

Complaint Investigation Report

v. RSU 87 / MSAD 23

May 18, 2020

Complaint # 20.065C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: February 24, 2020

I. Identifying Information

Complainants:

Respondent: RSU 87 / MSAD 23

Mark Turner, Superintendent

44 Plymouth Road

Carmel, ME 04419

Lesley Snyder, Director of Special Education

Student:

II. Summary of Complaint Investigation Activities

On February 18, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on February 24, 2020. Therefore, the current investigation covers the period of February 18, 2019 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 332 pages of documents from RSU 87 / MSAD 23 (“the District”). The investigator also received 351 pages of documents from the Student’s parents (“Parents”). Interviews were conducted with Parents on March 20, 2020 and on April 3, 2020. On March 25, 2020, the Director of Special Education was interviewed, and on April 16, 2020, the Director of the _____ Program and a Social Worker from the _____ Program were interviewed.¹ The Complaint Investigator reviewed all complaints, responses, and documents provided by the parties.

¹As per the standards of practice for conducting complaint investigations, the Complaint Investigator used her discretion about which witnesses to interview; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation. Additionally, as a result of required off-site instruction due to the COVID-19 pandemic, the Complaint Investigator made significant efforts to obtain

III. Preliminary Statement

The Student is _____ in the 6th grade. _____ resides with _____ parents (“Parents”) in _____, Maine, and RSU 87 / MSAD 23 (“the District”) is responsible for the Student’s educational programming. The Student qualifies for special education and related services under the category of Autism, and _____ carries a number of additional diagnoses, including Attention Deficit Hyperactivity Disorder (“ADHD”) – Combined presentation, Mild Intellectual Disability, and some form of mood disorder. See Student’s Individualized Education Plan, effective on May 17, 2019, last amended on January 14, 2020; see also Psychological Evaluation by Dr. Cole, dated December 14, 2018.

During the fall of 2018, after _____ family relocated to RSU 87 / MSAD 23, the Student began _____ enrollment at the _____ Program (“_____”) as a 5th grader. The Student successfully completed the majority of _____ 5th grade year at _____, although _____ was hospitalized twice during the 2018-2019 school year at _____ Hospital. After _____ second discharge from the hospital in July 2019, the Student returned to the _____ and successfully completed _____ Extended School Year (“ESY”) programming during the Summer of 2019.

However, the Student struggled significantly when _____ transitioned to _____ 6th grade classroom at _____’s middle school. The Student’s behavioral needs intensified, and following an incident on October 17, 2019, the Student was not allowed to return to the _____. The Student received no educational services from October 17, 2019 until November 25, 2019. Since November 25, 2019, the Student has received only tutoring services. The District has unsuccessfully attempted to secure placement for the Student at a therapeutic day treatment program, and the uncertainty of the current pandemic requiring off-site learning has further prolonged the placement search for the Student.

This complaint was filed by the Parents alleging that the District violated the Maine Unified Special Education Regulations (“MUSER”). After the receipt of the Parents’ complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on March 2, 2020, alleging nine violations of the MUSER. Also, a telephonic Complaint Investigation Meeting for all parties was held on March 2, 2020. A revised Allegations Letter was sent to the parties by the Complaint Investigator on March 5, 2020, alleging ten total violations of the MUSER. This investigation considers those ten allegations.

alternative contact information for potential witnesses. However, not all individuals were immediately available for interviews. To ensure that a thorough and complete investigation would occur during the exceptional circumstances of a pandemic requiring off-site instruction, the publication deadline for this report was extended by 30 days until May 18, 2020. At the time of publication, the Complaint Investigator feels confident that all her investigative resources have been exhausted and that complete information was collected about all the allegations raised in the present investigation. The Complaint Investigator also maintains that all critical witnesses were interviewed as part of the process.

IV. Allegations

The Parents have alleged that the District did not provide a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because of the following ten violations:

1. The District did not develop and/or implement an appropriate plan for positive behavioral interventions and supports to address the Student's behaviors at the Program. See MUSER IX(3)(C)(2)(a).
2. The District did not provide a functional behavior assessment and behavioral intervention services and modifications designed to address the Student's behavior violations so that they do not recur. See MUSER XVII(1)(D)(1)(b).
3. The District did not intervene when the Student was regularly removed from educational setting at the Program, even after the Student was subjected to repeated emergency interventions that effectively changed placement outside the IEP Team process and prevented IEP from being fully implemented. See MUSER IX(3)(B)(3); MUSER VI(2)(J, L).
4. The District did not perform a manifestation determination within 10 school days of a decision to change the Student's placement to an isolated/secluded setting at the Program because of a violation of a code of student conduct. See MUSER XVII(1)(E).
5. The District did not return the Student to the placement from which was removed on October 17, 2019 after the behaviors that resulted in suspension were determined to be a manifestation of the Student's disabilities at an IEP Meeting on October 25, 2019. See MUSER XVII(1)(F).
6. The District is currently providing the Student with 'tele-tutorial instruction' and an abbreviated school day without regulatory compliance. See MUSER X(2)(A)(4); MUSER VI(2)(L); MUSER IX(3)(B)(3).
7. The Student is not being educated in the least restrictive environment (LRE). See MUSER X(2).
8. The District has not implemented the Student's IEP since October 17, 2019. Specifically, the Student has not received the following: 6.5 hours per day of Specially Designed Instruction, 60 minutes per week of Speech, 30 minutes per week of Social Work, 30 minutes per month of BCBA services, and OT consult. See MUSER IX(3)(B)(3).
9. The Student's IEP does not consider the full academic, developmental, and functional needs of the Student. See MUSER IX(3)(C)(1)(d). As a result, the current IEP does not provide special education, related services, and

supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining annual goals. See MUSER IX(3)(A)(1)(d); MUSER IX(3)(D).

10. The complainant alleges that compensatory services are owed because the District has not provided FAPE to the student. Additionally, the complainant alleges that the District must develop an appropriate program and placement for the Student. In the alternative, if the District remains unwilling or unable to do so, the complainant alleges that the Maine Department of Education should step in directly to provide FAPE to the Student. See MUSER XVI(4)(A)(3).

V. Factual Findings

1. The Student is 13 years old, and is currently in the 6th grade.
2. The Student resides with parents (“Parents”) in , Maine, and RSU 87 / MSAD 23 (“the District”) is responsible for the Student’s educational programming.
3. The Student has three siblings who live at home with and Parents, and also has a step-sibling who resides with every other weekend.
4. The Student qualifies for special education and related services in the Autism category. also has a variety of other diagnoses that have an adverse impact on education, including ADHD-Combined type, Mild Intellectual Disability, and a mood disorder.² See Student’s Individualized Education Plan, effective on May 17, 2019, last amended on January 14, 2020; see also Psychological Evaluation by Dr. Cole, dated December 14, 2018.
5. The Student’s most recent educational achievement evaluations were conducted by the District on May 8, 2019. These assessments show the Student fell into the ‘Very Low’ range of cognitive performance in reading, language, writing, and mathematics, as measured by the Woodcock-Johnson IV Achievement Test. The Student performed in the early-elementary level in all subject areas, and struggled particularly with literacy (the Student’s written language skills were measured at a ‘high kindergarten’ level in May 2019).

²² The Student has been diagnosed with disruptive mood dysregulated disorder (“DMDD”). According to Dr. Tennes’ psychological risk assessment report, DMDD “is a new diagnosis in the DSM-5 and is in the Depressive Disorders section with specific diagnostic criteria. DMDD was incorporated into the DSM-5 to address a perceived overdiagnosis of Bipolar Disorder in children. Emerging research on DMDD suggests that there might be biological or neurological issues associated with chronic irritability, and oppositional and aggressive behaviors in children when these patterns begin to manifest before age 5.”

6. Additionally, the Student's recent assessments in overall intellectual functioning, as measured by the Weschler Intelligence Scale for Children – Fifth Edition (WISC-V), dated December 14, 2018, indicate that overall intellectual functioning falls within the 'Extremely Low' range (Full Scale IQ = 58; 0.3 percentile).
7. The Student's most recent Functional Behavioral Assessment ("FBA") was completed on September 15, 2017, during the beginning of 4th grade year. The FBA noted that the Student's most significant behavior challenges were: 1) noncompliance with staff directions, school rules, and policies; 2) bolting; 3) verbal threats towards others; and, 4) aggressive, assaultive, or physically threatening actions towards others.
8. The FBA also concluded that the Student's behavior incidents at school occurred in response to adults' requests for the Student to complete schoolwork, and the FBA observed that the Student's behavior incidents occurred at various times throughout the day, without any observable pattern.
9. Specifically, the FBA stated, "It appears that even with the rotation or higher preferred tasks with lower preference tasks that [the Student] still reaches a point where begins refusing to complete schoolwork. When this occurs [the Student] will then escalate behaviorally." See Student's Functional Behavioral Assessment, dated September 15, 2017.
10. The FBA recommended that educational interventions should focus on helping the Student communicate effectively and safely whenever the Student needs a break and should aim to motivate the Student with rewards for following classroom rules. The FBA also suggested providing the Student with more opportunities for one-on-one peer interaction, increased hands on learning tasks, and new physical outlets for expelling extra energy. Id.
11. In the beginning of 4th grade year, the Student was placed at Day Treatment Program, after an inpatient hospitalization. While was a student at the Student demonstrated a number of challenging behaviors, including but not limited to, environmental destruction, physical aggression, self-injurious behavior, bolting, biting, and spitting. Additionally, observed some lower-level behavioral concerns, such as non-compliance with staff directions and off-task behavior. reported the use of restraint and seclusion for the Student as needed to mitigate the imminent risk of injury to and others. See Discharge Information Sheet, dated July 31, 2018.

12. The Student was hospitalized at _____ Hospital for part of _____ 4th grade year, from the end of May through June 2018. See Written Notice from the IEP Meeting on September 7, 2018.
13. In the fall of 2018, the Student and _____ family moved to _____, Maine and RSU 87 / MSAD 23 (“the District”) became responsible for the Student’s educational programming; due to the distance, the Student could no longer attend the _____ program.
14. After an IEP meeting on September 7, 2018 to determine the Student’s least restrictive and most appropriate placement, the Student began attending the _____ Program (“_____”) on September 12, 2018, near the start of _____ 5th grade year.³ See Written Notice from IEP Meeting on September 7, 2018.
15. During the transfer meeting on September 7, 2018, the IEP Team also agreed to adopt the Student’s prior IEP in full, which called for 28.5 hours per week of specially designed instruction, 30 minutes per week of speech therapy, 2 hours per month of OT consultation, 30 minutes per month of behavior services, 60 minutes per week of individual clinical services, and special transportation. Additionally, the Student’s prior IEP included 27.5 hours per week of ESY services, and _____ IEP specified that the Student spent 0% of _____ educational time with non-disabled children. Id.
16. The Director of the _____ Program was present for the transfer IEP meeting on September 7, 2018, and she reviewed the format of the program at _____, including the school-wide behavior leveling system and structure of the program, including the systems for individual positive behavior support. The Student and the Parents were also scheduled to tour _____ Program prior to the Student’s start date on September 12, 2018. Id.
17. The _____ Program, located in _____, Maine, is a therapeutic day treatment program providing special education for students with behavior and emotional challenges from grades K-12. The _____ serves students in 24 school districts in Maine, and the program offers a low staff-to-student ratio, as well as a

³ Notably, RSU 87 / MSAD 23 does not offer an in-district day treatment program. Therefore, the Student’s IEP Team felt that the _____ Program was both the most appropriate and the most local option for the Student, even though it is located outside of _____ school district. The District has placed a significant number of students at the _____ in the past, and therefore, the District has established excellent communication channels with the administrators at the _____. Additionally, the District reports high confidence in the _____’s ability to address the individual needs of students with challenging behavioral needs.

highly-structured setting that emphasizes positive behavior support and reinforcement and hands-on learning. See Program Overview.

18. The Director of the , during her interview with the Complaint Investigator, also explained that the has access to a Board-Certified Behavioral Analyst (“BCBA”) and a School Psychologist to consult with teachers and staff, as needed. These consultation services are available to staff, even if a Student does not have these specific services listed on his or her IEP. Additionally, the employs three full time clinical Social Workers who work directly with students and who teach social and emotional skills in the classroom.

19. Like many therapeutic day treatment programs, the utilizes an “Instructional Level System.” Behavior data is collected and compiled daily by all staff members, and staff reviews each student’s data on a daily and weekly basis. The uses four instructional levels, and all students being the program at Level 3. Level 3 allows for the following: “Students access programming in their classroom setting and attend all specials with adult support. On Level 3, students are under direct supervision and within arm’s length of a staff member at all times.” If student demonstrates success with their individual behavior goals, they can eventually be moved to Level 2 or Level 1, allowing for more independence within the . However, if a student engages in seriously inappropriate or unsafe behavior (such as threats, aggression, non-compliance, or bolting), a student at any level can be moved to Level 4. At Level 4, students are on “restriction,” and therefore, “student are under direct supervision and within arm’s length of a staff member at all times. Students may be programmed for in an alternative space within the school setting.” See Program Student Handbook 2019-2020, ‘ Program’s Instructional Level System.’

20. During her interview with the Complaint Investigator, the Director of the explained that, in addition to the school-wide leveling system, all individual students at also have an individual Behavior Support Plan. The Director explained that each student’s individual plan can modify or overlap with the school leveling system, as needed to best address an individual student’s needs. While the leveling system, the classroom-specific behavioral support systems, and the individual behavior plans are all used a guide for most behavior management decisions, the Director clarified that the behavior systems are all completely fluid, allowing for regular adjustments on a daily, weekly, and monthly basis, depending on each student’s needs.

21. The Director of the also explained that every student at the has an individual tracking sheet that reflects the behavior goals for each student and that

tracks the behaviors targeted by each student's individual behavior plan and IEP. The staff members are required to update each student's behavior tracking sheet every 20 minutes throughout the school day. That data is compiled daily and tallied again for review at the end of the week. This behavior data drives all day-to-day decisions in the classroom.

22. Upon entering the _____, the Student's special education Teacher developed a Behavior Support Plan for the Student. The Student's individual plan that was similar to the positive behavior support plan utilized for the Student at the _____ Day Treatment Program, and _____ individualized plan implemented numerous strategies recommended by _____ most recent FBA from September 2017. For example, the Student's plan included visual representations of rewards/incentives that the Student is actively working towards, periods of time for the Student to engage in physical activity to expel energy, and direct instruction regarding calming and coping strategies to communicate when the Student is upset or frustrated, including the use of zoning cards and zone-check ins. See Student's Behavior Support Plan, developed in September 2018.
23. Notes provided by the District from the Student's special education teacher in 2018 reflect that the Student's individual behavior plan was modified, adjusted, and re-contemplated as additional observations were made about the Student's behavior in the classroom and as the motivations behind _____ behavior decisions were better understood. See Notes from Student's special education teacher, dated October 16, 2018.
24. Similarly, clinical notes provided by the District from the Student's Social Worker reflect that the Student continued to learn and develop new coping strategies for _____ when the Student was frustrated or upset. See Notes from Student's Social Worker, dated September 27, 2018 to October 16, 2019.
25. The Student's IEP Team met again in October 2018 to review _____ transition to the _____ and to discuss three Chapter 33 seclusion incidents. The IEP team adjusted some of the Student's goals and added the use of certain supplementary aids. The team reviewed the Student's behavioral data, including the three incidents of seclusion, and the Student's voluntary use of the Deferred Time-Out ("DTO") space as a calming strategy during the day. The IEP team felt that no changes should be made to the Student's behavior plan at that time.
26. During their interview with the Complaint Investigator, the Parents expressed that the Student did very well at the _____ during the first half of the 2018-2019 school year.

27. During interviews, the Director and a Social Worker from the both confirmed the same – that the Student was largely successful at the with individual behavior plan in place. Specifically, the Director and the Social worker reported that the vast majority of days were “good days” for the Student with very few or no behavior disruptions. Additionally, both staff members maintained that the Student’s behavior challenges, when they did occur during the first half of the 2018-2019 school year, were minor in nature and generally within the parameters of behaviors that many other students at the exhibit.
28. The Parents reported that the Student began to struggle in the second half of 5th grade year, and the Student was hospitalized for a period in April 2019.⁴
29. The Student’s IEP Team met again on May 17, 2019 for an annual review and re-evaluation meeting. The Team made a few adjustments to the Student’s programming (increasing Speech Therapy frequency to 60 minutes per week and decreasing OT consultation to 30 minutes per month); however, the IEP Team largely agreed that the current level of the Student’s programming was appropriate. See Written Notice from IEP Meeting on May 17, 2019.
30. At the May 17, 2019 meeting, the IEP Team also reviewed updated behavioral data, noting that the Student “has made nice gains this year. has reduced all target areas. Targeted behaviors include physical aggression, verbal aggression, property destruction, bolting, work refusal, and coping skills. Although has shown growth in all areas, it may be helpful to track the intensity of behaviors. [The Student] can go a while without having a major incident and then have one with high intensity. last several incidents were quite intense.” Id.
31. Overall, the IEP Team noted positive trends regarding the Student’s challenging behaviors. According to Written Notice, the Student’s strengths included, “[The Student] is very much a leader in the special education classroom. When is ‘on,’ is a great role model.” Notably, the Student received no out-of-school suspensions during the 2018-2019 school year. Id.
32. On May 22, 2019, the Student received first ‘Critical Incident Report’ at the , which required an in-school suspension. The Student reportedly became escalated with another peer, and then sprayed the classroom with a fire extinguisher, before bolting off campus.

⁴ No records were provided to the Complaint Investigator by either party regarding this hospitalization, so the specific dates of this inpatient stay are unknown.

33. On May 23, 2019, the Student became escalated on the school bus during ride home. attempted to damage a number of items on the school bus, and due to unsafe behaviors, the Sheriff became involved.
34. The IEP Team was not reconvened during this period, and the Parents opined during an interview with the Complaint Investigator that the Student's positive behavior support system was not being utilized properly at the during this period, or, if it was utilized, it was not helping the Student make meaningful gains towards goals.
35. From June 6, 2019 to July 2, 2019, the Student was hospitalized again at Hospital. According to the Student's discharge documentation, the Student was "admitted for aggressive and out-of-control behaviors in multiple settings." The hospital's follow-up recommendations at discharge included the following: "residential treatment is highly recommended, and at minimum, an application for intensive temporary residential treatment to be completed for approval for services...Home and community therapy is highly recommended if family is not ready to pursue residential treatment."⁵
36. While the Student was hospitalized in June 2019, due to reports about fire setting behaviors, the Student was referred for evaluation to the Fire Department by Hospital. The Officer who evaluated the Student quoted as saying, "I hate [school]. I tried to escape by spraying the extinguisher...I'm the bully at school...I get into fights. One time, I kicked a kid in the face because I was pissed off." See Fire Department Assessment, dated June 26, 2019.
37. The Fire Department Assessment concluded, "Honestly, this was perhaps one of the most challenging juvenile firesetter cases I have experienced in 23 years as a professional Fire and Life Safety Education Officer...taken as whole, I believe [the Student] is a child in crisis but not in the traditional sense where has a single or even multitude of life stressors causing to act out with fire play. Instead, I believe would fit into the subset category of a "recurrent" juvenile firesetter who is using fireplay to express feelings of anger or aggression." Id.

⁵ Unfortunately, the Student's discharge documentation was not provided to the District until November 2019, and the District did not seek out further information about the Student's hospitalization. These recommendations, as a result, were not discussed by the IEP Team to inform the Student's individual behavior support plan until after the Student was already engaged in tele-tutorial instruction at home.

38. After being discharged from the hospital on July 2, 2019, the Student returned to the , and successfully completed ESY programming during the summer of 2019 without any significant behavioral issues.
39. As reported by the Director of the during her interview with the Complaint Investigator, the expectations for students during the ESY program are substantially different from the expectations during the regular school year. The goals of the ESY program are designed to maintain a student's academic skills, rather than introducing new concepts, so the academic rigor is significantly different. Additionally, the ESY program is very small, usually including only 10 or students in the entire building, and the daily ESY schedule only lasts for a half-day.
40. During their interview with the Complaint Investigator, the Parents agreed that the Student excelled during the ESY program in July and August 2019. They felt that the abbreviated schedule was more manageable for the Student, and they explained that the Student showed gains at home as well during this time.
41. In the fall of 2019, the Student entered the 6th grade at the . faced some significant transitional obstacles, including a larger classroom size (nine students compared to four students during 5th grade class). Fortunately, the Student had preferred staff members in new classroom, including, but not limited to, the same special education teacher from ESY program and a preferred Education Technician.
42. The Student's special education teacher reported that the Student's first few weeks in 6th grade were productive and uneventful. According to the teacher, the Student appeared to be making a smooth transition to new classroom. See Written Notice for IEP Team Meeting on October 3, 2019.
43. The Parents also expressed initial confidence about the Student's transition based upon the "180-degree turnaround" the Student had made over the summer months following hospitalization. See Interview with the Complaint Investigator on April 3, 2020.
44. However, on September 16, 2019, the Student was returning to classroom with a Social Worker. Instead of going inside the classroom, the Student bolted down the hallway and sprayed a fire extinguisher throughout the hallway. then bolted out of the building before staff could stop and ran across traffic, across the street. See Incident Report Physical Restraint or Seclusion of a Student, dated September 16, 2019.

45. Due to the extensive damage caused by the fire extinguisher, the school building had to be temporarily closed and professionally cleaned. All the fire extinguishers had to be replaced. The Student was suspended for five school days. was not permitted to return to school until September 24, 2019. Id.
46. After the incident on September 16, 2019, the Director of the immediately asked the school's BCBA consultant to provide advice and guidance about the Student's behavior. In particular, the Director wanted to learn about any possible trigger for the Student's decision to bolt and spray the fire extinguisher. Because this was the second behavior incident involving a fire extinguisher, and the Director hoped to get more information about this action. The BCBA began reviewing the Student's files. See Director's Interview with the Complaint Investigator on April 16, 2020.
47. On October 3, 2019, the Student was being disruptive in class, and desk was relocated to the hallway. At one point, the Student observed the fire extinguisher in the hallway and moved towards it. A staff member intervened and immediately removed the Student to the Deferred Time Out room. See Incident Report Physical Restraint or Seclusion of a Student, dated October 3, 2019.
48. Later the same day, the Student's IEP Team convened to hold a parent-requested meeting and a Chapter 33 incident meeting. The Parents requested that the IEP Team consider an abbreviated school day. The Parents felt strongly that the Student was not able to manage the full day of school due to exhaustion and overstimulation. The IEP Team declined to implement this suggestion because "the current data does not support that [the Student] requires a shorter day. There is no indication or pattern of behavior that indicates that a shorter day would reduce behavioral challenges. This can be revisited at a later time, if necessary." See Written Notice of the IEP Team Meeting on October 3, 2019.
49. During her interview with the Complaint Investigator, the Director of the further specified that the Student's daily behavior data did not reflect a consistent time of day when behavior incidents were more likely to occur. The Director also explained that the IEP Team was concerned that an abbreviated day might exacerbate the Student's behavior struggles because a shorter day would mean that the Student's time to complete school work would be condensed and opportunities for necessary breaks would be reduced or eliminated. Additionally, the IEP Team felt that the Student needed substantially more support during transition into 6th grade, not less support. Ultimately, the Director felt, and the IEP

Team agreed, that an abbreviated school day would limit the ability to work with the Student.

50. Although the IEP Team reviewed the Student's individual behavior plan and behavior data, no changes were proposed or implemented to the Student's individual behavior plan on October 3, 2019. However, due to the incident on September 16, 2019 and the fact that the Student attempted to reach a fire extinguisher again earlier that day on October 3, 2019, the Director of the informed the IEP Team that she would be moving the Student's programming to an alternative location, as permitted by Level 4 restrictions outlined in the 'Instructional Leveling System.' See Written Notice for IEP Team Meeting on October 3, 2019.
51. Additionally, during the October 3, 2019 meeting, the Director of the proposed that the Student's FBA from 2017 be updated in order to consider potential adjustments to the Student's behavior plan. Id. Unfortunately, this process was never completed prior to the Student's ultimate exclusion from school on October 17, 2019.
52. On October 8, 2019, during a seclusion, the Student hit a staff member in the back of the head repeatedly and then wrapped hands around the staff members' neck. also attempted to set off the sprinkler system in the building by throwing shoes at the sprinkler system. As a result, the Student was suspended for four additional school days. was not permitted to return to school until October 15, 2019. See Incident Report Physical Restraint or Seclusion of a Student, dated October 8, 2019.
53. Two days after returning to school, on October 17, 2019, during the bus ride home, the Student became escalated. hit another student in the back of the head and kicked the bus driver in the stomach. The Student was suspended indefinitely, until an IEP meeting could be scheduled. See Incident Report Physical Restraint or Seclusion of a Student, dated October 17, 2019.
54. On October 25, 2019, the Student's IEP Team met for a manifestation determination. The Team concluded that the Student's recent behavior incidents were a manifestation of the Student's disabilities, and the administration at the asked for a risk assessment to be completed before the Student could return to school. Written Notice from the October 25, 2019 meeting indicates that, due to safety concerns as the Student's behaviors had increased in severity and intensity, "the team agreed to 10 hours of tutoring per week," while the risk assessment was completed. However, Written Notice also states that "no other options were

considered, as [the Student's] behavior are unsafe and increasing in intensity and purposefulness." See Written Notice from IEP Team Meeting on October 25, 2019.

55. During the October 25, 2019 meeting, the Parents expressed frustration that the Student was being suspended for unsafe behaviors from a day treatment program that was supposed to be equipped to manage exactly those kinds of behaviors. The Parents also shared that the Student was scheduled for an intake at on November 5, 2019 for possible admission to the Partial Hospitalization Program at Hospital. Id.
56. After the October 25, 2019 IEP Team Meeting, the District's Director of Special Education began the process of hiring two tutors with experience working with students with behavioral challenges. Due to delays in the hiring process, the Student's tutoring did not begin until over a month later on November 25, 2019. See District's Response to Complaint Investigation #20.065.
57. The Student's in-person tutoring meetings were scheduled to occur at the District's Central Office. However, during the Student's third tutoring session, on December 2, 2019, the Student began exhibiting "dangerous/violent" behaviors, including grabbing/possessing a screwdriver, kicking the wall, punching a computer, and calling 9-1-1. See Critical Incident Report, dated December 4, 2019.
58. After this incident at the District's Central Office, further in-person tutoring was not offered to the Student, and tele-tutorial services were the only available option presented to the Parents and to the IEP team. Tele-tutorial services did not begin until January 6, 2020.
59. Dr. Diane Tennes, PhD, LADC, met with the Student and the Parents on November 5, 2019 to complete a risk evaluation. On November 11, 2019, Dr. Tennes shared her preliminary conclusions and recommendations with the District's Director of Special Education. Dr. Tennes' report was completed on November 27, 2019. See Risk Assessment – Psychological Evaluation Report by Diane A. Tennes, PhD, LADC, dated November 27, 2019.
60. Dr. Tennes opined that the Student's "combination of clinical diagnosis is an extraordinarily challenging constellation of symptoms that require highly specialized treatment. Despite the current psychopharmacological medications, behaviors are poorly controlled and intensifying as well as being dangerous." Dr. Tennes further concluded that, "an immediate return to the

Program is not supported by this data and places staff and other students at significant risk at this time.” Id.

61. Dr. Tennes’ risk assessment recommended against in-home tutoring and suggested an alternative public location be found for the Student’s tutoring. She also recommended a residential treatment plan, due to her conclusion that the Student’s behaviors were not able to be safely and consistently managed in an outpatient or home setting. Finally, Dr. Tennes recommended that a comprehensive neuropsychological evaluation be completed and that a one-on-one aid be provided to support the student through any transition back to a school setting. Id.
62. On December 9, 2019, the Student’s IEP Team reconvened to address Dr. Tennes’ evaluation and review the Student’s tutoring program. Importantly, the IEP Team agreed again that, “Based on [the Student’s] autism, low cognitive functioning, language delays and behavior/safety concerns, the team determined that continues to benefit from a highly structured therapeutic day treatment program.” See Written Notice from IEP Team Meeting on December 9, 2019.
63. During the December 9, 2019 IEP Meeting, the Director of the _____, despite her concerns about aspects of the risk assessment, proposed that two additional staff members be hired to support the Student’s eventual return to the _____, including a one-to-one Educational Technician and a Behavioral Health Professional (“BHP”). Id.
64. While the Parents were initially open to the possibility of the Student’s return to the _____ with increased support, they also expressed some reluctance about the Student returning to the _____ during the December 9, 2019 meeting. Id. During their interview with the Complaint Investigator, the Parents also raised some specific concerns about the Student’s safety at the _____, alleging that the Student was improperly restrained and secluded.⁶
65. Following the December 9, 2019 IEP Team Meeting, the District immediately posted an opening for an Educational Technician and sought out various options to secure a BHP provider. Nonetheless, at the time of this report, no employees have been hired to fill either of those two support roles. See District’s Response to Complaint Investigation #20.065.

⁶ The District and the _____ deny these allegations by the Parents. However, this issue falls outside the scope of the MUSER, and these allegations were not investigated as part of the complaint investigation process.

66. After December 9, 2019, based on the Parents overall concerns about the Student's return to the , the District began to explore other therapeutic day treatment programs run by nearby school districts. Unfortunately, the District determined that those potential programs were unavailable due to the Student's level of need, each program's own issues with capacity, or the fact that these programs would not accept students from outside their districts.
67. According to the Director of Special Education, the Student remains third on the waitlist for Stillwater Academy, which is the Parents' preferred alternative program. The Student is also on the waitlist at the Day Treatment Program. The Director of Special Education reported during her interview with the Complaint Investigator that there is now a potential opening for the Student at the Day Treatment Program. However, due to the current necessity of off-site instruction during the pandemic, this spot cannot be presently offered or confirmed.
68. On January 14, 2020, the Student's IEP Team met again and concluded (again) that the most appropriate, least restrictive placement for the Student is a therapeutic day treatment placement. However, due to the unavailability of any such program and the District's inability to hire additional staff members to support the Student at the , the Team decided to continue with tele-tutorial instruction. See Written Notice for the IEP Team Meeting on January 14, 2020.
69. The Parents have repeatedly stressed during IEP meetings, during conversations with the District, and to the Complaint Investigator, that tele-tutorial instruction cannot meet even the basic needs of the Student. Due to cognitive disabilities, this form of instruction is frustrating and generally unproductive. The Parents also feel that the level of instruction is often not accessible to the Student nor tailored to the Student's academic level. As a result of this and due to other difficult circumstances in the home environment, such as the presence of three or four of siblings, the Parents have elected to reduce the number of tele-tutorial sessions at various points since it began on January 6, 2020.
70. During their interview with the Complaint Investigator, the Parents also made clear that they no longer support as an appropriate placement for the Student, regardless of whether the District is able to hire the proposed additional staff to support the Student throughout the day.
71. Of course, the COVID-19 pandemic and the resulting need for off-site instruction for all students, has further complicated the uncertainty about the Student's educational placement.

Other relevant facts are included, as needed, in the determinations below.

VI. Determinations

1. The District did not develop and/or implement an appropriate plan for positive behavioral interventions and supports to address the Student's behaviors at the Program. MUSER IX(3)(C)(2)(a). **COMPLIANCE FOUND.**

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

In the present complaint, the Student's extensive behavioral needs and complicated diagnosis are well documented in academic records, IEP, and evaluations. There is no question that the Student's behaviors have the potential to interfere with own learning and with the learning of peers. Specifically, the Student's FBA from September 2017 identified most significant behavior incidents as: 1) noncompliance with staff directions, school rules, and policies; 2) bolting; 3) verbal threats towards others; and, 4) aggressive, assaultive, or physically threatening actions towards others. The Students' behavior patterns while enrolled at the are consistent with the behaviors noted in FBA and with the behavior patterns described in the Student's discharge records from the Day Treatment Program in July 2018.

MUSER IX(3)(C)(2)(a) requires the IEP team to consider certain special factors. Particularly, "in the case of a child whose behavior impedes the child's learning or that of others, the use of positive behavioral interventions and supports, and other strategies, to address that behavior."

From the start of enrollment, the was proactive about implementing positive behavioral interventions and supports to address the Student's anticipated behaviors. First, the has a school-wide leveling system and a classroom behavioral plan that were immediately utilized to support the Student in achieving individual behavior goals. Additionally, the Student (like all students enrolled at the has always had an individual positive behavior support plan ("PBSP") in place. This plan was developed and modified by special education teacher and implemented in September 2018, when the Student began attending the . The Student's PBSP was adjusted and implemented based on the behavior data collected by teacher every 20 minutes throughout the school day.

The Student's IEP Team met in both October 2018 and May 2019, and the Team reviewed behavior data during both meetings. By May 2019, the IEP Team concluded

that the Student was demonstrating notable progress across all targeted behavior categories. Additionally, according to the Director of the _____, the Student's Social Worker at the _____, and behavior documentation provided to the Complaint Investigator, the vast majority of the Student's days at the _____ during the 2018-2019 school year were successful in terms of behavior growth. The Student was not suspended out-of-school at all during the 2018-2019 school year, and _____ was only placed in in-school suspension one time after the first incident where _____ discharged a fire extinguisher on May 22, 2019. The Student was hospitalized shortly after this incident in June 2019, and _____ did not return to the _____ until the summer for _____ ESY program.

Although behavior concerns were becoming less frequent and the Student was oftentimes acting as a leader in _____ special education classroom, the Student's behavior struggles in the second half of _____ 5th grade year seemed to be increasing in intensity whenever they did occur. Therefore, the Student's IEP Team elected in May 2019 to make some adjustments about the collection of behavior data – specifically, the IEP Team considered the severity of the Student's behavior incidents, not only the frequency.

Because the Student was successful in _____ ESY program, this reinforced the idea that the Student's PBSP would appropriately support _____ and _____ behavior goals upon the start of _____ 6th grade year.⁷

According to the Student's 6th grade special education teacher, who was also ESY program teacher, the first few weeks of the school year went well for the Student. Although the Student was transitioning to a new classroom with more peers, the Student initially seemed to be adjusting well.

However, the behavior incidents that occurred during the fall of 2019-2020 escalated very rapidly. On September 16, the Student discharged a fire extinguisher and bolted from the school building. _____ was suspended for 5 days, and _____ returned to school on September 24, 2019. Immediately, on September 16, 2019, the Director of the _____ reached out to the BCBA to help identify a possible trigger for the Student's behavior on September 16, 2019.⁸

Approximately one week after the Student returned to school, the IEP Team met on October 3, 2019. The IEP Team considered an abbreviated day as proposed by the Parents, but ultimately the Team determined that a shortened school schedule could

⁷ Unfortunately, the Student's IEP Team was not immediately provided with discharge information about the Student's stay at the _____ Hospital in June and July 2019. The District only became aware of that information after receiving the results of Dr. Tennes's risk evaluation in November 2019. It certainly seems possible that the IEP Team could have made more targeted changes to the Student's programming if the Team had been aware of the concerns and recommendations reflected in the Student's discharge summary.

⁸ Due to the discharge of the fire extinguisher on September 16, 2019, the _____ was forced to evacuate 55 students from the school, and as a result of the cleaning process, the _____ had to find an alternative location for programming those students for a number of days while the building was cleaned and the fire extinguishers were replaced. This dramatic inconvenience to the school community made things significantly more difficult socially for the Student upon _____ return to school because a number of students were upset about _____ choice to discharge the fire extinguisher.

exacerbate the Student's behavior challenges because the behavior data collected did not suggest a pattern of behavior incidents during any particular time of day. In the opinion of the Director of the [redacted] and other members of the IEP Team, the September 16, 2019 incident was an indication that the Student required more targeted support around behavior goals, not less.

At this point, on October 3, 2019, the Student was moved to Level 4 restriction, meaning that the Student would now be programmed for in an alternative setting within the [redacted] school building. Only three school days later, on October 8, 2019, the Student was suspended for a second time. This suspension was for four days due to aggression against a staff member. The Student was permitted to return to school on October 15, 2019. But, two days later, on October 17, 2019, the Student became escalated on the school bus, and [redacted] hit a peer and the bus driver. The Student was suspended for a third time, and [redacted] was not permitted to return to school after that.

Ultimately, the BCBA who began looking at the Student's patterns of behavior on September 16, 2019 had only reviewed the Student's file and never completed classroom observations of the Student before [redacted] was suspended for the third time.

There is substantial evidence that, at all times when the Student attended the [redacted], positive behavior support plan was thoughtfully implemented. Additionally, there is sufficient indication that the IEP Team took multiple opportunities to revise and reconsider the PBSP. When the Student's behaviors escalated in September and October 2019, the [redacted] continued to make adjustments and seek additional support, despite the rapid succession of the Student's behavioral incidents. Based on this, this report finds that the District developed and implemented an appropriate plan for positive behavioral interventions and supports to address the Student's behaviors at the [redacted] Program.

2. The District did not provide a functional behavior assessment and behavioral intervention services and modifications designed to address the Student's behavior violations so that they do not recur. MUSER XVII(1)(D)(1)(b); MUSER XVII(1)(F)(1)(a). **COMPLIANCE FOUND.**

MUSER XVII(1)(D)(1)(b) provides for a functional behavior assessment and behavioral intervention services and modifications, "as appropriate," for "a child with a disability who is removed from the child's current placement" pursuant to behavior that is *not* a manifestation of the child's disability or during a child's disciplinary removal resulting from special circumstances (see MUSER XVII(1)(G)), regardless of whether the behavior was a manifestation of the child's disability. The objective of this requirement is to ensure that the ongoing behavior violations can be addressed prior to their recurrence, allowing the child to move forward with [redacted] or her programming.

Similarly, MUSER XVII(1)(F)(1)(a) applies when the IEP Team determines that a child's conduct was a manifestation of the child's disability:

“If the SAU, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team must either: (a) Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.” MUSER XVII(1)(F)(1).

In the present case, the District decided not to require a new FBA of the Student because the Student’s prior FBA, completed in September 2017, continued to be an accurate reflection of the Student’s behavior challenges. Looking specifically, at the behaviors addressed by the FBA, many of the behaviors demonstrated by the Student during three critical behavior incidents on September 16, 2019, October 8, 2019, and October 17, 2019 were, indeed, contemplated and addressed by the prior FBA. The prior FBA addressed property destruction, bolting, and physical aggression towards staff and other students. Further, the prior FBA also noted the same triggers for the Student’s behavior difficulties as were observed by the Student’s team at the . Largely, the Student’s behaviors continued to relate to the avoidance of academic task demands.

Instead of requiring a new FBA, the IEP Team sought a psychological risk assessment as a means for obtaining advice about what behavior intervention services and modifications would best address the Student’s present struggles. Dr. Tennes’ evaluation considered the function of the Student’s behavior incidents and confirmed an ongoing pattern of behaviors that was challenging to address in any sustained manner without additional one-on-one support in the classroom. Because the regulations allow for a case-by-case determination by the IEP Team about the best path for achieving behavior support services and modifications following a disruption to a child’s programming and because the Student’s prior FBA addressed many of the present behavior concerns, compliance is found with respect to this allegation.

3. The District did not intervene when the Student was regularly removed from educational setting at the Program, even after the Student was subjected to repeated emergency interventions that effectively changed placement outside the IEP Team process and prevented IEP from being fully implemented. MUSER IX(3)(B)(3); MUSER VI(2)(J, L). **COMPLIANCE FOUND.**
4. The District did not perform a manifestation determination within 10 school days of a decision to change the Student’s placement to an isolated/secluded setting at the Program because of a violation of a code of student conduct. MUSER XVII(1)(E). **COMPLIANCE FOUND.**

The two allegations above are related; therefore, these issues are best addressed together. The Parents allege that the District's frequent use of both repeated seclusions and restraints in the Deferred Time Out ("DTO") room throughout the Student's time at the , as well as the Director's decision to move the Student to Level 4 restriction on October 3, 2019, where began to receive programming in an alternative setting, amounted to a change in placement outside the IEP Team process. Further, the Parents maintain that, because the Student's placement was effectively changed outside the IEP Team process, the District was required to convene a manifestation determination within 10 school days of the decision to remove the Student from program.

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 *Andrew 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 own unique needs. Id. at 999. The IEP Team is tasked with considering the child's academic growth, the child's progress towards grade-level proficiencies, the child's behaviors that may interfere with their growth, and additional information and input provided by the child's parents. See MUSER V(2)(B); MUSER VI(2)(J).

For all the reasons laid forth above, the importance of the IEP Team's role cannot be overstated, and all IEP Team members must be centrally involved in decisions to change a child's placement and/or programming. Nevertheless, in the present situation, neither the use of the DTO room nor the decision to place the Student on Level 4 restriction on October 3, 2019 (or the District's failure to intervene during those decisions) amounted to a change in placement outside the IEP team process.

The Student's current IEP effective on May 17, 2019, amended on December 9, 2019, and amended again on January 14, 2020, specifically incorporates Behavior Intervention Plan ("BIP") and FBA as supplementary aids that are necessary to

support academic and functional performance. Additionally, the Student's measurable goals reference the use of positive behavior supports, which refers to the supports the Student receives through the school-wide leveling system, the classroom-specific positive support systems, and individual positive behavior support plan ("PBSP").

In other words, when crafting the Student's IEP, the IEP Team intentionally allowed the to utilize fluid behavioral management plans to support the Student's success. The IEP Team first became aware of the leveling system during the transition team meeting on September 7, 2018, prior to the Student's enrollment at the . See Written Notice from the IEP Team Meeting on September 7, 2018. Certainly, the IEP Team expected the to support the Student by implementing the school-wide leveling system, the classroom-specific positive support systems, and the Student's individual positive behavior support plan ("PBSP") every day.

The Director of the credibly explained during her interviews that none of the policies and procedures, not even the school-wide leveling system, are set in stone. Every piece of the behavioral support program at the is designed to be individualized for each student in accordance with daily behavioral data. The Student's IEP team was able to make changes to these plans, as needed, which is why every IEP Team meeting included a review of the behavioral data for the Student, as well as a discussion about whether behavioral goals or the Student's individual positive behavior support plan required modification.

Looking first at the factual pattern of seclusions in the DTO space within the time frame of this complaint investigation, from February 19, 2019 to present, there is no indication that the Student was subjected to a pattern of seclusions that prevented the full implementation of IEP or that constituted a placement change. As evidenced by the documents provided by the District and the Parents, the seclusions that occurred during the 2018-2019 school year and the first part of the 2019-2020 school year were often brief, always occurring in the fashion described by the Student's individual behavior plan and by the Student's FBA, and frequently successful, meaning that the Student was able to be voluntarily re-integrated into classroom environment after a period of dysregulation. It also appears that the Student often elected to access the DTO space voluntarily as a coping strategy. Based on the information provided, there is no finding that the emergency interventions amounted to change of the Student's placement outside the IEP process.

Next, looking at the change of the Student's privileges to a Level 4 restriction on October 3, 2019 where began receiving programming in an alternative setting, there is no indication that the Student's placement was changed simply because lost programmatic privileges. The potential for the Student to lose those privileges at some point during time in the was already incorporated into IEP, which placed at the , a levels-based program. Similar to therapeutic day treatment programs

across the country, the _____ employs a level system that rewards students with more independence, less adult support, and more access to reinforcers and rewards, depending on each student's success in meeting _____ or her own behavior goals. Like an individual behavior plan, the school's leveling system must be fluid in its ability to reinforce positive student behavior and reduce negative behavior, all based upon a student's daily data.

In this matter, when the Student was moved to a Level 4 restriction on October 3, 2019, _____ continued to receive the services provided on _____ IEP, _____ continued to spend 0% of _____ time with non-disabled children (as called for by _____ IEP), and _____ continued to interact with _____ programmatic peers at various times during the school day, such as lunch and break times. Therefore, the change in the Student's classroom location, which was already contemplated as a possibility by _____ IEP, did not constitute a change in placement.

Since the emergency interventions and the Level 4 restriction did not constitute a change in the Student's placement, there was no requirement for the BHP to perform a manifestation determination in accordance with MUSER XVII(1)(E) with respect to these progressions in the Student's behavior plan. In conclusion, compliance is found with respect to the two allegations listed above.

5. The District did not return the Student to the placement from which _____ was removed on October 17, 2019 after the behaviors that resulted in _____ suspension were determined to be a manifestation of the Student's disabilities on October 25, 2019. MUSER XVII(1)(F). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

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

However, if, as in this case, the IEP Team determines that the violation of a code of student conduct *is* a manifestation of the child's disability, the IEP Team must "return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan." MUSER XVII(F)(2).

The District argues that the Parents agreed to modify the Student's placement to tutoring during the manifestation meeting on October 25, 2019, as part of a modification of the Student's behavioral intervention plan. However, the Parents disagree. According to the Parents, there was never an alternative placement option proposed by the _____ or

by the District. The Parents argue that they did not agree to tutoring in lieu of the Student's return to the because, even though the Student's behavior was a manifestation of disabilities, there was never an option to return to original placement at the . In essence, the Parents argue that they had no meaningful opportunity to disagree or object to tutoring because that was the only outcome presented for consideration on October 25, 2019.

When the Student was suspended on October 17, 2019, suspension was indefinite, until the IEP Team could convene. See Bangor School Department Suspension Report, dated October 17, 2019. Written Notice for the IEP Team Meeting on October 25, 2019 supports the Parents' account that a unilateral decision was made regarding tutoring. Although Written Notice states that "the team agreed to have [the Student] out of school for a 45-day interim placement while further evaluation is conducted," it also admits, "no other options were considered, as [the Student's] behaviors are unsafe and increasing in intensity and purposefulness." Written Notice also documents the Student's father's reaction as follows: "Mr. expressed frustration with [the Student] being suspended from school for behaviors and safety, especially where he's attending a day treatment school. He shared that he doesn't feel that staff are capable of managing [the Student's] behaviors."

Additionally, there is no indication from Written Notice on October 25, 2019 that the IEP Team determined that 45 days of tutoring was an appropriate modification of the Student's behavioral plan. The Written Notice states, "Administration has an increased concern for [the Student's] safety, the safety of staff and other students in the program and on the bus. As a result, the administration would like a Risk Assessment to help them understand [the Student's] behaviors and help plan for appropriate intervention/response." Therefore, the IEP Team, and more specifically the administration, believed that the risk assessment would be helpful to inform a modification of the Student's behavioral plan. Tutoring was seemingly considered purely as a means for filling the educational gap while the risk assessment was being completed in the following 45 days.

In sum, the District failed to return the Student to the placement from which was removed on October 17, 2019 after the behaviors that resulted in suspension were determined to be a manifestation of the Student's disabilities. None of the exceptions to this required as outlined by law and regulations apply, so the District has violated MUSER XVII(1)(F).

6. The District is currently providing the Student with ‘tele-tutorial instruction’ and an abbreviated school day without regulatory compliance. MUSER X(2)(A)(4); MUSER VI(2)(L); MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

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

Additionally, the IDEA only contemplates an “interim alternative education setting” after a child has been disciplined or after a child faces a medical issue. See 34 CFR 300.530; 34 CFR 300.531; MUSER XVIII(1)(B, G); MUSER XVII(2).

In this Student’s case, the IEP Team determined that the Student’s conduct was a manifestation of disability. There was no agreement by the District and the Parents to modify the Student’s placement as of a modification of the Student’s behavioral intervention plan. See MUSER XVII(F)(2). Therefore, if the District wanted to exclude the Student from prior placement at the (and then properly offer tutoring during a disciplinary exclusion), it would need to show an applicable “special circumstance” under MUSER XVII(1)(G).

MUSER XVII(1)(G) allows school personnel to “remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestations of the child’s disability” under three “special circumstances.” Specifically, a removal for 45 days would be appropriate if a child possesses a weapon at school, knowingly possesses, uses, or sells illegal drugs at school, or has inflicted serious bodily injury upon another person while at school. The term “serious bodily injury” is defined in Section 1365(h)(3) of Title 18, U.S. Code, to mean a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Since no information has been submitted by either party to suggest that the Student’s behavior violation falls into one of these special categories, this section need not be considered further.

The District did not offer tutoring to the Student for a qualifying disciplinary or a medical reason. The documentation also does not show that the District offered tutoring

because of an abbreviated school day.⁹ Therefore, the District is currently providing the Student with ‘tele-tutorial instruction’ and a functionally abbreviated school day without regulatory compliance.

7. The Student is not being educated in the least restrictive environment (LRE).
MUSER X(2). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

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

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

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

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

Providing tutoring services, while permissible in certain instances, is providing education in a very highly restrictive environment. *See* MUSER VI(2)(L). In the present complaint, the IEP Team has repeatedly conceded that tele-tutorial instruction is not the least restrictive, most appropriate environment for the Student. Written Notices from

⁹ As noted in the factual findings above, the IEP Team rejected the Student’s parents’ proposal for an abbreviated school day at the October 3, 2019 IEP Team Meeting, citing behavioral data that did not establish that the Student’s behavior would benefit from an abbreviated school schedule. Even if the Student’s educational needs warranted an abbreviated school day and/or tutoring, the IEP team did not document the regulatory compliance: addressing how the Student would meet learning results and access the general curriculum and IEP; developing a plan to return to a full-time school day as soon as possible; or documenting the basis for the determination of an abbreviated school day and/or tutoring based on the Student’s individual needs. MUSER VI(2)(L).

December 2019 and January 2020 IEP Teams both indicate that the IEP Team agrees that, even though such a program is not currently available, a therapeutic day treatment program is the appropriate placement for the Student. If a therapeutic day treatment program were available, such a setting would be significantly less restrictive for the Student who is currently being educated separately from any of peers.

While this analysis concedes that District has made repeated, sincere attempts to locate a therapeutic day treatment program for the Student, these efforts by the District do not impact the analysis about whether tele-tutorial instruction is the Student's least restrictive environment.¹⁰ Because the Student is not being educated in the least restrictive environment (LRE), even as assessed by the same IEP Team that has decided to continue with tele-tutorial services, the District has not complied with the requirements of MUSER X(2).

8. The District has not implemented the Student's IEP since October 17, 2019. Specifically, the Student has not received the following: 6.5 hours per day of Specially Designed Instruction, 60 minutes per week of Speech, 30 minutes per week of Social Work, 30 minutes per month of BCBA services, and OT consult. MUSER IX(3)(B)(3). **NON-COMPLIANCE FOUND. DENIAL OF FAPE FOUND.**

The District does not dispute that the Student has not accessed full-time programming since October 17, 2019. See District's Response to Complaint Investigation #20.065C. However, the District argues that the Parents' 'agreement' to tutoring for 45 days on October 25, 2019 at the manifestation determination hearing excuses the District's obligation to provide the services required by the Student's Individualized Education Plan, effective on May 17, 2019, last amended on January 14, 2020. This is not the case, and the lack of meaningful agreement to tutoring on the part of the Parents at the October 25, 2019 manifestation determination meeting is discussed at length above.

The logistical realities of tele-tutorial instruction exclude the possibility that the Student can currently receive specially-designed instruction, speech services, social work, and consultation services. Additionally, the Student received no tutoring at all between October 17, 2019 and November 25, 2019. tutoring was also discontinued between December 3, 2019 and January 6, 2020. The tele-tutorial sessions that have occurred since are a poor substitute for the full array of services needed for the Student's achievement of IEP goals. The Parents have repeatedly stressed during IEP meetings, during conversations with the District, and to the Complaint Investigator, that tele-tutorial instruction cannot meet even the basic needs of the Student. Due to cognitive disabilities, this form of instruction is frustrating and generally unproductive.

¹⁰ Notably, the District has also contracted Dr. Kara Wisniewski to complete a further comprehensive evaluation to assist with the Student's programming decisions. This evaluation is currently underway.

The District has not complied with MUSER IX(3)(B)(3) because the Student's IEP has not been fully implemented.

9. The Student's IEP does not consider the full academic, developmental, and functional needs of the Student. MUSER IX(3)(C)(1)(d). As a result, the current IEP does not provide special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining annual goals. MUSER IX(3)(A)(1)(d); MUSER IX(3)(D). **NO FINDING.**

After interviewing the Parents, the Complaint Investigator was able to narrow the scope of this investigation to exclude this allegation because the Parents were clear that their son's Individualized Education Plan, effective on May 17, 2019, includes an appropriate combination of special education services, related services, and supplementary aids to enable the Student's progress towards goals. The problem lies in the implementation of the Student's IEP, not in the IEP itself. Therefore, no finding is issued regarding this allegation.

However, it should be noted that the documentation provided by the District and the Parent for this complaint investigation offer additional support for the Parent's conclusion that the IEP Team has carefully considered the Student's individual needs in formulating and revising the Student's IEP.

10. The complainant alleges that compensatory services are owed because the District has not provided FAPE to the student. Additionally, the complainant alleges that the District must develop an appropriate program and placement for the Student. In the alternative, if the District remains unwilling or unable to do so, the complainant alleges that the Maine Department of Education should step in directly to provide FAPE to the Student. See MUSER XVI(4)(A)(3). **SEE CORRECTIVE ACTION PLAN BELOW.**

The Student is entitled to significant compensatory services as a result of the District's failure to provide FAPE to the Student between October 28, 2019 (when the Student should have been returned to the following the manifestation determination meeting on October 25, 2019) and March 16, 2020 (when the COVID-19 pandemic required all students to begin receiving off-site instruction).¹¹

MUSER XVI(20) sets forth: During the pendency of any...state complaint

¹¹ Notably, the present complaint investigation report does not consider whether FAPE was provided to the Student during required off-site instruction resulting from the COVID-19 pandemic. This issue was not raised by the complaint, which was filed prior to the start of off-site instruction, and the Parties did not submit arguments or documentation regarding the District's provision of FAPE to the Student after March 16, 2020, during the COVID-19 pandemic. Due to the very nature of off-site instruction, there is no question that FAPE during remote learning may present very differently than FAPE during on-site learning. However, the nuances of that distinction are not addressed here because of the nature of the original allegations.

investigation request...unless the Department or SAU and the parent of the child agree otherwise, the child involved in the hearing request must remain in his or her current educational placement.” As interpreted by *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1 (1999), a school district must continue to implement the last placement “that the parents and the educational authority agreed to be appropriate.” *Id.* at 10.

With respect to the present case, the Student’s ‘stay-put’ placement is at the _____, based upon the Student’s IEP from May 2019. Although the District argues that the Parents agreed to tutoring after a manifestation determination on October 25, 2019, no agreement between the District and the Parents was meaningfully reached because no alternatives were open for discussion, not even the option for the Student to remain in current placement at _____.

After the COVID-19 pandemic, when remote learning concludes and on-site instruction begins again within public schools in RSU 87 / MSAD 23, the Student’s ‘stay-put’ placement remains the _____. Therefore, in the absence of another available and agreed-upon placement for the Student before the conclusion of remote learning, the District must return the Student to the _____.

VII. Corrective Action

1. **When public schools in RSU 87 resume on-site instruction**, the District shall return the Student to ‘stay-put’ educational placement at the Program (unless the District has taken further action to secure the Student an alternative, agreed-upon placement in a therapeutic day treatment program).

The District must continue to implement the Student’s special education and related services that are listed on the Student’s last agreed upon IEP. The District remains responsible for ensuring that the Student is provided with a free, appropriate public education, both during and after this period of remote learning caused by the COVID-19 pandemic.

2. A comprehensive plan for the provision of the Student’s compensatory education is due to the Department **no later than 30 days after public schools in RSU 87 resume on-site instruction** following the COVID-19 pandemic.

The compensatory education plan must include:

- a. 175 hours of compensatory specially-designed instruction by a special education teacher, offered in conjunction with the Student’s current educational programming, as determined by the Student’s IEP Team.
- b. 10 hours of compensatory speech instruction, offered in conjunction with the Student’s current educational programming, as determined by the Student’s IEP Team.
- c. 5 hours of social work services, offered in in conjunction with the Student’s current educational programming, as determined by the Student’s IEP Team.
- d. A reasonable timeframe for the delivery of these services to the Student, as well as a proposed schedule for providing documentation to the Department that these services have been delivered.

Once on-site instruction resumes, the District must provide compensatory services that address the Student’s academic, functional, and behavioral goals. The compensatory services must be provided in addition to the Student’s existing educational program. Services must be provided by a certified special educator or an educational technician with oversight by a certified special educator specifically for these services. **The school will choose the provider and provide documentation of the provision of these services to the Department.**

3. **Prior to June 15, 2020**, the Student's IEP Team must reconvene to consider the issues addressed in this complaint investigation. The IEP Team has already concluded that the Student's most appropriate, least restrictive placement is a therapeutic day treatment program. Therefore, the District must present both of the following to the IEP Team:
 - a. A plan for further action to secure the Student an alternative therapeutic day treatment program;
 - b. A plan to provide the Student with FAPE upon to return at the
Program, if no alternative program becomes available before the conclusion of off-site learning.

The IEP Team must also begin to discuss potential options for compensatory education once on-site instruction following the COVID-19 pandemic resumes.

Written notice from this IEP Meeting must be provided to the Department within 10 days of the IEP Team meeting.

Dated: May 18, 2020

Julia N. Pothen, Esq.
Complaint Investigator