includes Student 1’s parents, who may have additional information to share about the impact of counseling services upon Student 1’s educational needs.

While Student 1 ultimately began receiving counseling services as a related service on IEP, it is easy to see that the decision to add services could have gone in the opposite direction if the special education clinician felt that Student 1 did not initially respond well to pull-out sessions. If that occurred, the result should properly be a return to the IEP team with the clinician’s recommendation. Then, the IEP team must reach consensus about Student 1’s needs, and the IEP team’s decision cannot be limited to the four prescribed outcomes described by the District’s written policy.

While the District's current policy, as written, creates a systemic violation of the MUSER, the District is absolutely welcome to create a policy that encourages the best practice of obtaining an informal social work assessment by a special education clinician prior to adding counseling as a related service to a student's IEP. Nevertheless, that policy needs to leave room for a student's IEP team to make the ultimate decisions about the student's needs, including both the decision of whether to refer the student for a social work assessment and, if the IEP team makes such a referral, the District's policy needs to leave room for the IEP team to make a decision about whether or not to adopt the final recommendation of the special education social worker.

The second counseling issue is whether or not, as in the case of Student 3, Student 4, and Student 8, the District's organizational practices at School have systemically prevented students from accessing counseling services as provided by their IEPs. With regards to the provision of counseling services that are required by students' IEPs, no systemic policy or practice violation is found. Student 3, Student 4, and Student 8 are all differently situated, and although their counseling services were not provided initially due to individual circumstances, there is not sufficient evidence to conclude that the District has engaged in a practice or policy of failing to provide necessary counseling services for special education students.

For Student 3, there was a troubling breakdown in the communication between the IEP team and . It is apparent that Student 3 went without prescribed counseling services from May 2019 until the end of the 2018-2019 school year. When the school year began in August 2019, Student 3's counseling was still not implemented, and even when mother raised the issue with the Principal in November 2019, another month went by before the problem was resolved by the District. While the District must take steps to proactively address communication issues with in the future and must move more quickly to remedy service provision problems as soon as they come to the attention of the Special Education Department, there is no evidence that Student 3's experience represents a systemic practice or policy of the District at School. The District has responded to Student 3's specific problem with an appropriate offer for compensatory services. Additionally, School currently has two full-time licensed special education clinicians, and they are currently able to provide

the vast majority of counseling services for students who have counseling as a related service on their IEPs. The Special Education Supervisor also reported that her relationship with [redacted] has improved as she has settled into her role, and the communication patterns between [redacted] School and [redacted] have reportedly been strong and successful in 2020.

Turning next to Student 4, there was a brief delay in the provision of counseling services, as required by [redacted] IEP. Student 4 started at [redacted] School on August 28, 2019. [redacted] counseling services began approximately one month later, on September 26, 2019. While compensatory services are appropriate to address the gap in [redacted] services, this brief delay appears to be unique to Student 4 and does not represent a pervasive, systemic practice. Fortunately, [redacted] School was able to remedy Student 4's situation quickly because a general education clinician observed [redacted] dysregulation during In-School Suspension. The Student's counseling services began the very next day after the general education clinician notified the Special Education Supervisor of the issue. This is encouraging evidence that [redacted] has strong practices in place to provide students with access to general education clinicians during difficult disciplinary scenarios, and it also demonstrates the ability of the District at [redacted] School to remedy an error in services as quickly as possible.

Finally, Student 8's return to [redacted] School in November 2019, after [redacted] brief transfer to [redacted] School at the start of the 2019-2020 school year, makes [redacted] situation particularly unique. While additional compensatory services are absolutely appropriate, Student 8's delay in receiving counseling services does not appear to reflect a systemic practice to deny students their related services on their IEPs. In Student 8's situation, the provision of [redacted] counseling services began shortly after the Principal at [redacted] School reviewed [redacted] transfer file from [redacted] School, discovered that Student 8 was a special education student, and notified the Special Education Supervisor. Please note that the other, more significant, concerns surrounding Student 8's transfer back to [redacted] School are discussed next in Section VII, regarding "Transfer Students."

Finally, with respect to the District's alleged failure to provide Speech and Language services, no systemic violation is found. See MUSER IX(3)(B)(3). The

District's actions in the Fall of 2019 demonstrate a serious and sustained effort to resolve an unexpected crisis, not a practice, policy, or procedure to deprive students of their related services on their IEPs. When the District's speech therapist resigned right before the school year began, the District immediately and proactively took reasonable steps to secure alternative options for a Speech and Language service provider. Additionally, the District has made good faith arrangements to provide compensatory education for all services that were missed during the time period when no Speech and Language service provider was available.

MUSER X(2)(A)(5) states: "If a school administrative unit is unable to hire qualified staff for the provision of related services, the unit shall make an ongoing, good faith effort to recruit and hire appropriately and adequately trained personnel to provide related services to children with disabilities."

It is apparent that the District continues to make reasonable efforts to recruit and hire a speech therapist who is appropriately and adequately trained, and in the meantime, the District has found an option to continue to provide FAPE to all students who are in need of Speech and Language services to access their special education curriculum.¹⁰

VII. TRANSFER STUDENTS

A. Factual Findings

1. Interested Party 1 and Interested Party 2 both allege that the District has a practice at the _____ School of not implementing transfer students' IEPs immediately upon entering the District, specifically with regards to Student 2, Student 3, Student 4, and Student 8. See MUSER IX(3)(B)(5).

¹⁰ Notably, MUSER IX(3)(B)(3) contemplates the scenario that the District here was faced with, instructing as follows: "If the 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. This IEP Team shall occur no later than 30 days after the start of the school year or the date of the IEP Team's development of the IEP. The IEP Team shall determine any amendments to the IEP necessary to reflect the inability to commence services as originally anticipated by the IEP Team." It is unclear from this investigation whether the District took these steps for all individuals who were in this position. The only named student who was in this situation was Student 3, and _____ did not have an IEP meeting with the first 30 days of the school year. Nonetheless, with only one example and no additional facts presented, there is insufficient evidence to conclude that a systemic violation has occurred.

2. As part of systemic complaint #19.122CS, Interested Party 1 previously raised the issue that the District was not implementing transfer students' IEPs immediately upon entering the District. As a result, with respect to this allegation, the current investigation will only examine the period of August 6, 2019 to present for potential violations of the MUSER.
3. **Student 2** is _____ years old, and _____ lives in _____, Maine. The District is responsible for _____ educational programming. _____ is in the _____ grade, and _____ qualifies for special education services under the Emotional Disturbance category.
4. Student 2 transferred to _____ School on August 30, 2019. _____ came from the _____ School in _____ Student 2 immediately began receiving specially-designed instruction.
5. On September 10, 2019, the District received an updated IEP for Student 2. The IEP team had already scheduled a transfer meeting for the same day, and, based on new information from the Student's IEP, the IEP Team decided that the Student should be placed in a behavior program at _____ in Lewiston. See Written Notice for Student 2, dated September 10, 2019.¹¹
6. Student 2 was placed at _____ School on September 12, 2019. As a result, _____ transfer process was relatively quick and efficient.
7. **Student 3**, as introduced above, is _____ years old. _____ attends the _____ grade at _____ School, and _____ lives in _____, Maine. The District is responsible for Student 3's educational programming. _____ is eligible for special education services under the Speech/Language Impairment category.
8. Student 3 transferred to _____ School from _____ on May 8, 2019.
9. On June 12, 2019, Student 3's IEP team held a Transfer Meeting. The District indicates that Student 3 immediately began receiving specially-designed instruction, Speech and Language services, and accommodations from _____ IEP. However, Student 3 did not begin to receive related services of counseling until much later, as described in Section VI above.
10. Because Student 3's transfer to the District occurred during the period of the prior complaint, and where the District already proposed a resolution with

¹¹ Although there was some disagreement among IEP team members about whether Student 2 was properly placed in the least restrictive environment, that question was not raised by this complaint, and no determination is made on that issue with respect to Student 2.

respect to this allegation previously, the determination in this case regarding a systemic violation will not consider Student 3's transfer into

11. Also described above, **Student 4** is years old. attends the grade at School, and lives in , Maine. The District is responsible for Student 4's educational programming. is eligible for special education services under the Other Health Impairment category.
12. Student 4 transferred to School at the start of the 2019-2020 school year from .
13. There is no indication that a transfer meeting was held prior to the start of the 2019-2020 school year on August 28, 2019 for Student 4. In fact, there is no specific indication that a transfer meeting was held at all.
14. Instead, Student 4's IEP team met for the first time on October 3, 2019 for an annual review and to create IEP. At that point, Student 4 had been receiving special education services for over 5 weeks.
15. Upon transfer to School, Student 4 was entitled to 30 minutes per week of social work/counseling services.
16. Student 4 began receiving counseling on September 26, 2019. No compensatory services have been offered by the District for the weeks missed.
17. Aside from counseling services, the District maintains that Student 4 began receiving full array of services as required by School IEP upon the start of the 2019-2020 school year at School.
18. Nonetheless, at Community School, Student 4 was receiving 50 minutes per week of Specially Designed Instruction in organization and task management. There is no indication from the Written Notice from the annual review on October 3, 2019 about why those services were removed from Student 4's IEP and why had not received those services upon enrollment at School.
19. **Student 8** was also introduced in the previous section. is currently years old, and she is a -grade student at School. She is eligible for special education services under the Specific Learning Disability category.

20. Student 8 left _____ School after the 2018-2019 school year, and she transferred to _____ School at the start of the 2019-2020 school year.
21. On November 7, 2019, Student 8 transferred back to _____ School as a _____-grade student. However, Student 8's parents did not come to the school to re-enroll _____. Instead, Student 8 simply showed up at _____ School by bus on November 7, 2019 with a partially completed registration form.
22. The Principal reported during his interview with the complaint investigator that he did not want to turn Student 8 away when _____ showed up for school. He recognized Student 8 from _____ previous attendance at _____ School during the 2018-2019 school year, but he did not initially recall that she received special education services.
23. The general practice for school registration at _____ School is that parents appear in person at their child's new school, submit required paperwork, and answer questions that are posed by the school administrative staff. Among the questions asked is a question about whether a student received special education services at his or her prior school. When Student 8 re-entered _____ School on November 7, 2019, the portion of _____ registration form regarding special education was never completed because _____ parents did not appear in person at the school to answer questions.
24. The Principal at _____ School has recently revised the process for receiving transfer student files as a result of the concerns raised by systemic complaint allegation #19.122CS. Specifically, the Principal has created and instituted a checklist for staff members to review all transfer student files to see if an incoming student had an IEP at their prior school.
25. Student 8's education file from _____ School was received at _____ School on November 21, 2019, as indicated by the signature and date of a secretarial staff member. November 21, 2019 was the Thursday before Thanksgiving. Within 4 school days, on Sunday, December 1, 2019, the Principal personally reviewed Student 8's cumulative education file and noticed a passing reference to _____ IEP goals. No IEP was included within the file. The Principal reported to the complaint investigator that he then contacted the Special Education Supervisor to notify her that Student 8 should be receiving special education services.
26. Therefore, it appears that Student 8 did not begin receiving any of the services on _____ prior IEP in the month of November.¹²

¹²There is a factual dispute about the reasons why Student 8 initially did not receive any services upon return to _____ School. The Special Education Supervisor reports that she was never made

27. During the week of December 9, 2019, Student 8 began receiving counseling services.
28. However, Student 8 still did not begin to receive any specially designed instruction (“SDI”), despite repeated efforts by general education teachers to get those services started. On December 18, 2019, Student 8’s teacher emailed the Special Education supervisor for an update about when Student 8’s transfer meeting would be scheduled because Student 8 was struggling significantly without special education services. The teacher reported that Student 8 had been absent from school for two days and Student 8 allegedly told peers that was not coming to school to avoid a math quiz. See Email from Student 8’s teacher to Special Education Supervisor, dated December 18, 2019.
29. On January 3, 2020, a transfer meeting was finally held regarding Student 8.¹³ former IEP from School was adopted, including Specially Designed Instruction for Math 5 times per week for 60 minutes and Specially Designed Instruction for Reading 5 times per week for 60 minutes. As a result, Student 8 went from spending nearly 100% of time with non-disabled peers in November and December 2019 to just 69% of time with non-disabled peers in January 2020.
30. On January 6, 2020, Student 8’s teacher inquired by email about whether compensatory services would be offered for missed SDI. The Special Education Supervisor replied that no compensatory education would be offered because the student had been in School at the start of the year. See Email from Special Education Supervisor to Student 8’s teacher, dated January 7, 2020.
31. During the course of this investigation, the District has now conceded that there was a gap in the provision of Student 8’s SDI, and the District has now offered to provide 20 hours of SDI as compensatory education services to

aware that Student 8 returned to the school, but Student 8’s general education teachers maintain that they immediately informed the Special Education Supervisor of Student 8’s return and advocated for special education needs in November 2019. Fortunately, the complaint investigator need not determine the exact date upon which the Special Education Supervisor became aware of Student 8’s transfer back to Elementary School to determine whether compensatory education is due. Nevertheless, emails and other documentation provided by the parties suggest that both the Special Education Department and the school administration were aware of Student 8’s needs by December 1, 2019, at the very latest. Yet, Student 8 did not begin receiving Specially Designed Instruction (“SDI”) until the week of January 6, 2020. The District has suggested that Student 8’s services were delayed because School did not forward an updated IEP for Student 8. This explanation ignores the fact that School had recently provided extensive Special Education services for Student 8 only months before, during the 2018-2019 school year. Certainly, the District was aware of Student 8’s needs, and the District did not act quickly and efficiently to meet those needs.

¹³ The Student’s parent was not in attendance at this meeting. Written notice was not sent to the parent until January 22, 2020.

Student 8 when
pandemic closure.

School re-opens after the COVID-19

32. As noted above, to ensure that the special education needs of all transfer students are met, Principal has created a new procedure for the review of all files for incoming transfer students. The Principal conducts a review of every file himself to ensure that nothing is overlooked. If a transfer student is identified as a child with a disability, the Principal immediately informs the Special Education Supervisor to begin the process of implementing the child's prior IEP and scheduling a timely transfer meeting.

B. Determinations

No Systemic Violation Found Regarding the Implementation of Transfer IEPs. Violation and Denial of FAPE Found with Regards to Student 8.

Looking exclusively at the 2019-2020 school year, no systemic violation is found with respect to the District's efforts to immediately implement the IEPs of transfer students upon their entry into School. The evidence does not indicate that there was a policy, practice, or procedure by the District at

School that has resulted in a violation of the MUSER that is, or has the potential to be, applicable to a group of students. Nonetheless, the District's actions with respect to Student 8 have not complied with the District's own policies and practices (or with the requirements of the MUSER) with respect to immediately implementing the IEPs of transfer students, and as such, Student 8 is entitled to compensatory education services.

First, with respect to Student 2, it appears that the transfer process proceeded in a reasonable fashion, largely consistent with the policies of the District at

School.¹⁴ Immediately, at the start of the school year, Student 2 received special education services in accordance with the IEP in transfer file. transfer

¹⁴ According to "Transfer Sheet" provided by the District, Student 2 was first enrolled at on August 12, 2019. In accordance with MUSER IX(3)(B)(3), which states that "all identified children with disabilities shall have a current [IEP] in effect at the start of each school year," Student 2's IEP meeting should have occurred prior to the start of the school year on August 28, 2020. At the time, however, new Special Education Supervisor had not yet started in her new role.

meeting was quickly scheduled for September 10, 2020 and an updated IEP, received by the Special Education department immediately before the IEP Team transfer meeting was already scheduled to occur, was reviewed and utilized to make adjustments to Student 2's programming on September 10, 2020. Only two days later, on September 12, 2020, Student 2 was placed at _____ School.

Looking next at Student 4, there is no indication that a transfer meeting was held prior to the start of the school year to create Student 4's IEP. According to "Transfer Sheet" provided by the District, Student 4 was first enrolled at _____ School as a transfer student from _____ School on August 12, 2019. In accordance with MUSER IX(3)(B)(3), which states that "all identified children with disabilities shall have a current [IEP] in effect at the start of each school year," Student 4's IEP meeting should have occurred prior to the start of the school year on August 28, 2020.

However, despite this procedural error, Student 4 immediately began receiving special education services which were largely comparable to the services required by IEP from _____ School, including specially designed instruction in literacy 5 times per week for 70 minutes, specially designed instruction in math 5 times per week for 60 minutes, and Occupational Therapy. Student 4's program was initially missing one major component when compared with _____ service delivery grid in

_____ School – counseling (as discussed above, these services did not start at _____ School until September 26, 2019).

The first IEP meeting for Student 4 was an annual review on October 3, 2019, at which point _____ IEP was adjusted to include additional time in the resource room for math, additional occupational therapy to help with self-regulation strategies and impulse control, and adult support throughout the day. See Written Notice from IEP annual meeting on October 3, 2019.

Aside from the absence of a formal transfer meeting, a month-long delay in the provision of counseling services (addressed in Section VII above), and the absence of SDI in organization and task management, it appears that the District successfully implemented Student 4's required special education and related services, as determined by _____ IEP at _____ School, immediately upon _____ enrollment at _____

School. As a result, this investigation concludes that Student 4's experience does not indicate a larger systemic practice at School of failing to implement transfer students' IEPs.

Finally, Student 8's transfer back to School requires additional consideration and discussion. It is very apparent that Student 8's transfer back to School on November 7, 2019 was not handled in accordance with the District's own policies or practices at School or in line with the requirements of MUSER regarding students who transfer between schools mid-year. Nevertheless, the circumstances behind the District's regulatory violations were very unique to the unusual situation of Student 8's transfer, and, therefore, the District's handling of Student 8's cannot be found to reflect a larger policy, practice, or procedure. This investigation holds that Student 8's case is an outlier for many reasons, but the main concern addressed below is a violation of Student 8's right to a free appropriate public education.

There are many reasons why Student 8's transfer to was unique. Student 8 was a student at School during the 2018-2019 school year. transferred to School, but she returned to after only two months away. When Student 8 returned for first day back at School, she was not accompanied by parents. Student 8 took the bus to school, much like she had done during the 2018-2019 school year, and she brought with a partially-completed school registration form in backpack. The Principal feared that turning Student 8 away on first day of school would be harmful to Student 8. The school staff never fully completed Student 8's registration paperwork, and the portion of the form where a parent is asked whether their child qualifies for special education services was never addressed. Apparently, no follow-up communication with Student 8's parents was conducted by School staff to complete that portion of the registration process.

At some point between November 7, 2019 and December 1, 2019, the Special Education office at School was informed that Student 8 required special education services and was not receiving them. On December 9, 2019, Student 8 began receiving counseling. On December 18, 2019, Student 8's teachers reduced

concerns about Student 8's outstanding needs for special educational in writing with an email to the Special Education Supervisor.¹⁵

Finally, on January 3, 2020, a transfer meeting was held regarding Student 8.¹⁶ former IEP (from grade year at School) was adopted, including Specially Designed Instruction for Math 5 times per week for 60 minutes, Specially Designed Instruction for Reading 5 times per week for 60 minutes. As a result, Student 8 went from spending nearly 100% of time with non-disabled peers for approximately two months in November and December to 69% of time with non-disabled peers.

MUSER IX(3)(B)(5)(a)(i) provides that "If a child with a disability (who had an IEP that was in effect in a previous SAU in the same State) transfers to a new SAU in the same State, and enrolls in a new school without the same school year, the new SAU must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous SAU), until the new SAU either adopts the child's IEP from the previous SAU or develops, adopts, and implements a new IEP that meets the applicable requirements in 300.320 through 300.324 [34 C.F.R. 300.323(e)]."

Because school staff failed to identify Student 8 as a child who receives special education services, the District did not provide Student 8 with a free appropriate public education in November and December 2019. While the Special Education Supervisor has explained that School was unable to obtain an updated IEP from School, this does not excuse the District from their obligations to provide FAPE to Student 8 immediately upon transfer to .¹⁷ In

¹⁵ As referenced above, Student 8's teacher maintains that this written communication on December 18, 2019 was not the first time that she informed the Special Education Supervisor about Student 8's special education needs, and the teacher maintains that multiple in-person communications occurred prior to December 2019.

¹⁶ The Student's parent was not in attendance at this meeting. Written notice was not sent to the parent until January 22, 2020.

¹⁷ In its response regarding Student 8, the District describes the typical process for implementing transfer students' IEPs at School: first, the District obtains a transfer student's previous IEP, then the District schedules a transfer meeting, or, if it is difficult to do so because the student's parents cannot be reached immediately, "we typically start services as soon as we know what services are on the current IEP." To clarify, if the District is aware that a transfer student is a student with a disability who requires special education services, the District is responsible for providing FAPE, even if the current IEP is not immediately provided. The District must take reasonable steps to follow-up with the sending school to obtain the prior IEP, and if an IEP is not immediately available for some extenuating reason, the District

fact, where School was still in possession of Student 8’s special education files from the 2018-2019 school year, even without an updated IEP from School, it should have been a fairly streamlined process to determine Student 8’s educational needs during a transfer IEP meeting in November or December 2019 or to immediately implement services based on the prior IEP if a transfer meeting could not be scheduled promptly.

Where Student 8 did not receive necessary SDI for approximately two months, and where missed more than a month of counseling services in addition to the counseling services missed in the 2018-2019 school year, Student 8 is entitled to compensatory education.

VIII. RESPONSE TO INTERVENTION

A. Factual Findings

1. Interested Party 1 alleges that the District has a practice at the School of over-utilizing Response to Intervention (RTI) instead of timely referring students to special education, specifically with regards to Student 5 and Student 6. See MUSER IV(2)(C-F); OSEP Memorandum 11-07 (January 21, 2011).
2. As part of systemic complaint #19.122CS, Interested Party 1 previously raised the issue that the District was delaying timely referrals of potential special education students by over-utilizing their RTI program. As a result, with respect to this allegation, the current investigation will only examine students, named and unnamed, who are alleged to have had their referrals delayed after August 6, 2019, when the resolution for systemic complaint #19.122CS was published.
3. **Student 5** is years old and in the grade at School. Student 5 lives in , Maine, and the District is responsible for educational programming.
4. Student 5 does not currently receive special education services, but has been engaged in the Response to Intervention (“RTI”) program at School.

must make reasonable efforts to determine the student’s special education needs during a promptly scheduled transfer IEP meeting. See MUSER IX(3)(B)(5)(a)(i).

5. RTI documents provided by the District indicate that Student 5 has been participating in the RTI program since the grade. In total, the student has received RTI services for approximately three and a half years.
6. In grade, Student 5 participated in an Individualized RTI Plan, based in classroom from January 2017 until June 2017.
7. In grade, Student 5 worked with a counselor through the RTI program, as well as a Bates Mentor, and an emotional regulation skills group. The student also had an individualized plan (or a 1-2-3 Removal plan).
8. For the entirety of -grade year, Student 5 engaged again with an individualized RTI plan (a 1-2-3 Removal plan) and a leveled Literacy Intervention program.
9. In grade, Student 5 had an individualized plan with alternative recess, as well as counseling through the RTI program.
10. According to documents provided by the District, in the Fall of 2019, Student 5's RTI team consulted with Student 5's mother and submitted a joint referral for Special Education Services. According to the referral form, the basis for this request was "recent escalation in behaviors, physical aggression, stealing, off-task impacting academics, or academics triggering behaviors?" See Referral for Special Education Services Form for Student 5.
11. On page 2 of the Referral Form, the RTI team members listed their names in the column entitled, "Everyone that works with the student and should be invited to the IEP/504 meeting." The names listed included Student 5's RTI counselor, Student 5's teacher, Student 5's Boost Program interventionist, and an Assistant Principal who participates in the Student's RTI team.
12. The RTI team reported on the referral paperwork that, despite extensive participation in the RTI program, Student 5 continued to perform significantly below grade level in Reading, Writing, and Math.
13. Student 5's IEP team met on November 14, 2019 for a special education referral meeting, but only the Special Education Supervisor, a Special Education Case Manager who is not on Student 5's RTI team, and Student 5's teacher were present for the referral meeting. The other members of the RTI team who submitted the referral and who worked closely with Student 5 were not included. Student 5's parent was not present. Therefore, the only person at the special education referral meeting who worked directly with Student 5 was classroom teacher.
14. The Written Notice from the referral meeting on November 14, 2019 indicates that "[Student 5] is not eligible for Special Education at this time.

will join an academic Response to Intervention (RTI) group.” The Written Notice does not detail any specific data to be collected or even any specific interventions to be implemented prior to Student 5 being referred for special education evaluations. There is no reference to prior RTI programs that Student 5 engaged in during grades and . Additionally, there is no reference to Student 5’s academic assessments, indicating that is below grade level in reading, writing, and math. Written Notice merely states, “due to a lack of evidence linking [Student 5’s] academic performance to any particular (Special Education) qualifying disability, the IEP team decided [Student 5] will be placed in an academic RTI group.”

15. However, according to email communications provided by the parties, Student 5 was not immediately re-referred back to the RTI program, and RTI team did not realize that Student 5’s special education referral meeting had already occurred until mid-December 2019.
16. Similarly, Written Notice from the referral meeting denying Student 5’s eligibility for special education evaluations on November 14, 2019 was not sent to Student 5’s parents until December 16, 2019.
17. The District’s response indicates that Student 5’s mother again requested a referral to special education in January 2020.
18. There is no indication from documents provided to the complaint investigator that Student 5’s mother’s referral to Special Education was reduced to writing by the District, and the specific date of the mother’s referral in January 2020 is unknown.
19. However, on February 24, 2020, another referral meeting was held for Student 5. During this second special education referral meeting, multiple staff members who worked with Student 5 in RTI were present – including all four individuals from the original referral form.
20. The IEP team concluded, according to Written Notice from the meeting on February 24, 2020, “the IEP team will move forward to evaluate the student for special education. The team will conduct an academic evaluation, a psychological evaluation – along with observations.”
21. The complaint investigator has received no further information about the current status of Student 5’s evaluation for special education.
22. **Student 6** is years old, and is in the grade at School. lives in , Maine, and the District is responsible for educational programming.

23. Student 6 does not currently receive special education services, but has been engaged in the RTI process at School.
24. Student 6 has participated in the RTI program since grade. RTI provided with individualized behavior plans, oral language development, counseling, a leveled literacy intervention throughout -grade year that required up to five sessions per week of 30 minutes each, and literacy processing and number core interventions in the grade.
25. In May of 2018, when Student 6 was in grade, Student 6 was referred for special education evaluations, and the IEP team found that did not qualify as a student with a specific learning disability (“SLD”). Instead, the IEP team elected to return Student 6 back to the RTI program for more interventions.
26. After Student 6 returned to RTI in May 2018, the RTI team has continued to work with Student 6 for another 1.5 years.
27. The RTI team concluded near the beginning of the 2019-2020 school year that Student 6 was not responding to RTI interventions and recommended that be evaluated for special education under a disability other than SLD.
28. Despite the consensus of the RTI team, the Special Education Supervisor requested more observations of Student 6 before a referral meeting would be scheduled.
29. The observations were conducted by Student 6’s RTI licensed clinician in September 2019 and October 2019. The observations simply consisted of Student 6’s licensed clinician’s behavioral observations of Student 6 during classes. There is no reason for the complaint investigator to conclude that these same observations could not have been conducted while the special education referral meeting was being scheduled.
30. On November 19, 2019, with the consent of Student 6’s mother, Student 6’s classroom teacher submitted a referral for special education services.
31. Advanced Written Notice of the referral meeting was sent to Student 6’s parent on January 6, 2020 for a meeting on January 15, 2020.
32. No specific explanation has been provided for why it took nearly two months after the November 19, 2019 referral to hold a specific education referral meeting for Student 6.
33. On January 15, 2020, the IEP team met to discuss their concerns and their request for a special education referral. Student 6’s classroom teacher stated that Student 6 is “reading far below grade level peers. has received

lots of after school interventions and is not making growth.” Student 6’s ELL teacher stated that, “ [redacted] will not stay focused unless I am working with [redacted] directly. [redacted] does not seem to retain information.” Student 6’s ELL interventionist reported that [redacted] has trouble “processing conceptual information and applying it.” Student 6’s math interventionist noticed that [redacted] is doing basic skills and is not retaining information. [redacted] has lost ground since we have started.”

34. The IEP team determined that Student 6 should be referred for evaluations, as every staff member who worked with Student 6 had significant concerns about [redacted] lack of academic progress.
35. The complaint investigator has received no further information about the current status of Student 6’s evaluation for special education.
36. [redacted] School has a robust and impressive RTI program, and the RTI Coordinator has developed an extensive system for maintaining data about individual student’s history and needs. The RTI program addresses both academic and social emotional concerns. The Coordinator explained during an interview with the complaint investigator that a student’s RTI team will generally reconvene every 30 to 45 days to assess what is working and what could be done differently to move the student forward.
37. During her interview with the complaint investigator, the Special Education Supervisor described her role in the RTI process. She explained that she would likely be invited to an RTI meeting if the RTI team was considering a special education referral. At those meetings, the Special Education Supervisor saw her role as looking for growth throughout a child’s RTI data. She reported that, if she observed growth, even slow growth, she would push for more progress monitoring and new strategies within the RTI structure to gather more data before a referral to special education.
38. In response to the complaint investigators questions about the Special Education Supervisor’s role in the RTI process, the RTI Coordinator agreed that she might be invited to a meeting if the team was considering a special education referral. Also, the RTI Coordinator agreed that, if the Special Education Supervisor asked for more data, then the RTI team will go back and get more data before moving forward with a referral.
39. In discussing the cases of Student 5 and Student 6 specifically, the Special Education Supervisor, the Director of Special Education, and the Assistant Director of Special Education did not describe Student 5 or Student 6 as outliers. The District and the staff at [redacted] School did not concede that the special education referrals for Student 5 or Student 6 were delayed as a result of their lengthy participation in the RTI program.

40. As a result, the complaint investigator concluded that, based on all documents provided for Student 5 and Student 6, based on all information provided during interviews about unnamed students, as well as numerous consistent interviews about the way that the RTI process and the special education referral process intersect at _____ School, that the circumstances experienced by Student 5 and Student 6 are significantly reflective of other unnamed students at _____ School.

B. Determinations

Systemic Violation Found Regarding the Delay of Special Education Referrals.

20 U.S.C. § 1412(a)(3) provides that school districts must ensure that: “All children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”

As the court in D.K. v. Abington noted, a school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all." Id, citing A.P. ex rel. Powers v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 226 (D. Conn. 2008). The Abington court held that “schools [are required to] identify disabled children within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." Id., quoting W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995) (other citations omitted).

MUSER IV(2) governs ‘Child Find’ policies for children ages three through twenty in the State of Maine, and states, in relevant part: “All referrals to the IEP Team must be acted upon in a timely manner.” MUSER IV(2)(E)(3) further provides: “Referral by parent – A parent may refer at any time. The parent of a child receiving general education interventions may request that the agency conduct a full and individual evaluation for possible eligibility determination at any time during the implementation of these general education interventions.”

The Office of Special Education Programs (OSEP) has offered guidance about the intersection of the child find process and robust RTI programs, like the one

found at _____ School. Specifically, OSEP instructs, “States and Local Educational Agencies (“LEAs”) have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy.” OSEP Memorandum 11-07 (January 21, 2011). Further, “the regulations at 34 CFR 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR 300.304-300.311...if the LEA agrees with a parent who refers their child for evaluation that the child *may* be a child who is eligible for special education and related services, the LEA must evaluate the child.” *Id.* (emphasis added).

Many similarities exist between Student 5 and Student 6. Both students are presently in the _____ grade, yet both have been participating in various RTI programs, both academic and social/emotional since the _____ grade. In both cases, the RTI team reached the conclusion at the start of the 2019-2020 school year that a special education referral was needed due to the students’ stalled progress (or complete lack of progress) with RTI programming.¹⁸ Student 5’s and Student 6’s parents were part of the requests for special education referrals. Yet, in both cases, the initial request for an evaluation was delayed (and later, in the case of scheduling Student 6’s initial eligibility meeting, even more significantly delayed) in favor of the use of a different RTI strategy or the collection of additional data through the RTI process.

Looking specifically at Student 5’s referral process, the individuals on the RTI team who worked directly with Student 5 and who submitted a referral for special education evaluation in the Fall of 2019 were not included in the special education referral meeting in November. Even though the RTI team was not present during the November meeting, the referral was denied and the Student was referred back for additional RTI interventions without consultation with or even notification to the RTI team. As a result, looking only at the 2019-2020 school year, Student 5’s special education evaluations were likely unnecessarily delayed for at least three months.

¹⁸ Because both Student 5 and Student 6 have now been referred for special education evaluations, this report need not elaborate on the specific educational data provided by the District for Student 5 and Student 6, except to note there is a glaring lack of academic growth made by both Student 5 and Student 6 from year to year, despite robust assistance from their RTI programs.

In the case of Student 6, the individuals on the RTI team were asked by the Special Education Supervisor to collect “additional data” in September 2019, rather than immediately submitting a referral for special education. Even after such data was collected by the RTI team in September and October 2019, and a formal referral was submitted by Student 6’s classroom teacher with those additional observations in November 2019, Student 6’s special education referral meeting was not scheduled until January 15, 2020. As a result, looking only at the 2019-2020 school year, Student 6’s special education evaluations were likely unnecessarily delayed for at least five months.

Under these circumstances and based upon the information obtained during interviews about the general practices regarding special education referrals from RTI teams, the evidence supports a finding that the District at _____ School has a systemic practice of over-utilizing Response to Intervention (RTI) instead of proceeding with timely referrals for RTI students to special education in violation of MUSER IV(2)(C-F). See also OSEP Memorandum 11-07 (January 21, 2011).

IX. EDUCATIONAL TECHNICIANS, 1:1 SUPPORT, & ADULT SUPPORT

A. Factual Findings

1. Interested Party 3 alleges that the District has a practice at the _____ School of not providing Educational Technicians, 1:1 support, and/or adult support to students who require such services as part of their IEPs. MUSER IX(3)(B)(3).
2. Specifically, Interested Party 3 asserts in her complaint that “the District uses substitutes for long-term solutions for educational technicians to support student that are supposed to be provided social emotional/academic support.” The complainant then goes on to explain why this practice is detrimental to students.
3. Because this specific allegation was not addressed in the prior systemic complaint #19.122C, the present investigation considers the full regulatory time frame of January 17, 2019 to present.
4. The Special Education Supervisor, the Director of Special Education, the Assistant Director of Special Education, and the Principal all explained during separate interviews with the complaint investigator that it remains difficult to fill open Educational Technician positions. All open positions are posted and monitored daily in hopes of filling vacancies with qualified

professionals. As a result of these vacancies, the District has been forced to utilize the services of substitutes to provide students with adult support, and the school administration often cannot guarantee consistency, even with a long-term substitute.

5. The Director of Special Education and the Special Education Supervisor at School told the complaint investigator that it can be difficult to cover every student who requires adult support, but with creative solutions, every student who requires the services of a 1:1 or who requires adult support on their IEP is covered.
6. Multiple teachers who were interviewed raised concerns that, due to the general lack of staff resources at School for adult support, IEP Team's currently feel that they cannot consider adding adult support, 1:1 support, or Behavioral Health Professionals, even if the IEP Team would otherwise agree that the student requires those supports to be educationally successful.
7. While Student 4 was not specifically named by the complainant regarding this allegation, both District staff and many school staff who were interviewed spoke about Student 4's ongoing need for consistent adult support throughout day.
8. On October 3, 2019, Student 4's IEP Team met to create IEP. Written Notice from the October 3, 2019 meeting indicates, "adult support throughout the day," as one of the determinations from the meeting. According to Written Notice, Student 4's general education teacher, special education teacher, and occupational therapist all spoke during the IEP Team meeting about Student 4's need for significant adult support to "complete assignments, interact appropriately, and show safety within the classroom."
9. Additionally, along with 14 other instructional strategies, "adult support throughout the day" is listed on Student 4's IEP, dated October 10, 2019, as a supplementary aid, service, modification, and/or support. In the frequency column for those 15 instructional strategies, it states that Student 4 is to receive those strategies, "5 times per week for 6 hours and 30 minutes as needed."
10. Student 4's teacher emailed the Special Education Supervisor on January 27, 2020 to inquire about getting adult support for Student 4 after a long-term substitute who was providing adult support left for maternity leave. The teacher explained that Student 4 was "starting to act out and is being oppositional and noncompliant to teachers both in and out of the resource room. Also, is refusing to go with counselor." See Email from Student 4's Teacher to Special Education supervisor, dated January 27, 2020. The

Special Education Supervisor responded back the same day, writing, “Thank you for checking in. Student 4 has adult support as needed, not a 1:1, we will be assigning people as they become available...please check in with [Student 4’s case manager] if you have further questions.”

11. There is a factual disagreement about whether Student 4 is currently receiving adult support as needed. The Special Education Supervisor maintains that the student’s needs are covered, even if it requires creative scheduling, such as utilizing an OT or a clinician to provide adult support. Student 4’s teachers disagree, stating that Student 4 is only provided with adult support “if available,” not as determined by Student 4’s needs.
12. Additionally, multiple staff members separately raised an issue about IEP Team consensus with respect to the question of whether or not a student requires adult support. Essentially, every teacher who was interviewed voiced their perspective that the Special Education Supervisor, as the LEA, always has the ultimate decision-making authority about whether to add or remove services from a child’s IEP, particularly with respect to a service where the school suffers from a lack of resources. Teachers report that the IEP process is not functioning properly if the Special Education Supervisor can exercise a veto about a particular service, particularly because the Special Education Supervisor may be the only member of the team who does not directly provide services to the student in question.

B. Determinations:

No Systemic Violation Found Regarding the Provision of Educational Technicians, 1:1s, and Adult Support.

No Finding Regarding Student 4’s Adult Support Being Fully Implemented

The District moved to dismiss this systemic allegation regarding educational technicians, alleging that Interested Party 3’s complaint failed to meet the pleading standards set forth in the MUSER. Specifically, the District argued that a complaint must contain both a statement of the alleged violation, and “the facts on which the statement is based.” MUSER XVI(4)(B)(2)(b).

In complaint 20.055CS, without specifying the names of any individual students, Interested Party 3 specifically states the following facts about the District’s provision of educational technicians: “the District uses substitutes for long-term solutions for educational technicians to support student that are supposed to be provided social emotion/academic support.” As a result, the complaint investigator finds that Interested Party 3’s complaint satisfies the requirements of MUSER XVI(4)(B)(2)(b) because

Interested Party 3 cites a specific factual concern, namely that students are not being provided the social emotional and academic support required by their IEPs through educational technicians, 1:1s, and/or other adult support.

While substitutes are nowhere close to a perfect solution for staffing difficulties in a special education environment, the District is not alone in the State of Maine in its struggle to fill Educational Technician positions. Again, MUSER X(2)(A)(5) states: “If a school administrative unit is unable to hire qualified staff for the provision of related services, the unit shall make an ongoing, good faith effort to recruit and hire appropriately and adequately trained personnel to provide related services to children with disabilities.”

It is readily apparent that the staff at _____ School spend a great deal of time searching for candidates for open positions, and when those efforts are unsuccessful, then the administration spends a great deal of additional time moving around staff members to cover the gaps throughout the school building. Without specific evidence that a particular student or a group of students is not receiving the level of adult support required by his/her/their IEPs, this investigation cannot conclude that the District has a practice at the _____ School of not providing Educational Technicians, 1:1s, and/or adult support to students who require such services as part of their IEPs. See MUSER IX(3)(B)(3). To the contrary, the District and administrative staff members who were interviewed all expressed a sincere commitment to providing staff to cover all special education students’ needs, even though such staffing efforts create a huge degree of uncertainty, frustration, and added pressure on already overburdened professionals.

Additionally, no finding can be reached regarding whether Student 4 is appropriately being provided with “adult support throughout _____ day,” as required by current IEP because _____ plan lacks specificity. The language in Student 4’s current IEP is unclear – does it refer to “adult support all throughout the day” or does it mean “adult support at some points of _____ day.” The meaning of Student 4’s IEP becomes increasingly unclear where the corresponding frequency column states that Student 4 is to receive adult support throughout the day, “5 times per week for 6 hours and 30 minutes as needed.” The IEP Team is best-equipped to determine *specifically* what Student 4

requires in terms of adult support and to resolve the apparent inconsistency of language between “adult support *throughout the day*” and “5 times per week for 6 hours and 30 minutes *as needed.*” (Emphasis added). Therefore, to provide the District with a clear picture of Student 4’s adult support needs, Student 4’s IEP Team should hold a progress review as soon as possible where true consensus is reached to the best of the team’s ability. Of course, this consensus must be based on the IEP Team’s interpretations of Student 4’s ongoing needs, not based upon the general unavailability of adult support resources at _____ School due to staffing insufficiencies.

X. STUDENT 7

A. Factual Findings

1. Interested Party 2 and Interested Party 3 allege that the District has not provided Student 7 with a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)).
2. Because this specific allegation was not addressed in the prior complaint #19.122C, the present investigation considers the full regulatory time frame of January 17, 2019 to present.
3. **Student 7** is _____ years old, and _____ is in the _____ grade at _____ School. Student 7 lives in _____, Maine, and the District is responsible for educational programming.
4. Student 7’s IEP team met on December 20, 2018 to review _____ special education evaluations and to create _____ initial IEP. Student 7 was determined to qualify for special education services with an intellectual disability in the mild range (full-scale IQ of 70).
5. Jennifer Robert, PsyD., NCSP, attended Student 7’s IEP meeting on December 20, 2018, and she reported to the IEP team about Student 7’s psychological evaluation and her recommendations. Specifically, Dr. Robert opined that Student 7 would not fit in well socially in a more restrictive learning environment, such as a Functional Life Skills Program. This conclusion was based on her clinical judgment, having worked as a School Psychologist since 1999, and based on her observations and conversations with Student 7. Dr. Robert agreed with the IEP Team that Student 7’s Least Restrictive Environment should allow _____ access to _____ mainstream peers.
6. In her interview with the complaint investigator, Dr. Robert recalled quickly scoring a Vineland Adaptive Behavior Assessment during the Student 7’s IEP

meeting, using scoring guide on her cell phone. Dr. Robert scored the Vineland during the meeting because it was not returned to her by one of Student 7's teachers until after the IEP meeting began. Immediately, Dr. Robert reported that she could tell that the results of the Vineland Adaptive Behavior Scale validated her overall conclusions and impressions about Student 7, as articulated in her full psychological evaluation, which had already been completed and distributed prior to the start of the IEP meeting.

7. Dr. Robert also told the complaint investigator that, although she could not specifically recall the details of the IEP team's discussion that occurred on December 20, 2018, based solely upon the results of her psychological evaluation for Student 7, Dr. Robert was certain that she would have recommended significant, additional supports in the classroom for Student 7 around functional behavior goals.
8. On December 20, 2018, the IEP Team determined that Student 7 would receive specially designed instruction in math, reading, and writing, and would have access to non-disabled peers 62% of the time.
9. The IEP Team did not create functional goals for Student 7 on initial IEP.
10. In mid-January 2019, Student 7's special education and general education teachers contacted the former Special Education Supervisor at School to express concerns about Student 7's programming and placement.
11. Despite concerns of teachers, no program review was held to evaluate Student 7's progress between the creation of IEP in December 2018 and the end of the 2018-2019 school year.
12. At the start of the 2019-2020 school year, Student 7 entered grade. Soon thereafter, on September 9, 2019, new general education teacher requested a program review. teacher also requested to access to Student 7's full IEP, psychological evaluation, and Vineland Adaptive Behavior Scale through the current Special Education Supervisor.
13. On November 13, 2019, at the request of Student 7's mother, the IEP Team gathered for a program review. According to Written Notice from the November 13, 2019 meeting, the IEP Team decided "to implement pre-teaching of social skills in unstructured settings." Various IEP Team Members voiced a desire to add functional behavioral goals on Student 7's IEP, but the Special Education Supervisor stated, "There are not functional needs listed on prior IEP, therefore, we cannot add functional goals."
14. On December 18, 2019, the IEP Team met again for Student 7's annual IEP review. Social skills goals were added to Student 7's IEP at the time, and the

Team determined that Student 7 would receive 15 minutes of specially designed instruction five times per week regarding self-regulation and organizational tools.

15. A member of the IEP Team on December 18, 2019 disputes the accuracy of the Written Notice from that meeting.

B. Determinations

Each of Interested Party 2's and Interested Party 3's five allegations regarding the denial of FAPE to Student 7 are examined individually below.

1. The District failed to review and revise the Student's IEP after being presented with concerns about the Student's lack of progress in the general education curriculum. MUSER IX(3)(D)(1)(b). **VIOLATION FOUND. DENIAL OF FAPE FOUND.**

The IEP team is tasked with the review and revision of the IEP, and MUSER IX(3)(D)(1)(a) requires that the IEP Team review the child's IEP "periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved." A regular education teacher of the child, as a member of the IEP Team, must participate in the review and revision of the child's IEP. MUSER IX(3)(D)(1)(d). Additionally, the IEP team must revise the IEP to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." MUSER IX(3)(D)(1)(b)(i).

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., 988 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.

A free appropriate public education ("FAPE") is an education "specially designed to meet the unique needs of the handicapped child, support by such services as are necessary to permit the child the benefit from the instruction." Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist., Westchester Cty v. Rowley, 458 U.S. 176, 188-89 (1982). In Endrew F. v. Douglas Cty. Scho. Dist., 137 S.Ct. 988 (2017), the Court emphasized that IEPs for children with disabilities must take into account the individual and "unique

circumstances” of the child. *Id.* at 999 (citing *Rowley*, 458 U.S. at 207). IEPs must be reasonably calculated to enable the child to receive education benefits. *Id.*

In January 2019, shortly after Student 7’s initial IEP was implemented, Student 7’s general education and special education teachers expressed concerns about programming, placement, and lack of expected progress towards annual goals. Nevertheless, no IEP Team meeting was scheduled to discuss the Student’s progress towards annual goals during the 2018-2019 school year.

Only a few days after the school year began on August 28, 2019, Student 7’s new teacher began advocating for a program review on September 9, 2019. Student 7’s teacher expressed repeated concerns about placement in the classroom, about lack of progress towards academic goals, and about the lack of functional behavioral goals on IEP. Student 7’s teachers continued to request a program review throughout September and October 2019. No IEP Team meeting was scheduled until Student 7’s mother requested a program review, which occurred on November 13, 2019.

Ultimately, the scope of discussion was limited during the meeting on November 13, 2019, and the IEP Team was not permitted to consider adding functional goals to Student 7’s IEP until annual review in December 2019. Without the ability to convene as needed to discuss the appropriate goals for Student 7, the IEP Team cannot appropriately ensure that Student 7 is provided with a free appropriate public education. Despite Dr. Robert’s conclusion back in December 2018 that Student 7 would benefit from and require support from functional behavioral goals in the classroom, an entire school year passed before the IEP team was able to meaningfully discuss their concerns about Student 7’s functional behavior goals and add such goals to IEP on December 18, 2019.

2. The District did not ensure that the Student’s level of functioning was properly evaluated when a Vineland Behavior Assessment was scored without proper protocol or documentation by a psychologist during the Student’s IEP meeting. MUSER V(2)(C)(1). **NO VIOLATION FOUND.**

Based on information provided by Dr. Robert during her interview with the complaint investigator regarding the thorough process by which she evaluated Student 7 and reached her conclusions, this investigation finds that the Student was properly

evaluated, even though the Vineland Behavior Assessment was scored quickly by hand during Student 7's initial IEP meeting. Dr. Robert's evaluation of Student 7 meets the standards of MUSER (V)(2)(C)(1).

3. The District did not provide a copy of the Student's Vineland Behavior Assessment Report to the Student's parents at least 3 days prior to the IEP Team Meeting at which the evaluation was discussed. MUSER V(4)(G); MUSER VI(2)(A). **PROCEDURAL VIOLATION FOUND. NO DENIAL OF FAPE FOUND.**

MUSER VI(2)(A) requires that "a copy of the evaluation report must be provided to the parents at least 3 days prior to the IEP Team Meeting at which the evaluation will be discussed."

The District concedes that the Vineland Adaptive Behavior Assessment was not provided to the Student's parents at least 3 days prior to the IEP Team Meeting at which the evaluation was discussed. The completed Vineland Assessment was presented to Dr. Robert for the first time during the IEP Team meeting, which is why she quickly scored it and presented to the Team about her overall findings. This procedural violation did not result in a denial of FAPE to Student 7.

4. The District did not ensure that the Student's full IEP was accessible to each teacher responsible for its implementation. MUSER IX(3)(B)(4). **NO VIOLATION FOUND.**

MUSER IX(3)(B)(4) states that a District must ensure that each child's IEP is "accessible to each regular education teacher, special education teacher, related services provider, and any other services provider who is responsible for its implementation." Although Student 7's teachers expressed frustration about the District's current processes for accessing Student 7's special education file and the delay those processes caused, this investigation finds that the District has complied with MUSER IX(3)(B)(4) by making Student 7's file accessible to Student 7's teachers in the Special Education office.

5. The District did not follow regulatory procedures regarding Written Notices. 34 CFR 300.503; MUSER App. at 220. **NO VIOLATION FOUND.**

Although a member of the IEP team disputes the accuracy of the Written Notice from Student 7's December 18, 2019 annual IEP review, this investigation concludes that the District has complied with the basic regulatory procedures regarding Written Notice. See 34 CFR 300.503; MUSER App. at 220.

CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The following Individual Student Compensatory Plans are due to the Department by **September 1, 2020**.¹⁹
 - A. For Student 1, whose counseling services were delayed due to the District's written policy regarding adding counseling services to an IEP, the District must provide the following:
 - A plan to deliver 2 hours of compensatory counseling services by the Student's special education clinician, as determined by the Student's IEP Team.
 - B. For Student 4, whose counseling services were delayed after transfer to the District at the start of the 2019-2020 school year and whose IEP is currently unclear about needs for adult support, the District must provide the following:
 - A plan to deliver 2 hours of compensatory counseling services by the Student's special education clinician, as determined by the Student's IEP Team.
 - Written Notice demonstrating that the Student's IEP team has convened before September 1, 2020 to revise or clarify Student 4's specific needs in terms of adult support in IEP.
 - Written Notice demonstrating that the IEP team has discussed whether Student 4 would benefit from Specially Designed Instruction in organization and task management, as was specified in prior IEP but never provided at School.
 - C. For Student 5, whose evaluation for special education is currently in progress but was significantly delayed due to the over-utilization of the RTI program, the District must do the following:
 - Hold an IEP meeting as soon as possible to determine the results of the Student's evaluation.
 - If Student 5 qualifies for special education services, reach a consensus as an IEP team about how many hours of compensatory specially designed instruction will account for the Student's delayed special education referral between November 14, 2019 and February 24, 2020.

¹⁹ Due to the uncertain nature of the COVID-19 pandemic closures, the District is being afforded significantly more time to create compensatory plans for individual students that will hopefully be implemented during the 2020-2021 school year. However, if School remains closed during the fall of 2020, then the District should contact the Department immediately to reassess these deadlines.

- D. For Student 6, whose evaluation for special education services is currently in progress but was significantly delayed due to the over-utilization of the RTI program, the District must do the following:
- Hold an IEP meeting as soon as possible to determine the results of the Student's evaluation.
 - If Student 6 qualifies for special education services, come to a consensus as an IEP team about how many hours of compensatory specially designed instruction will account for the Student's delayed special education referral between September 2019 and January 15, 2020.
- E. For Student 7, who was denied FAPE when no IEP Team progress review was held between January 2019 and November 2019, despite the requests of special education and general education teachers, the District must provide the following:
- 3 hours of compensatory SDI by a special education teacher in conjunction with the Student's current educational programming, as determined by the Student's current IEP Team. The SDI shall focus on Student 7's functional behavioral goals, if the IEP Team determines that is appropriate.
- F. For Student 8, whose counseling services and specially designed instruction were delayed due to the District's failure to implement prior IEP upon transfer back to _____ School, the District must provide the following:
- 2 hours of compensatory counseling services by the Student's special education clinician, as determined by the Student's IEP Team.
 - 25 hours of compensatory SDI by a special education teacher in conjunction with the Student's current educational programming, as determined by the Student's current IEP Team.
2. The District must create a plan specific to _____ School containing internal processes that will ensure that regulatory deadlines are met, including deadlines for IEP copies and Written Notices being mailed to parents, for initial referral meetings being scheduled, and for transfer meetings being scheduled. Additionally, the current process for ensuring timely annual reviews and triennial evaluations should be reviewed. This plan should include a proposed timeline for regular reports to the Department about the number of regulatory deadlines that are successfully met (or missed) during the 2020-2021 school year. This plan is due to the Department by **September 1, 2020**.

3. The District must redraft and submit to the Department its written policy regarding adding counseling to a student's IEP to reflect deference to IEP Team Decision Making Process. This amended written policy is due to the Department by **September 1, 2020.**

4. The District must create a plan specific to _____ School containing internal processes that will ensure that RTI teams have the authority to make timely referrals for special education services, as needed, that special education referral meetings will be scheduled in a timely fashion, and that IEP referral meetings will include input from individuals who have worked with the child during the RTI process, if the referral originates from the RTI team. This plan is due to the Department by **September 1, 2020.**

5. The Superintendent, the Special Education Director, the Special Education Assistant Director, and the Special Education Supervisor at _____ School must receive training by an attorney or member of the Department regarding specific special education regulations. Evidence of training is due to the Department by **September 1, 2020.**

Training must review the following regulatory provisions:

- MUSER V(2)
- MUSER VI(2)
- MUSER IX(3)(B)(3)
- MUSER IX(3)(D)(1).
- MUSER IX(3)(G)
- MUSER App. 1 at 220

Dated: May 1, 2020

Julia N. Pothen, Esq.
Complaint Investigator