

Complaint Investigation Report
Parents v. Maine EUT/MSAD #70
Complaint 20.071C
Complaint Investigator: David C. Webb, Esq.
June 1, 2020

I. Identifying Information

Complainant: _____, Parents

Respondents: RSU 70; Barbara Pineau, Special Education Director, Education in the Unorganized Territories (“EUT”), Maine Dept. of Education; Shelley Lane, State Director, EUT, Maine Dept. of Education; Sandy Flacke, Special Education Director, Maine School Administrative District No. 70 (“MSAD #70”).

Student: _____
DOB _____

II. Summary of Complaint Investigation Activities

On March 4, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on March 5, 2020.

The Complaint Investigator received 77 pages of documents from the Parent and 358 pages of documents from the District. Interviews were conducted with the following people: _____, Parents; Barbara Pineau, Special Education Director; Tricia Bragan, Treatment Case Manager; Leslie Sadler, Licensed Clinical Social Worker; Julie Racine, Family Psychiatric Nurse Practitioner; Maureen Foss, BCBA; Diane Jurson, MSAD 70 Special Education Teacher/Case Manager; Dr. Angela McCormick, Psychological Evaluator; Sandy Flacke, MSAD 70 Special Education Director.

III. Preliminary Statement

The 12-year-old student resides with _____ family in _____, Maine, which is a part of Maine’s Unorganized Territory.¹ _____ is the educational responsibility of the Maine Education in the Unorganized Territories (“District”) where _____ qualifies for special education and related services as a student with Autism.

¹ _____ has been a part of Maine’s Unorganized Territory since July 1, 2019. EUT is the responsible educational agency to the Student under MUSER IV.4(A), (B) and (I) because the Student resides within a community that is served by EUT for delivery of educational services. Maine School Administrative District No. 70 is providing services as a “receiving placement”, as set forth in MUSER IX.3(I). Prior to July 1, 2019, _____ was part of MSAD #70 which was the responsible agency for the Student’s educational services. Unless specifically designated, the respondents shall be collectively referred to as “the District.”

This complaint was filed by the Student’s parents (“Parents”) alleging that the Districts violated the Maine Unified Special Education Regulations (“MUSER”).² After the receipt of the Parents’ complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on March 18, 2020 alleging six separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on March 31, 2020.³

IV. Allegations

1. Not properly developing or revising an IEP that is reasonably calculated to enable the Student to make progress in light of circumstances, in violation of MUSER §§ IX(3)(A), §IX.3.(D), VI.2.J.(4) and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; *RE-1*, 2017 WL 1066260 (Mar. 22, 2017);
2. Not considering existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c);
3. Not ensuring that a continuum of alternative placements is available to meet the Student’s educational needs and that the Student’s educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;
4. Not providing behavioral intervention services and modifications designed to address the Student's behavior in violation of MUSER §XV11.1.D(1) and MUSER §IX.3.C (2)(a);
5. Not providing qualified staff in violation of MUSER §X.2(5); and,
6. Not adequately considering the concerns of the parents in the IEP decision making process in violation of MUSER §IX.3.C(1)(b) and MUSER §VI.2(I);

Ancillary Issue

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

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

V. FACTUAL FINDINGS

² Following the COVID-19 outbreak and the District’s transfer to distance learning, the Student has been regularly receiving binders for distance learning from special education teacher and individual social work services for 30 minutes a week. Contract BCBA assistance has been provided at home with behavior intervention through the month of April, 2020. The Parents noted in an April 17, 2020 e-mail to District staff that the Student “has been doing well with the work and we do not have any questions at this time.” (see also e-mail from Mim Carter, SLP, May 5, 2020). As noted by the March 21, 2020 *Supplemental Fact Sheet Addressing the Risk of COVID-19*, schools may not be able to provide all services in the same manner they are typically provided, and individualized determinations about whether and to what extent compensatory services may be needed shall be addressed when schools resume normal operations.

³ Due to the COVID 19 pandemic and the limited availability of certain witnesses, the Complaint Investigation deadline was extended by 30 days to June 4, 2020.

1. The 12-year-old student resides with Parents in , Maine, which is a part of Maine’s Unorganized Territory. is the educational responsibility of the Maine Education in the Unorganized Territories (“District”) where qualifies for special education and related services as a student with Autism.⁴
2. The Student was removed from biological mother and stepfather and placed in DHHS custody in November, 2014 due to “severe neglect and abuse”. The Student was placed in therapeutic foster homes until being placed with the Parents in 2017, who adopted in April, 2018. The Student is the Parents’ only child.
3. The IEP developed for the Student on June 18, 2018, provided that the Student would spend 47% of time with non-disabled children and provided the following classroom supports and services, supplemental aids, and modifications:
 - Specially designed instruction (“SDI”) in math, English language arts, writing and social skills, five times per week for 80 minutes;
 - Occupational Therapy (OT) consultation, 30 minutes per trimester;
 - Adult 1:1 Educational Technician (“Ed Tech”) Support in the regular education and special education setting, 6 hours and 45 minutes/day;
 - Defined limits/expectations;
 - preferential seating;
 - Frequent reminders to stay on task;
 - Positive/consistent reinforcement and natural consequences;
 - Modified assignments for social studies and science;
 - Test to be read to the Student;
 - Frequent breaks for attention, distractibility, physical and/or medical conditions.
4. Dr. Angela McCormick conducted a psychological evaluation of the Student in January, 2019 and offered a diagnosis of Autism Level 1, Post-traumatic Stress Disorder (“PTSD”) and Attention Deficit Hyperactivity Disorder (“ADHD”). Dr. McCormick’s recommendations included:
 - Scheduled breaks during the day after times of stimulation, such as recess and lunch, in order for to calm down and refocus;
 - Giving choices at school;
 - Specialized instruction in reading, math, and written expression due to scores indicating learning disorders in these areas;

⁴ The Student had previously identified as eligible for special services under the category of Other Health Impairment and a Specific Learning Disability, but as of June 2019 is identified under the primary eligibility category of Autism.

- Cue the Student to upcoming changes or challenging demands in schedule and provide with a copy of daily schedule;
 - Medication management is encouraged to assess the effectiveness of current medications;
 - Section 28 services are encouraged to continue to help teach coping skills, emotional regulation, social communication skills, and ways to handle anxiety and anger;
 - During the winter months, encourage to participate in sports at school or to get involved in karate or other activity;
 - Discuss both positive and negative emotions that the Student felt that day, as well as other people's feelings in the classroom or at home; and
 - Target a few behaviors at a time.
5. An IEP team meeting was held on January 22, 2019, at the Parents' request, to discuss the Student's "behaviors and discipline." At this meeting, the Parents noted that "yelling and refusing has not decreased but has become a daily occurrence." Mr. Richardson, the school administrator, stated had reviewed the behavior sheets sent to and noted that the Student's behaviors have increased over the past month. The Student's father noted that feels that the "Stop Sign" system is not effective as it gives the Student "too many chances" to become escalated in the negative behavior is demonstrating. The Parents also noted that the Student "comes home without the things needs to complete homework" and that it takes the Student "hours to complete work."
6. The written notice prepared in connection with the January 22, 2019 meeting noted the following determinations made by the IEP team:
- The "Stop Sign" behavior system will no longer be used;
 - In the event of any refusal, yelling, arguing, etc. within the classroom setting, the Student will be removed immediately;
 - Consequences will be immediately given at the time of action;
 - The Student will be given sensory breaks, as necessary;
 - Reasonable time limits will be given for work to be completed;
 - A visual schedule will be provided for the Student. Mrs. Bell (the school social worker) will assist the Student in compiling a list of necessary weekly tasks for schedule;
 - The Student will keep an assignment book and ed tech will check that has assignments listed correctly and she will initial that page; and
 - The Student will be notified of the changes to behavior plan prior to the change.
7. The Student's Behavior Intervention Plan ("BIP") dated January 22, 2019, identified the "target problem behaviors" as "arguing and yelling at staff, refusing to follow directions and blaming others for behaviors." The preventative strategies to address these behaviors included the following:

- The Student’s teacher will address choices to argue with neutral posture and calm tone;
 - Giving directions and expectations in a clear concise manner, minimize directions to two or fewer steps;
 - When appropriate and possible, the teacher will withhold attention to disruptive behavior;
 - Provide sensory break as needed, but especially after breakfast and lunch in the cafeteria or after a large group setting, including five minute breaks as needed or requested by the Student;
 - Maintain medication routine as prescribed by the Student’s doctor;
 - 30 minute weekly meeting with school counselor to work on skill building;
 - Staff will give immediate praise for on task and appropriate responses throughout the school day;
 - Token economy system will provide the Student with positive reinforcements throughout the school day;
 - Staff will monitor target behaviors without dialogue; and,
 - If [the Student] is disrupting the lesson in any classroom, then [the Student] will be removed from designated schedule when argues, yells, or refuses to follow staff directions. When [the Student] exhibits target behaviors, staff will use a two stickie system to signal to [the Student] that is demonstrating a target behavior. Staff will place the first stickie next to [the Student's] work area to signal is demonstrating a target behavior. If [the Student] continues then receives a second stickie and will leave the classroom to work in the conference room or an alternative setting apart from peers.
8. An IEP team meeting was held on March 1, 2019 to discuss the Student’s progress with new behavior plan. The written notice prepared in connection with this meeting noted that the Student’s current program and new behavior plan was “working for The Student’s special education teacher noted that the Student “often receives stickie warning, but knows will be removed from the classroom if does not change the behavior that caused to receive the warning.” The team determined that the Student’s overall program would remain the same with the addition of Extended Year Services (ESY) for the Student.
 9. The Written Notice from the March 1, 2019 IEP team meeting reported that the Parents were seeing an “improvement at home” and that the Student’s “behavior/emotions are much more leveled out... Parents have no concerns at this time.”
 10. Cognitive and academic testing was completed in May, 2019 by Dr. Angela McCormick. As a result of this testing, Dr. McCormick prepared a report dated May 5, 2019 and confirmed her January 2019 diagnoses of ADHD, PTSD and Autism Spectrum Disorder, and further diagnosed the Student with a Specific Learning Disorder with impairments in reading (with dyslexia), written expression and mathematics. While Dr. McCormick’s

test showed the Student had a “significant strength in reading comprehension”, the Student’s word reading was in the 4th percentile (mid first grade level); essay composition in the 3rd percentile (first grade level); pseudoword decoding in the .5 percentile (below first grade level); spelling in the 1st percentile (first grade level) and total reading in the 4th percentile (below average range). The Student’s full scale I.Q. was 76, in the “very low” range when compared to other students age.⁵

11. In her May 2019 report, Dr. McCormick recommended that the Student’s IEP contain interventions in basic reading skills, phonics, written expression, spelling, and math problem solving and computation skills with an “Orton-Gillingham-based system” as it is “helpful to overcome many of the drawbacks with difficulties in learning to read.”
12. With regard to the Student’s behavior issues, Dr. McCormick noted in her May, 2019 report the following additional steps to assist the Student with ADHD and behavior issues:
 - Reduce the amount of distracting stimuli in the classroom environment; provide a low stimulation environment that has a predictable, consistent routine;
 - Include physical exercise breaks;
 - Break down work into smaller, more manageable units to reduce cognitive overload; working on each unit until it is well learned;
 - Emphasize the quality of work, rather than the quantity of it;
 - Mix easier tasks/those where success is easier to achieve with more difficult tasks, to assist with maintaining interest and motivation;
 - Teach compensatory strategies to help focus attention, such as quietly repeating instructions as they are told, outlining, underlining, etc.;
 - Make frequent eye contact during lessons;
 - Seating close to teacher or source of information and away from distractions;
 - Regain attention through verbal prompts or a predetermined signal so that ongoing activity is not disrupted;
 - Simplify and repeat instructions;
 - Use hands-on learning aids, such as iPads, flash cards, manipulatives, etc.;
 - Use physical devices such as timers and buzzers to help structure time;
 - Keeping desk clear of non-essential materials;
 - Checking to make sure that the is paying attention to and understands instructions. Have paraphrase or summarize material. It may be helpful to remove competing stimuli and provide simple orienting or alerting cues;
 - Give only one instruction at a time;
 - Present information in only one sensory modality at a time;
 - Monitoring and checking progress;
 - Providing "step-by-step instructions for organizing and executing complex tasks;

⁵ The Student’s last full scale I.Q. testing in 2016 revealed an I.Q. of 85, at the 16th percentile.

- Intermixing tasks which involve physical activity with those that require quiet work (e.g., delivering messages, handing out papers);
 - Limit number of items per page or number of pages;
 - Provide verbal reinforcement when child accurately completes or complies with assignments;
 - Reduce cognitive load by organizing information and starting with a clear introduction and finishing with a summary. Initially, present information simply and then go back and elaborate. Use linguistic cues to high-light relationships.
13. The IEP Team met in June 2019 for the Student’s annual review. In the Written Notice prepared as part of the June, 2019 IEP team meeting, it was noted as follows:
- Mrs. Jurson (the Student’s special education teacher) noted that the Student was working at the “middle of the third-grade level in the area of ELA....and is making adequate progress in ELA Skills.”
 - On the Spring 2019 NWEA, the Student scored the following: Math 199 (17th Percentile), Reading 188 (12th Percentile), and Language Usage 168 (1st Percentile);
 - Ms. Jurson noted that the Student's grades went up in both Math and Reading. She also stated the Student has re-taken the Language portion of the NWEA several times, but struggles in this area; and,
 - The Student’s mother “agreed there has been some progress at school, however, at home there is still a lot of arguing, inappropriate behaviors, and trying to pit one parent against the other. She states she has spoken to primary care physician, med management, and therapist who all recommend Kid's Peace as a possible placement for [the Student].”
14. At the June, 2019 IEP team meeting, the team made the following determinations:
- Change the Student’s primary disability to Autism Spectrum Disorder;
 - Continue the Student’s SDI in the resource room setting in Math, (5 times per week for 80 minutes);
 - Continue the Student’s SDI in English Language Arts and Writing (5 times per week for 120 minutes)⁶;
 - Continue participating in regular education with supports in Social Studies and Science classes;
 - Maintain “current supplementary aids, services, modifications and supports.”
 - The team recommended ESY services for the Student.
15. At the June, 2019 IEP team meeting, the team determined that the Student did not need to be placed at an out-of-district placement at .

⁶ The June 18, 2018 IEP designates that the Student will receive SDI in English Language Arts (5 times per week for 80 minutes) and SDI in Writing (4 times per week for 40 minutes);

16. Maine EUT became the responsible educational agency for the Student on July 1, 2019. At an IEP Team meeting convened on September 5, 2019, the Team:
- Added a goal for reading comprehension and removed the service time (4 X 40 minutes/week) for writing;
 - Increased OT consultation time from 30 minutes per trimester to 45 minutes per month;
 - Added the following accommodations:
 - i. closely monitoring and limiting computer access time;
 - ii. sensory breaks as needed;
 - iii. a visual schedule and use of a visual timer; and,
 - iv. use of checklists for tasks.
 - Determined that the Student’s behavior plan would remain in effect and ordered a Functional Behavioral Assessment (FBA);
 - Maintained the Student’s current level of SDI in math and science;
 - Maintained SDI in ELA (to include writing skills) to five times per week for 80 minutes per session;
 - Determined that the Student would participate in the Afterschool Program that “might attend on Tuesdays, Wednesdays and Thursdays”
17. The Written Notice for the September 5, 2019 IEP Team meeting noted the following:
- Ms. Jurson reported that the Student attended summer school and worked successfully in a small group of 8 students;
 - The Parents requested more specific information be added to the Student’s Daily (behavior) Sheet when a visual reminder or stickie is given to the Student, e.g. instead of just noting that “refused,” specify if “refused to do the work” or if “refused to follow staff directions”; and,
 - Discussed the option of the Student change from 5th to the 6th grade, noting that the “Parents and Ms. Bragan believe this is a good idea since [redacted] was retained two times.”
18. At the September 5, 2019 IEP Team meeting, Ms. Jurson explained how the “visual reminder and stickie” are used throughout the school day to address “target” (negative) behaviors.
19. The District tracked the Student’s behavior on daily sheets starting on September 3, 2019 through March 13, 2020. The sheets are broken into time periods for classes, with separate boxes for “visual reminder and stickie” with separate categories of behaviors including “arguing/yelling/refusing/blaming” along with a box where staff documenting the behaviors can write comments.
20. In November, 2019, the District referred the Student to Maureen Foss, MS, BCBA, to conduct a Functional Behavior Assessment (“FBA”). The FBA concluded that the Student’s “behavior appears to be reinforced by avoidance/escape from non-preferred and/or aversive tasks... [redacted] also seems to gain secondary reinforcement from attention

which is secondary to the avoidance or delay of completing the work, and that even a verbal reprimand is a form of attention.” In her November FBA, Ms. Foss recommended:

- Reconsideration of the removal of recess as a consequence for unwanted behavior;
- Provide resources that will assist with addressing the symptoms of dyslexia;
- “Prompt and Wait” strategies are likely to be very effective;
- Refrain from engaging in power struggles;
- Identify and define targeted behaviors in the BIP;
- Define appropriate behavior such as completing assigned work for which the Student can earn a token. These tokens can be used at school or at home to purchase reinforcers such as TV time;
- Targeting the most significant behaviors for change before addressing those of less importance is encouraged;
- A visual schedule may be helpful at home and at school. Only put three to five activities/expectations on the schedule at a time to avoid (but not eliminate) the problems that result from unexpected schedule changes.
- Opportunities to practice social skills and emotional regulation should be encouraged. If available, an evidenced based social skills group for pre-teens could be helpful

21. The IEP Team convened on November 25, 2019 to review the FBA completed by Maureen Foss. At this meeting the Team:

- Amended the IEP to include a Related Service for BCBA support as needed and a bathroom schedule;
- Added 30 minutes with the school's social worker and 30 minutes/week of Specially Designed Instruction for social skills training with the Speech Language Pathologist;
- Confirmed the change of the Student’s placement to the sixth grade;
- Determined that the Student’s current behavior plan “will be reviewed to consider how to increase positive behavior supports;”
- Determined that a “token economy system” would be utilized whereby the Student could “earn 3 minutes of free time for every block of time without a target behavior;”
- Discussed the need to be more clear on defining target behaviors so that all staff working with the Student can maintain the same expectations; and,
- The IEP Team agreed to exempt the Student from Coding since [the Parents] believe it is necessary to limit use of "screen time". [The Parents] approved the use of a computer for Fast ForWord.

22. There were no changes to the Student’s reading program as a result of the November 25, 2019 IEP team meeting.

23. On December 6, 2019, social language instruction commenced by Speech-Language Pathologist (“SLP”) Miriam (“Mim”) Carter.

24. In a December 20, 2019 e mail to the Parents, Diane Jurson wrote:

After dismissal, Ms. Bickford reported to me that she and Ms. Sylvain had asked [the Student] to clear out locker and cubby, but refused and argued over doing this task. became angry and insistent that would not do this chore. stated that would not take the papers home because they would be burned if did. stated would get a lock so that staff could not get into locker. Given it was the end of the day, [the Student] was dismissed with this unresolved issue. After [the Student] left, Ms. Bickford chose to clear [the Student’s] locker as it was filled and had refused to do this task... A clothespin with a magnet that is used in Room 25 and an eraser (identified by Ms. Sattler) were returned to owners.

25. In a January 14, 2020 e-mail to Barbara Pineau, Diane Jurson wrote:

I wanted to make you aware of a situation that is not documented on the daily sheet. Yesterday, Ms. Goff (6th grade teacher) told me that

Although [the Student] has been successful in attending the Afterschool program, staff has begun monitoring these choices.

26. In a Progress Note dated January 20, 2020, Julie Racine, the Student’s Family Nurse Practitioner wrote:

- recently was using vulgar and language at school;
- because was angry that had a consequence for behavior at school. mother feels that is showing no remorse and is smiling about the behavior;
- Symptoms of PTSD are continuing. No change in symptoms are reported; Feelings of hypervigilance continue unchanged. Irritability or outbursts of anger are continuing unchanged; and

- - is refusing to do schoolwork at times.
27. In her January 20, 2020 Progress Note, Julie Racine diagnosed the Student with ADHD, PTSD, a Specific Learning Disorder and Reactive Attachment Disorder, with impairment in reading.
28. On January 22, 2020, the Student was suspended from after school program for one week as a result of inappropriate behavior.⁷
29. On February 2, 2020, Leslie Sadler, LCSW, the Student's counselor, wrote to the Student's school, stating in relevant part as follows:

[The Student] continues to demonstrate a high need for control, lack of respect for adults and often challenges others. In our recent therapy sessions, the focus continues to be on [the Student] taking responsibility for behaviors, recognizing the impact of behaviors on others and now, the impact of displays limited awareness of how negative attention is not the same as positive attention. This, coupled with impulsivity, leads [the Student] to make poor decisions and underlies need for a great deal of structure. In addition, [the Student] often seeks revenge against others when does not get own way. For example, some of arguing with teachers is meant to punish them for expecting to do work does not want to do. is often aware that is breaking rules and seeks to justify what has done through arguing and lying. Of importance, is the increase of [the Student]'s acting out. is voicing that such behavior is common and expected. views partly due to the home environment of biological parents...

With these behaviors prominent, I would ask that the school consider a more structured setting, such as the program in . A smaller and more intensive program would allow for these issues to be addressed more fully than perhaps is available in the typical classroom. Peer interactions could be monitored more closely. I believe this would be beneficial for [the Student's] mental health.

30. On February 4, 2020, the IEP Team met at the Parent's request to review the Student's program. The Written Notice prepared in connection with this meeting noted as follows:
- The Student's mid trimester grades were posted on January 24, 2020. The Student's grades were as follows: Health 94%, Math 88%, Reading 80%, Writing 80%, Social Studies 39%, and Science 69%. The Written Notice noted that the reason for the low Social Studies grade is a 46% on States and Capitals test (staff members that work with tried to study with states and capitals reviewed in class for several weeks) and missing Daily Geography assignment

and the reason for the lower Science grade is due to a low quiz grade on plant and animal cells which was a 25% as well as two low worksheet grades;

- The Student’s music teacher said that struggles with staying on task in music class, especially when it is time to practice the guitar;
- The Student’s Art teacher reported that can be impulsive and requires more prompts to focus than peers;
- The Student was scheduled for two 30-minute sessions for social skills training. Ms. Carter, Speech Pathologist wrote that "With structure and encouragement, [the Student] is attentive and engaged. I have only seen a couple times so far, due to my family medical leave⁸;
- Maureen Foss, BCBA, reviewed the Student's Behavior Plan and her recommendations were added;

31. The February 4, 2020 Written Notice also stated that “Of the 34 documented school days, [the Student] attended 40% of these days with no targeted behaviors, 41% with one documented target behavior that ended after the first visual reminder, and 19% of these days with two or more visual reminders. On four days, [the Student] received a second visual prompt that resulted in [the Student] being removed from the classroom until chose to follow directions and complete assigned work.

32. The “daily sheets” identify negative behaviors of varying degrees. A compilation of all of the negative behaviors documented, including behaviors not marked as “visual reminders” or “stickies” are as follows⁹:

Mo.	No. of recorded days	No. of behavior incidents	Negative behaviors/day
Sept.	19	35	1.8
Oct.	12	24	2.0
Nov.	13	26	2.0
Dec.	9	17	1.9
Jan.	18	26	1.4
Feb.	12	28	2.3
Mar.	9	22	2.4

33. At the February 4, 2020 IEP Team meeting, the team:

⁸ According to a schedule provided by counsel for Maine EUT, the Student missed three weeks of social skills SDI (180 minutes total) in February and early March due to Ms. Carter’s leave of absence EUT Ex. 40). On March 9, 2020 MSAD 70 wrote a letter to the Parents to make up missed sessions resulting from Ms. Carter’s leave of absence. (EUT Ex. 42)

⁹ According to the January, 2019 BIP, if the Student exhibits “target behaviors”, staff will use a “stickie” to signal to the Student that is to leave the regular education classroom. The daily sheet reported “behavior incidents” do not include the incidents reported on December 20, 2019 or January 16, 20 or 28, 2020. If these incidents are included in the summary, the Student’s daily negative behavior average for December increases to two per day, and for January increases to 1.7. (The Student’s file has multiple references to “stickie”, which on occasion has been spelled “sticky”, although the meaning appears to be the same. For purposes of this report, the term will be spelled “stickie” as per the referenced behavior sheets.

- Added accommodations for access to a quiet place as needed, movement break before and/or after Science and Social Studies as needed;
- Agreed that the Student could work in an alternative setting as needed, transitions between classes before the designated time as needed;
- Added one on one support during the Afterschool Program, and supervision on the bus by a bus monitor;
- Agreed to continue to offer and encourage sensory breaks;
- Increased the Student's counseling in school from 30 minutes per week to 60 minutes per week;
- Amended the IEP to reflect the current 60 minutes of direct instruction for social skills SDI instead of the 30 minutes written in the IEP;
- Reviewed and rejected the Parents' request to refer the Student to a special purpose private school. This was refused based on the review of data that demonstrates that the Student is making progress on IEP goals that address academic and functional needs.

34. In a February 6, 2020 e-mail to Barbara Pineau, Diane Jurson wrote as follows with regard to an incident on the playground during recess:

[The Student] and another student got into a shoving fight at recess today... Sandy told me today that [the Student's father] said the [the Student] came home with broken glasses and bruises. ..When I checked with Mr. Oliver today, did not see any bruises on [the Student] when they met. said followed through as would any two students in a scuffle on the playground. Ms. Bickford, the Ed Tech who goes out to recess with the [the Student], said [the Student] ran ahead and was already in conflict with the other student by the time she could get to due to ice...

35. On February 9, 2020, Maureen Foss updated her FBA for the Student. In her updated report, she noted in relevant part:

- Since the original FBA on 11/1/19, additional information has been provided.
- E-mails provided by the parents from school personnel also indicate that [the Student] has been involved in at least two fights on the playground in one month. One altercation left with a bruise on face and broken glasses;

- Diane Jurson, the Student's case manager, emailed a report to the parents that small stolen items (an eraser and a magnet with a clothespin attached) were found when a school staff member cleaned out [redacted] locker and cubby.

36. In her updated FBA dated February 9, 2020, Maureen Foss recommended:

- Supervision: Due to concerns about inappropriate interactions a responsible person must keep [the Student] in the line of sight and within two arms lengths (approximately six feet) of [the Student] when [redacted] is at school. This supervision is necessary during all hours when [the Student] is on school grounds including on the playground;
- Require that [redacted] completes a less preferred activity before [redacted] has access to a more highly preferred item or activity;
- Effective Reinforcement increases the likelihood of a behavior to occur in the future;
- Break tasks into smaller "chunks" of instruction;
- Tell [the Student] what you want [redacted] to do;
- Use as few words as possible to communicate demands/instructions/tasks;
- "Self-monitoring" to help the Student's ability to differentiate between positive attention and negative attention and [redacted] lack of concern about the effects of behavior on others;
- Use of a visual schedule help [the Student] with understanding what comes next, prepare for transitions, and can also be used to remind [redacted] of the reinforcer [redacted] is working for;
- Instruction in and practice of Social Skills:
- Pre teaching-Review behavioral expectations with [the Student] before every class or activity;
- Safety-Care interventions-Use the "Wait," "Help," and "Prompt" strategies as needed and appropriate to avoid power struggles with [the Student] and to assist [redacted] in de-escalation;
- Ignore the outbursts. Respond only minimally to [redacted] arguments if it is absolutely both necessary and appropriate. Once [redacted] is calm, present the same task that was given to [redacted] before the behavior began;
- Goals and Procedures. Baseline data for each of the goals is necessary to establish criteria. Continue with the interventions you currently use while collecting data consistently for three consecutive days. On the fourth day, start the interventions described below and continue to take data;
- Engaging in tasks promptly;
- Remaining on task;
- Model appropriate conversations and statements;

- Avoid using the word "no." Instead, tell what may have or what may do;
- Task refusal — refusal or avoidance of beginning a task or activity within 5 minutes of the demand/request/instruction from an adult in authority. Remind of what is working for in a very succinct manner. Do not allow access to more preferred items or activities. Present the task again every 5-10 minutes.
- Provide as little attention to [as possible] until complies with the task;
- Leaving the classroom excessively — [the Student] should be provided with a limited number of passes each day. When those passes are used, may not leave the classroom except for actual emergencies;
- Inappropriate interactions - [the Student] will eliminate touching others in an unwanted way and staring at others (staring being defined as looking at another person without being engaged in social interaction or instruction for more than five consecutive seconds). Review the need to gain permission before touching another person with the expectations reviewed with before each class and activity.

37. On February 6, 2020 the Student got into a physical altercation with another student on the school playground. In a February 11, 2020 e-mail to Barbara Pineau, Diane Jurson wrote that she had reviewed the video tape of the incident and reported as follows¹⁰:

Per your request, I viewed the camera during recess on Thursday, February 6, 2020. The incident started at approximately 11:40.41 at the beginning of recess. [the Student] appears on the right corner of the camera. [the Student] is approached by 3 boys and a peer initiates the first contact to [the Student]. The incident takes approximately 2 minutes and includes several "hands on" to [the Student] and then [the Student] shoves the peer who first approached . As a teacher appears on the right side of screen (unaware of what happened), the other boys begin to fade off. [The Student] approaches another teacher now coming out to the playground and appears to be explaining what happened. At this point, Ms. Bickford, the Ed Tech who goes out to recess with [the Student], also appears on the camera, assisting a student on the ice.

38. Mim Carter, the Student's Speech-Language Pathologist, missed the first scheduled 60 minute social skills instructional session with the Student on February 12, 2020 due to "scheduling conflicts." On February 14, 2020, Ms. Carter missed the session due to her being at a "medical appointment with her spouse." At some point prior to the conclusion of February break, Ms. Carter advised MSAD #70 that she was taking family medical leave and was unavailable when school resumed the week of February 24, 2020. As a

¹⁰ The complaint investigator requested a copy of the video referenced herein but was informed by the District that the video was no longer available and had been erased, as is the usual practice.

result, social skills SDI sessions were not provided for the Student in the two weeks immediately following February break (weeks of February 24, 2020 and March 2, 2020).

39. Beginning during the week of March 9, 2020, the Student's social skills instructional services were provided by Diane Jurson, the Student's special education teacher.
40. On February 28, 2020 the Student received a written warning from _____ teacher for improper behavior in the classroom.¹¹
41. On March, 2, 2020, Ms. Foss prepared an updated BIP which identified behavior antecedents, specific things the Student needs in order to succeed and ways for staff to respond to identified situations. The updated BIP addressed responses and specific detailed instructions on how staff should respond to certain behaviors, including inappropriate statements, defiance and inappropriate _____. The BIP included the following with regard to data collection: "Please record each incident of targeted unwanted behavior on the data collection sheet. If an unwanted behavior that is not identified is observed, please document that behavior on an ABC data sheet. Data sheets should be sent to the BCBA at the end of the school week."
42. On March 3, 2020, the IEP team met for a program review. Although no changes were made to the Student's IEP at this meeting, additional academic, functional and social performance evaluations were ordered. The Written Notice from this meeting noted as follows:
 - Ms. Foss provided an updated BIP draft with a new daily report format to measure the degree/intensity of the Student's behaviors along with defining _____
 - The Parents reiterated their request for a special purpose private school placement, noting that the Student's behaviors continue to be elevated at home and _____
 - Ms. Jurson reported that staff that work with the Student have been on 'high alert' to concerns of inappropriate _____ that were voiced at the last meeting.
43. On March 9, 2020, Sandy Flacke wrote a letter to the Parents regarding Ms. Carter's absence, stating that the Student's social skills instruction sessions would be provided by the special education teachers, with consultation from Jolayne Mathers, the Assistant Special Services Director, who is also a speech therapist. The letter also stated that the District would be offering compensatory education in the summer to address any service shortfalls.

¹¹ Failing to wait for _____ teacher and taunting other students and a teacher who were waiting to come in from recess.

44. An undated “Progress Report for Annual Goals” report shows progress towards goals in a number of different areas as follows:

Subject	Goal	Progress
comprehension	By June, 2019, Student will understand text for literature and information, progressing from second grade to early third grade to beginning to end of third grade	June, 2019: Partially met. Completed Lesson 18 of 30 stories so progressed to just passed halfway through the third grade curriculum.
reading	by June 2020, Student will identify main idea and two supporting details with 80% accuracy	November, 2019: Partially met- Student identified the main idea with greater accuracy than narrowing down relevant supporting details. partially met this goal and will be provided more opportunities to master this skill during the second trimester.
reading	By June, 2020, given an independent level reading passage and questions to answer, [the Student] will read each answer choice, and refer back to the passage when necessary, with 80% accuracy for 4 of 5 passages as measured by classroom assessments.	November, 2019: Partially met- During the first trimester, [the Student] scored an 83% on correctly answering questions from independent reading passages.
identifying and using prepositional phrases	By June, 2020 to identify, form and use prepositional phrases with 80% accuracy	November, 2019: Partially met- Student used a word bank of common prepositions to complete the worksheets for identifying prepositions. will continue to work on identifying prepositions without the word bank then continue the lesson to form prepositional phrases.
identifying adjectives in sentences	By June, 2020, Identify and correctly order adjectives within sentences with 80% accuracy for 4 of 5 passages	November, 2019: partially met... In addition to adjectives, Student reviewed identification of nouns. Student relied on staff instruction to complete these activities. Student will continue to work on this goal during the second trimester with emphasis on independent completion
written answers to written questions	By June, 2020 using a complete sentence that contains vocabulary directly from the question provided and is grammatically correct and meaningful with proper use of capitals and punctuation in 4 of 5 attempts as measured by student work samples and teacher report.	November, 2019: partially met. Student worked on creating a complete sentence as a daily activity. improved on rephrasing the question, but needed ongoing prompts to use capitals and ending punctuation. Student needs to work on writing in a neat, legible manner
understanding of the conventions of	By June, 2019 increase understanding of the conventions of standard	June, 2019: partially met the goal of increasing understanding of the grammar and usage in writing. Student is working at

standard English grammar	English grammar and usage when writing and speaking from the beginning second grade level to the beginning third grade level	the mid second to end of second grade skills while composing prompts, but understands grammar skills in isolation (verbal responses, assignments, targeted instruction) at the mid third grade level. Student needs to learn to <u>apply grammar skills to writing prompts.</u>
Punctuation and capitalization	By June, 2019 write paragraphs that include proper capitalization, end punctuation, commas for dates, as well as spell taught words correctly and unknown words	June, 2019: partially met practiced writing complete sentences with the understanding that these sentences could combine to build a paragraph. Using graphic organizers, staff assisted Student in developing ideas, prompting to use transition words, adjectives, and creative details. For each writing piece, Student received ongoing help for editing that included capitalization, punctuation, commas, and correctly spelled words. Student often resisted help during the revision process, preferring to pass in the initial draft. At this time, Student needs more practice in order to independently complete these tasks.
Write opinion, informative and narrative pieces	By June, 2019, given Instruction in the regular education classroom followed by support and reteaching in a small group setting, the Student will write opinion, informative, and narrative that include an introduction, development of the topic, linking words and phrases, and a conclusion	June, 2019: Partially met. Writing prompts for opinion, informative, and narrative writing were scored at the second grade level.
Math word problems	June, 2020 will choose the correct operation to solve word problems with 80% accuracy in 4 of 5 trials of 10 problems	November, 2019: Partially met. Worked on word problems that focused on addition and subtraction to solve the problem. needed to recognize the phrases such as "how many were missed", "in all", "does have now", "have together", "were missed", and "in all" in order to determine which operation was needed to answer the question.
Behavior, making appropriate choices	By June, 2019 increase from does not meet the standard to partially meets the standard to meets the standard for making appropriate choices (telling the truth, respecting personal property, respectful language, completing assigned work) throughout school day as measured by daily documentation and teacher observation.	June, 2019: Partially met. There were incidents when the Student struggled with telling the truth, however, overall this was not considered as a target behavior and showed improvement in being truthful at times when made inappropriate choices. In regards to respectful language, the Student continued to work on refraining from arguing which is a target goal on Behavior Plan. The new Behavior Plan, updated and implemented in January 2019 was effective in helping the Student see the cause and effect of choices. In regards to completing assigned work, the Student struggled with tasks when became fixated on being right or when attempted to engage in a power struggle with staff. The

		goal of using respectful language and completing assigned work will continue as primary goals for the upcoming school year.
Behavioral-social language skills	Will understand and use selected grade level social thinking and related social language skills from 5 areas of study: Friendship, Conflict Resolution, Peer Pressure, Handling Feelings, and Taking Responsibility	March 13, 2020: Partially met. (no further narrative on report)
Behavioral-communicating thoughts and feelings	June 2, 2020, given emotional regulation and social communication skills, the Student will demonstrate ability to communicate thoughts and feelings to others appropriately during periods of target behaviors 80% of the time as measured by weekly check-ins by social worker.	November, 2019: Partially met. The Student continues to show progress in the area of communicating thoughts and feelings towards others. has done this during a period of significant changes
	By June 2, 2020, given a visual reminder, the Student will refrain from arguing with adults or peers from 14% of school days to 50% of school days as measured by classroom documentation and teacher report.	November, 2019: Partially met. During the first trimester, the Student refrained from arguing with adults or peers for 35% of school days

45. In an interview with the Complaint Investigator, the Parents stated:

- The Student should have received 30 minutes per week of social skills training, but since September of 2019, has only received two social skills meetings.
- The Student has had four different ed techs this year, which impacts the consistency of the support and programming that receives.
- That since the Student has been home, is doing OK with work with little resistance or arguing. They note, however, that is working at a “third grade level” and that can’t read social studies or science homework.
- They did not receive notices from the District with regard to the Student’s Behavior Intervention Plan (“BIP”). When they were finally notified of the BIP, The Parents objected as it contained a “token” plan, which they feel does not work for the Student, as it allows the Student to continue to manipulate the adults/staff that are implementing the plan. They also do not feel that the BIP is appropriate for the Student in light of the Reactive Attachment Disorder (“RAD”) diagnosis offered by Julie Racine.

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- The Student’s reading comprehension is still very strained, and poor grades in social studies and science are directly linked to reading inability. Specifically, is unable to read social studies and science homework, which appears to be “way over head”, and the Parents have to read the instructions to
- They made the determination in the fall of 2019 to have the Student skip fifth grade and move to the sixth grade so didn’t “age out” of special education before graduated from high school in order to help with vocational skills and transition planning. Additionally, the Parents moved forward as they had some concerns that the Student is “drawn to younger kids,” because can “control them.” The Parents feel there is a reduced risk of the Student harming younger children if is around kids own age level.

46. In an interview with the Complaint Investigator, Leslie Sadler stated as follows:

- She has been working as the Student’s counselor (out of school) since December, 2018 on a weekly basis, with very few cancellations;
- She said that the Student has a very difficult early childhood history and has a lot of anxiety. In addition, has difficulty with boundaries and needs constant supervision at school. For example,
- She is aware of the Student’s recent propensity to , which she characterized as “a big red flag” and that the Student has “serious work to do.”
- She is concerned that as the Student enters seventh grade with a different school, teachers and greater academic expectations that could struggle even more.
- She feels that a special purpose private school, such as or the program in that have teachers and ed techs with specific training and experience is a more appropriate placement for the Student to address behavioral and academic needs. While she has a concern that may be placed with lower functioning children, she has recently placed other similarly behaviorally challenged children at who have done very well at this program. She noted that would provide more consistency and would stress skills such as empathy building and issues to help students make sure that others are safe. Both programs also work with intellectually challenged children to help with their academics.

- She feels that it could be positive for the Student to be one of the higher functioning children in class to help build self-esteem.

47. In an interview with the Complaint Investigator, Barbara Pineau stated:

- The Student is demonstrating progress with behaviors at school-most of the Student's more troubling behaviors are happening at the Student's home;
- When some of the Student's other behaviors were getting more frequent, the IEP team increased support level in order to have an ed tech on the Student "like lint;"
- The Student's Speech and Language therapist (Mim Carter) was supposed to be providing the Student's social skills training, but she has been out with a sick relative. Diane Jurson, the Student's special education teacher, picked up doing this social skills work.
- School staff (teacher and behavior specialist) make changes to the Student's BIP as is necessary without the IEP team;
- The Student would get a "stickie" as positive reinforcement for good behavior in class and would also get "stickies" on behavior sheet for poor behavior.¹²
- The Student's daily behavior data sometimes didn't include behaviors at the end of the day if it was "too late" to put on the behavior sheet and get into the Student's backpack to take home. As a result, the behavior sheets did not include approximately "three or four" behaviors.
- She does not believe that the Student's diagnosis of PTSD has an adverse effect on education;
- The Student's 'partially meeting' goals is demonstrable progress and evidence that the District is providing a FAPE to the Student. The Student is 'absolutely meeting or making progress with other IEP goals.'
- None of the Student's positive behaviors were tracked until February, 2020 when the BIP was adjusted.

48. In an interview with the Complaint Investigator, Tricia Bragan stated as follows:

- She started working with the Student and Parents approximately two and a half years ago to assist with case management/support, which included coordination with regard to Section 28 services and the Student's educational programming.
- She has concerns that the Student's need for a 1:1 ed tech at all times could be detrimental to the Student who is already isolated and needs to have room to learn and develop social skills.
- She has learned from the Parents that the Student has been at home, which confirms her concerns about the serious nature of the Student's

¹² Ms. Pineau acknowledged that having the Student receive a "stickie" for both good and bad behavior could be confusing.

behavior issues. She noted that in her experience, behaviors happening at home often will spill over to behaviors at school, and vice versa.

- The District's ed techs do not have sufficient experience or training to address the Student's challenging behavior issues;
- She said that the Student's struggles in reading impact poor grades in social studies and science. She does not believe that the Student has made meaningful progress in either behavior or reading and that the District has not adequately or effectively provided programming to address the Student's challenges.
- She has experience with both the _____ and _____ programs which she feels are better able to address the Student's behavioral and academic needs. She said that she has successfully placed other children at both of these locations.

49. In an interview with the Complaint Investigator, Maureen Foss, MS, BCBA stated as follows:

- She has concerns about how the District is recording the Student's behavior data- For example, she would see notes indicating five arguments, and the ed techs would mark down one behavior incident. When she spoke to the ed techs about this, they reported to her that they "felt sorry for
- The Student uses "arguing" as "avoidance behavior", e.g. the Student feels that everyone else can read better, so _____ argues to avoid the task of doing something that _____ struggles with;
- Reading needs to be worked on with the Student and _____ ed techs need to be trained in the Student's reading program and behavior plan. Ms. Foss brought this issue up at an IEP team meeting and did not get a clear answer that the ed techs had the requisite training in the Student's reading or behavior programming. She noted that some of the Student's ed techs hadn't seen _____ behavior plan;
- The Student's behavior plan should "tell _____ what you want _____ to do, not just what you don't want to _____ to do;
- The Student would benefit from working with registered behavior technician¹³..
- Some of the behaviors are less of a concern and more typical of the Student's developmental stage, e.g. farting in another student's face...or "eye rolling" are more typical pre-teen behavior. Task avoidance and more socially significant behaviors are more troubling.
- She believes that the Student's behavior/socialization program can be effectively delivered by a behavior analyst or case manager/special education teacher, with appropriate training. She believes the behavior/socialization programming would

¹³Ms. Foss said that to become a registered behavior technician one would take a 40 hour course, then work with a BCBA (board certified behavior analyst)

be the same for the Student even if it was determined that [redacted] was diagnosed with RAD.

50. Angela McCormick, Ph.D., the School Psychologist, provided an updated psychological evaluation in May, 2020 which found in relevant part as follows:

- The Student's Total Reading is in the Low range, standard score 64, at the 1st percentile. This is a significant decrease from [redacted] WIAT-III Total Reading standard score of 74, at the 4th percentile in April 2019. [redacted] has shown significant decreases in Reading Comprehension from the Average range (standard score 96) to the Below Average range (standard score 76). Oral Reading Fluency also decreased from standard score 77 in April 2019 to 65 on today's evaluation. Basic Reading was at a standard score of 59, at the 0.3 percentile, Low range. In April 2019, the Basic Reading standard score was 68, at the 2nd percentile, Low range, slightly decreased. Spelling was at a standard score of 67, at the 1st percentile in April 2019 and has slightly increased to a standard score of 71, at the 3rd percentile;
- As diagnosed in 2019, these difficulties in reading comprehension, basic reading skills, oral reading fluency, and spelling are consistent with a Specific Learning Disorder with impairment in Reading, with dyslexia;
- The Student's performance on the Essay Composition evaluation has decreased from the 3rd percentile in April 2019 to the 1st percentile on today's evaluation;
- The Student's mathematics score was at a standard score of 72, at the 3rd percentile, Below Average range. This is slightly decreased from [redacted] Mathematics Composite of 76, at the 5th percentile in April 2019. Math Fluency was at a standard score of 66, at the 1st percentile, Low Range. This is significantly decreased from a standard score of 80, at the 9th percentile in April 2019.
- On the NEPSY-II, Social Perception, the Student's results were similar to January 2019 results...indicating that the Student continues to have difficulties with encoding the facial features of new faces, which is often seen in children with a mild Autism Spectrum Disorder;
- In the Theory of Mind subtest, the Student showed in Jan. 2019 and on today's evaluation difficulties with taking the perspective of others, understanding hidden idioms and the use of deception, and understanding the meanings conveyed in pictures. [redacted] results on today's evaluation are lower than [redacted] Jan. 2019 results in the Theory of Mind subtest, although both were below age level
- The Gilliam Autism Rating Scale, Third Edition, was independently completed by the Student's special education teacher and a regular classroom teacher. The teachers, both who have known the Student for more than 2 years, indicate that [redacted] has more difficulties when routines are changed, becomes frustrated quickly, responds negatively to requests, attaches very concrete meanings to words, speaks with a flat affect and tone, fails to predict social consequences, has difficulty

understanding why peers may not like or when is being teased, shows difficulty understanding that others may have different views, often does not try to make friends with peers, and often stares at hands or an object for at least several seconds.

- BASC-3 scales completed by the Student's mother and two teachers, indicated difficulties by all three in the areas of: Hyperactivity, Aggression, Conduct Problems, Externalizing Problems, Leadership, and Attention Problems. mother (and special education teacher) also indicated difficulties with Depression, Somatization, Internalizing Problems (also regular classroom teacher), Atypicality (also regular classroom teacher), Bullying, and Anger Control. Both teachers ... indicated problems [sic] with Learning Problems, School Problems, Adaptability, Functional Communication, Resiliency, and Autism Probability. regular classroom teacher noted problems with Withdrawal and Anxiety. The special education teacher noted difficulties with Hyperactivity, Social Skills, and Study Skills.
- These evaluations indicate that the teachers and the Student's mother are noticing symptoms of mild aggression, conduct problems, depression, withdrawal, and anxiety due to the difficulties [associated] with Autism Spectrum Disorder symptoms, learning problems, and ADHD symptoms.

51. In her May, 2020 psychological evaluation Dr. McCormick recommended as follows:

- Being in a small group setting with specialized instruction due to social interaction difficulties, need for control, and learning problems.
- Receiving Section 28 and/or HCT services and outpatient therapy to work on attachment, taking the perspective of others, social communication, and coping skills. Equine therapy may be beneficial in helping the Student understand how actions and emotions affect others and to increase self-awareness.
- Environmental and instructional modifications that are recommended for children who have symptoms of Attention Deficit Hyperactivity Disorder.¹⁴

52. In an interview with the Complaint Investigator, Dr. McCormick stated as follows:

- The Student's academics have "definitely regressed" since her May, 2019 evaluation. The decrease in the Student's academic skills is more of a concern than behavior issues at this point.
- The Student needs "intense interventions" in reading and written expression, with a program like an Orton Gillingham based reading program/modality.
- With regard to the Student's behaviors, her evaluation also showed that behaviors have either regressed from last year or stayed the same. While she noted that a student's behaviors can be linked to issues at home, she is not aware of any unusual current home issues or trauma. Her interactions with the Parents

¹⁴ Dr. McCormick listed 23 different modifications and supports that were substantially similar to the modifications and supports suggested in her May, 2019 report.

and evaluation results indicate that the Parents are attentive and more than willing to help the Student with anything needed.

- She noted that the Parents have been attentive to the Student obtaining outside counseling through Leslie Sadler on a weekly basis.
- While she recommended social skills training and other supports within the school, she doesn't review the Student's IEP to see if her recommendations are implemented.
- She believes that the Student could do "alright" in some regular education classroom situations
- A special purpose school may be appropriate for the Student insofar as it may be able to better target areas where the Student needs further support, including social skills, social communication and academics. Additionally, being in such a placement could help the Student to form more positive attachments with other Students. As a caution, she noted that because children have a tendency to mimic other children, it could potentially cause the Student to regress if is only around other behaviorally challenged children in a special purpose school.

53. In an interview with the Complaint Investigator, Julie Racine, the Student's Family Psychiatric Nurse Practitioner, stated as follows:

- She started working with the Student in May, 2019, and has seen on a monthly basis since then;
- Since she has worked with the Student, behaviors have gotten worse, starting on or about October of 2019. The Student's negative behaviors became more frequent,

She has also seen a negative change in the Student's lack of remorse for behaviors, which raises some very serious concerns with regard to safety issues and ability to socialize appropriately with other children. For example, when she asked why

calmly said that "because my mother took my TV away."

- She said that the Parents have been "very attentive" to the Student's needs- making sure that does homework, takes medication and setting appropriate boundaries for the Student. She said that the Parents have taken an "eyes on" at all times approach with the Student and have split their time watching .
- The Student's medications are helping, but has plateaued with regard to the level of help they can provide to address ADHD and anxiety. She recently tried to increase dosage a slight amount, but the increase made no difference in behaviors or attentiveness.

- She “highly recommends” either a private special purpose school or residential placement. The Student needs to have staff with specific training and expertise to address the Student’s behavior and learning issues.

54. In an interview with the Complaint Investigator, Sandy Flacke, Ph.D., the Special Education Director for MSAD #70 since July 1, 2019, stated as follows:

- Since Maine EUT took over responsibility for the Student’s special education programming on July 1, 2019, MSAD #70 has been the provider of the Student’s special education services and the Student’s IEP in cooperation with Maine EUT, under the direction of Barbara Pineau;
- Either she or the Assistant Special Education Director for MSAD #70, Jolayne Mathers, has been to each of the Student’s IEP team meetings since Dr. Flacke started working for the District.
- The “stickie system” behavior plan used for the Student was part of a plan supported by the school principal, who was also new to the District on July 1, 2019. She would not have recommended the “stickie system” behavior plan as it was punitive and rewarded the Student with attention for bad behavior. She said that the “stickie system” was changed with more of a positive behavior support plan around the time that Maureen Foss conducted her FBA and started her work with the Student in November, 2019. She said that the process of developing a positive behavior support plan was delayed due to the Team not recognizing that the Student needed “rewarding” for positive behaviors.
- She is “seeing a lot of behavior progress” with the Student.
- Diane Jurson was “supposed to pick up” the Student’s social skills training when the Student’s Speech and Language Pathologist, Mim Carter, took family leave in September, 2019.
- The District has proposed a compensatory education plan for the Student starting this summer in light of the Student not receiving social skills services required by IEP.¹⁵
- With regard to extracurricular activities, the District has only offered the Student an “after school program” and has not offered sports or other physical activity programs to the Student. While the District can provide supports for the Student to participate in sports or group activities, the Parents have been reluctant for the Student to take part as they feel it would be stressful for the Student to be in group activities.
- The District has “done an amazing job” with regard to the Student’s behavior. She said that the District is continuing to work on what needs to be documented. Even without fully accurate behavior documentation, she knows behavior has

¹⁵ Dr. Flacke said that a letter has been delivered to the Parents offering a compensatory program for social skills training for the Summer of 2020.

improved because Diane Jurson has told her so, and that she trusts her “anecdotal perceptions” about the Student.

- She “can’t comment” on whether the Student has made progress in reading, however the Student’s evaluation scores are not reflective of day to day progress in the classroom. She agrees that the Student needs a specialized reading program like one of the Orton Gillingham programs. She “can’t speak” as to why the District is not providing this program to the Student, and that as the new Special Education director, changing the reading program has been one of the things that she has suggested to the Superintendent.
- The “Fast Forward” reading program which has been used for the Student is a “great” research based literacy program, however it is a “computer based program” which has been an “ongoing issue because the Student has challenges with working with computers. She agrees that the IEP team “should be looking at new things.”

55. In an e-mail sent to the Complaint Investigator on May 12, 2020, Sandy Flacke said that the behavior plan shift from using the school/ classroom-wide "stickie" note system following the February break (Feb 17-21 2020), after which we started using Maureen Foss' data system. Maureen's data system did not include the use of stickies. Dr. Flacke further noted that “staff did use a stickie as a visual reminder if a student was off task or inappropriate. However, a stickie was not used in Maureen's data tracking.”

56. In an interview with the Complaint Investigator, Diane Jurson, the Student’s special education teacher and case manager since September, 2017 stated as follows:

- The Student was lying and stealing to a significant degree, during 2017/2018 school year.
- The Student’s dyslexia first came up at the September, 2019 IEP team meeting.
- The Fast ForWord on-line intervention based program was utilized for 30 minutes per day with the Student and that it does target dyslexia, among other items.¹⁶ She believes that although the Student’s progress slow, it was “measurable.”
- The Student’s 1:1 Ed Tech support was given primarily as a reaction to the Student’s behavior, and to keep the Student within “arm’s distance.”
- The January, 2020 “playground” incident happened after the Student’s 1:1 support person stepped away to help another student for a period of one or two minutes. During this time period, which was captured on video, the Student was involved in an altercation involving another student in a small group. Both students had their hands on one another and “both pushed each other.” Although both students went to see the nurse, there were no physical injuries to either student.

¹⁶ “Fast Forward” is an “online reading intervention” program that it is designed for elementary school children, starting at age 5, through adult learners to address reading difficulties including children with “mild to moderate autism” and “dyslexia” <https://www.fastforwardhome.com/what-is-fast-forward>

- She said that the behavior sheets were designed to track the Student’s behaviors, and she is “not sure why daily sheets didn’t record this incident.”
- Some of the staffing changes for the Student impacted the recording of behaviors on the Student’s daily behavior sheets.
- Any incidents that were not recorded in the daily behavior sheets were shared by staff via e mail with Maureen Foss.
- In response to the “lunch table” incident¹⁷, additional support personnel were added to the lunchroom and Maureen Foss updated the Student’s behavior plan.
- If the Student was having a negative behavior, staff would give a “visual” cue. If continued with the negative behavior, the Student would be given a “stickie” If continued with negative behavior after getting a sticky, would be removed from the regular education setting.
- The Ed Techs working with the Student did not have specific behavior training except for the training received from Maureen Foss in February and March, 2020. The IEP didn’t agree that there was a need for specific training.
- She did not talk with Mim Carter, the Student’s Speech and Language Therapist, about providing the Student’s social skills instruction after Mim had to take family medical leave. Ms. Jurson took over the Student’s social skills instruction in late February or early March, 2020. She is not aware of anyone else filling in to cover the Student’s social skills instruction after Mim took family leave.

57. The final day of “in-person” instruction in MSAD #70 was on March 13, 2020 due to the COVID-19 virus.

VI. DETERMINATIONS

1. **Not properly developing or revising an IEP that is reasonably calculated to enable the Student to make progress in light of circumstances, in violation of MUSER §§ IX(3)(A), §IX.3.(D), VI.2.J.(4) and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988; *RE-1*, 2017 WL 1066260 (Mar. 22, 2017);**
2. **Not considering existing evaluation data and the academic, developmental and functional needs of the Student in violation of MUSER §IX.3.C (1)(c);**
3. **Not ensuring that a continuum of alternative placements is available to meet the Student’s educational needs and that the Student’s educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;**

¹⁷ making school on or about January 20, 2020;

at the

4. Not providing behavioral intervention services and modifications designed to address the Student's behavior in violation of MUSER §IX.3.C (2)(a).

NON-COMPLIANCE FOUND; DENIAL OF FAPE FOUND

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

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

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

Congress indubitably desired “effective results” and “demonstrable improvement” for the Act’s beneficiaries. *Burlington II*, 736 F.2d at 788. Hence, actual educational results are relevant to determining the efficiency of educators’ policy choices...The key to the conundrum is that, while academic potential is one factor to be considered, those who formulate IEPs must also consider what, if any, “related services,” 20 U.S.C. § 1401(17), are required to address a Student’s needs. *Irving Independent School Dist. V. Tatro*, 468 U.S. 883, 889-90 (1984); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864 (1983).

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

There is a two-part standard for determining the appropriateness of an IEP and placement. First, was the IEP developed in accordance with the Act’s extensive procedural requirements? Second, was the IEP reasonably calculated to enable the child to receive “educational benefits”? See *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley* (“*Rowley*”), 458 U.S. 176, 206 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27 (1st Cir. 2008). “Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 205.

The Supreme Court recently explained its *Rowley* standard by noting that educational programming must be “appropriately ambitious in light of a student’s circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Endrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

In *Endrew*, the parents of an autistic child were dissatisfied with his progress after his IEPs largely carried over the same basic goals and objectives from one year to the next. *Id.*, *Slip Op* at 6. As a result, they removed the child from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism. An Administrative Law Judge rejected the parent’s claims seeking reimbursement for this placement, concluding that the annual modifications to the IEP objectives were “sufficient to show a pattern of, at the least, minimal progress.” *Id.*, *Slip Op* at 8. Both the Federal District Court and the Tenth Circuit Court of Appeals affirmed, the latter noting that it had long interpreted the “minimal progress” standard under *Rowley* to mean that a child’s IEP is adequate as long as it is calculated to confer an “educational benefit [that is] merely . . . more than de minimis.” *Id.*

The *Endrew* Court overturned the Tenth Circuit decision, explaining:

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement.

The *Endrew* Court held that a student’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.*, *Slip Op* at 11.

The Least Restrictive Environment (LRE) requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or

private institutions or other care facilities, are educated with children who are not disabled." See 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). MUSER §VI.2.I provides that the School Administrative Unit has the ultimate responsibility to ensure that a student's placement is in the LRE.

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

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services.

[20 USC 1412(a)(5) and 34 CFR 300.114]

The First Circuit Court of Appeals has declared that determinations about least restrictive programming are unavoidably part of the determination of an "appropriate" program for a student. See *Lenn v. Portland School Committee*, 998 F. 2d 1083, 1090 n.7 (1st Cir. 1993) (questions about least restrictive programming are "an integral aspect of an IEP package (and) cannot be ignored when judging the program's overall adequacy and appropriateness."). The educational benefit and least restrictive environment requirements operate in tandem to create a continuum of educational possibilities. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 928, 993 (1st Cir. 1990). Supplementary aids and services must be provided within the regular classroom and placement in a more restrictive setting should only be considered when those services cannot be achieved satisfactorily. MUSER §X.2.B.

In this case, an IEP was developed for the Student with a combination of specially-designed instruction in language arts and math and a variety of supplemental aids, services and modifications. With regard to the Student's literacy programming, received SDI in ELA five times per week for 80 minutes during the 2018-2019 school year. teacher (Ms. Jurson) used the "Fast ForWord" reading intervention based program for 30 minutes per day.

In Spring 2019 NWEA scores, the Student scored the following: Math 199 (17th Percentile), Reading 188 (12th Percentile), and Language Usage 168 (1st Percentile). Dr. McCormick's May, 2019 evaluation showed the Student's word reading was in the 4th percentile (mid first grade level); essay composition in the 3rd percentile (first grade level); pseudoword decoding in the .5 percentile (below first grade level); spelling in the 1st percentile (first grade level) and total reading in the 4th percentile (below average range). In her May 5, 2019 report,

Dr. McCormick recommended interventions in basic reading skills, phonics, written expression, spelling, and math problem solving and computation skills with an “Orton-Gillingham” based system.

In the Student’s *Progress Report for Annual Goals* report, the Student failed to meet any of reading or written expression objectives as of the date of annual review as of June, 2019.^{18,19}

Despite this data on the Student’s literacy struggles, the Team failed to make any changes to the Student’s IEP in June, 2019 with regard to literacy programming, maintaining the Student’s SDI in English Language Arts (5 times per week for 80 minutes) and Writing (4 times per week for 40 minutes) Surprisingly, at the September 5, 2019, IEP team meeting, the team *removed* the Student’s service time for writing, thereby decreasing the Student’s total SDI literacy time by 160 minutes per week.

Additionally, the Fast ForWord literacy program, which is primarily an on-line, computer-based system which was used for the Student during the 2018-2019 school year, was not working for the Student. At the September 5, 2019 IEP team meeting, the Written Notice stated that staff should “closely monitor and limit computer access time.” At the November 25, 2019, IEP team meeting, the Team agreed to exempt the Student from Coding since [the Parents] believe it is necessary to limit use of "screen time". Dr. Sandy Flacke noted that the Fast ForWord program has been an “ongoing issue” because the Student has challenges with working with computers.²⁰

A school district is obligated, within a reasonable period of time, to review and develop a programming alternative once it becomes clear the student's IEP is not working. *M.C. ex rel. JC v. Central Regional School District*, 81 F.3d 389, 396-97 (3d Cir.), cert. denied, 519 U.S. 866, 136 L. Ed. 2d 116, 117 S. Ct. 176 (1996).

The results of Dr. McCormick’s May, 2020 evaluation provide further evidence that the Student’s literacy instruction was not working. Dr. McCormick noted “a significant decrease from the Student’s WIAT-III Total Reading score” from April 2019 to May, 2020. She also noted “significant decreases in reading comprehension,” stating that the Student’s academics have “definitely regressed” since her May, 2019 evaluation.

¹⁸ In the Written Notice dated January 22, 2019, the Parents reported the Student “comes home without the things needs to complete homework” and that it takes the Student “hours to complete work.”

¹⁹ Writing prompts for ‘opinion, informative, and narrative writing’ were scored at the second grade level; ‘Understanding of the conventions of standard English grammar’ were scored at the mid second to end of second grade level; ‘Composing prompts’ (verbal responses, assignments, targeted instruction) at the mid third grade level.

²⁰ Dr. Sandy Flacke noted in her interview that Fast Forword has been an “ongoing issue” because the Student has challenges with working with computers. She agrees that the IEP Team “should be looking at new things.”

Rather than consider a different program such as the Orton-Gillingham program recommended by Dr. McCormick in May, 2019, the IEP team continued the use of the Fast ForWord on-line computer reading program at the September, 2019 and November 2019 IEP team meetings.

Although educational methodology generally falls within the discretion of the school district unless the method is distinctive or exclusive, it must be effective in addressing the Student's unique needs and allowing to make appropriate progress in light of circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988; see also, *Central Bucks School District* 40 IDELR 106, 103 LRP 52413, Pennsylvania State Educational Agency, November 13, 2003; see also, *Medina Valley In-dependent School District, Texas State Educational Agency*, 106 LRP 29730 October 10, 2005; *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (d. Me. 1993), quoting *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir.), cert. denied, 109 S.Ct. 308 (1988).

In *Parents v. RSU No. 75*, (No. 18.047H, June 22, 2018), a Maine case dealing with learning methodologies and students with severe literacy challenges, the Hearing Officer noted: "The IEP Team did not consider whether the methodology they were using was appropriate given the Student's orthographic impairment." *Id.* at 42. The Hearing Officer further noted:

As *Andrew F.* directed school districts to focus on the unique circumstances of students when developing IEPs and to provide access to instructional strategies based upon these unique circumstances. *Id.* It was foreseeable that the Student was essentially set up for failure during the seventh grade given the reduction in the direct instruction he was getting, along with a methodology that was not addressing his specific learning disability. His frustration level, lack of focus, and lack of motivation to succeed were symptoms of the ineffective programming decisions made by the IEP Team. *Id.* at 51.

In a similar manner, it was foreseeable that the Student in the present case would not make meaningful progress in literacy given the reduction in direct literacy instruction in September, 2019, along with continuing a methodology that posed challenges for the Student to use.

MUSER §IX.3.C (1)(c) provides that in developing each child's IEP, the IEP Team must consider the results of the initial evaluation or *most recent evaluation* of the child. (emphasis added). In *School Union #51* 26 IDELR 1193, 26 LRP 4557, (Maine, 1997), the Hearing Officer found that a school district denied a 15-year-old ninth grader a FAPE when it failed to review an evaluation of the student. In the *School Union #51* case, the Hearing Officer held:

It is the responsibility of the PET to review all the existing evaluations in developing the program for a student... It appears from the record that the Speech/Language evaluation of September 1996 was never reviewed by the PET. This evaluation contains some excellent concrete academic recommendations that were never discussed and thus are not in the I.E.P. where they belong.

With regard to the Student's programming to address behavior, MUSER §IX.3.C (2)(a); provides that the IEP Team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. In *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1467 68 (9th Cir. 1996), the Ninth Circuit Court held:

The placement must also include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley*, 458 U.S. at 189...[G]oals are not limited to academic benefits, but also include behavioral and emotional growth...Educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.

The Student received over 178 discipline or behavior warnings or infractions during the first seven months of the 2019-2020 school year, when the team started to track the Student's behavior data. The District developed a Behavioral Intervention Plan ("BIP") for the Student in the IEP dated January 22, 2019. The Plan identified behaviors to be reduced or eliminated as arguing with and yelling at staff, refusing to follow staff directions and blaming others for behaviors.²¹ The Plan provided for a number of preventative strategies and a system referred to as a "stickie system" to signal to the Student that is demonstrating a target behavior to assist the Student with these behaviors. The January 22, 2019 BIP also developed a "positive reinforcement" plan which included staff giving immediate and specific praise for on task and appropriate responses throughout the school day.

While the January 22, 2019 BIP offered a number of supports and strategies for staff to use with the Student, the District neglected to update the plan to reflect Dr. McCormick's behavioral recommendations following her May, 2019 evaluation. As a result, over 15 separate recommendations did not get integrated to the Student's BIP nor were they identified as additional accommodations in the Student's IEP at either the June, September or November IEP

²¹ See Fact 7.

team meetings.²² As stated in the *School Union #51* case, this evaluation “contains some excellent concrete academic recommendations that were never discussed and thus are not in the I.E.P. where they belong.” 26 IDELR 1193, 26 LRP 4557, (Maine, 1997)

Furthermore, the District failed to properly implement a mechanism for tracking the Student’s behavior, as put in place by the January, 2019 BIP. The daily “behavior sheets” reveal that the forms were not consistently documenting the Student’s behaviors. For example, the October 2, 2019 behavior sheet identifies that *no target behaviors* were documented during the Student’s ELA class, however the comment section of the form indicated that the Student “Received slip for being disrespectful to teacher during ELA”.

Even after the FBA was conducted and additional supports and services were offered in November, 2019, the behavior sheets neglected to accurately document the Student’s behaviors, including:

- inappropriate statements to _____ rumors at the school on or about January 20, 2020;
- Involvement in two fights on the playground in one month, with one of the incidents occurring on or about January 28, 2020. (The daily behavior sheet only stated that an “incident at recess” will be reviewed by Mr. Oliver);
- An inappropriate _____ drawing on or about January 16, 2020;
- Small stolen items were found when a school staff member cleaned out _____ locker and cubby, on or about December 20, 2019.²³

²² The following recommendations from Dr. McCormick’s May, 2019 evaluation were not considered or added to the Student’s BIP:

- Break down work into smaller, more manageable units to reduce cognitive overload; working on each unit until it is well learned;
- Emphasize the quality of work, rather than the quantity of it;
- Mix easier tasks/those where success is easier to achieve with more difficult tasks, to assist with maintaining interest and motivation;
- Teach compensatory strategies to help focus attention, such as quietly repeating instructions as they are told, outlining, underlining, etc.;
- Make frequent eye contact during lessons;
- Use hands-on learning aids, such as iPads, flash cards, manipulatives, etc.;
- Use physical devices such as timers and buzzers to help structure time;
- Keeping desk clear of non-essential materials;
- Have _____ paraphrase or summarize material.
- It may be helpful to remove competing stimuli and provide simple orienting or alerting cues;
- Present information in only one sensory modality at a time;
- Monitoring and checking progress;
- Intermixing tasks which involve physical activity with those that require quiet work (e.g., delivering messages, handing out papers);
- Limit number of items per page or number of pages;

²³ The accuracy of the behavior sheets is questionable in light of the February 4, 2020 Written Notice which reported that “Of the 34 documented school days, [the Student] attended 40% of these days with no targeted behaviors, 41% with one documented target behavior that ended after the first visual reminder, and 19% of these days with two or more visual reminders.

Maureen Foss also stated that she had concerns about how the District was recording the Student's behavior data. She gave an example of where she saw notes indicating *five* separate arguments on a day where the ed techs would mark down *one* behavior incident because they 'felt sorry' for the Student. She also noted that some of the Student's ed techs hadn't seen behavior plan.

A general compilation of all of the Student's negative behaviors, including behaviors not marked as "visual reminders" or "stickies", plus the incidents reported on December 20, 2019, January 16, 20 and 28, 2020, show the Student's daily negative behavior average jumps from 1.8 negative behaviors per day in September, 2019 to 2.3 per day for February and 2.4 per day for March, 2020. As noted by both the Parents and the Student's teachers, there is also a direct relationship between the Student's behaviors and academic success, even in mainstream classes. At the February 4, 2020 IEP Team meeting, the Student's Music teacher said that struggles with staying on task in class, and the Student's Art teacher reported that can be impulsive and requires 'more prompts' to focus.

Julie Racine, the Student's Family Psychiatric Nurse Practitioner, stated the Student's negative behaviors became more frequent, more and directed at other children (), along with behaviors demonstrating She has also seen a negative change in the Student's lack of remorse for behaviors, which she noted "raises some very serious concerns with regard to safety issues and ability to socialize appropriately with other children."

MUSER §VI.2.J.(4) provides that one of the major IEP Team Responsibilities is to develop and *revise* an Individualized Education Program. (emphasis added). In the present case, the District missed a critical period of time to make adjustments to the Student's IEP and behavior plan during the end of the 2018-2019 school year and the beginning of the 2019-2020 school year. As a result, even after the District provided an FBA and offered additional social skills support beginning in November, 2019, the Student had more behavior incidents that were more and violent in nature.

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

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with

the use of supplementary aids and services cannot be achieved satisfactorily. [20 USC 1412(a)(5) and 34 CFR 300.114]

MUSER §X.2.B. further provides:

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

The Least Restrictive Environment (LRE) requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." *See* 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). MUSER §VI.2.I.

The First Circuit Court of Appeals has declared that determinations about least restrictive programming are unavoidably part of the determination of an “appropriate” program for a student. *See Lenn v. Portland School Committee*, 998 F. 2d 1083, 1090 n.7 (1st Cir. 1993) (questions about least restrictive programming are “an integral aspect of an IEP package (and) cannot be ignored when judging the program’s overall adequacy and appropriateness.”). The educational benefit and least restrictive environment requirements operate in tandem to create a continuum of educational possibilities. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 928, 993 (1st Cir. 1990). Supplementary aids and services must be provided within the regular classroom and placement in a more restrictive setting should only be considered when those services cannot be achieved satisfactorily. MUSER §X.2.B.

Because there is no “bright-line rule on the amount of benefit required of an appropriate IEP,” courts and hearing officers must use “an approach requiring a student-by-student analysis that carefully considers the student’s individual abilities.” *Ridgewood Bd. of Educ.*, 172 F.3d at 248 (decision-maker must “analyze the type and amount of learning” that a student is capable of when determining whether “meaningful benefit” has been provided). Whether a program provides a “meaningful benefit” however, must be individualized, based upon each student’s potential for advancement. *Polk v. Central Susquehanna Interm. Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988).

In the present case, the Parents requested that the Student be placed in a “special purpose private school” to address behavioral and learning disability needs. This request has been echoed by Julie Racine, the Student’s Family Psychiatric Nurse Practitioner; and Leslie Sadler, the Student’s counselor. Tricia Bragan, the Student’s Treatment Case Manager, agreed with the

special purpose placement and noted that the Student's need for a 1:1 ed tech at all times in public school placement may overly restrict the Student who is already isolated and needs to have room to learn and grow social skills. Dr. McCormick, the District's psychologist, recommended that the Student be placed in "a small group setting with specialized instruction due to social interaction difficulties, need for control, and learning problems."

Maine EUT argues that there is no data showing that the Student is not able to make appropriate progress in this current placement. Further, at a special purpose private school, the Student's peers would be exclusively children with disabilities and academics would come second at a day treatment placement, meaning that [the Student] could expect to see less academic progress during time in a day treatment program. Moreover, the services available in a day treatment program would be similar to the services provided under the Student's current IEP.

MSAD #70 argues that the time period is too short to conclude that the new interventions were a failure. This behavior intervention system was developed by a trained BCBA, and it is difficult to understand how one might conclude that the approach was an unreasonable calculation and should be abandoned. In support of its position, MSAD #70 cites *Regional School Unit No. 21*, 111 LRP 8384 (SEA Me 2010), a Maine case in which a Hearing Officer ruled against a school unit that attempted to place a child in a behavior program at another public school, when the local school unit had not yet undertaken an FBA and behavior plan to inform its decision about whether the child could be served in the public school.

While it may still be possible for the District to provide an appropriate program for the Student, it is important to note that the District appears to have missed several key opportunities to make meaningful adjustments to academic and behavioral programming. First, many of Dr. McCormick's behavior recommendations in her May, 2019 report did not get included in the Student's behavior plan or IEP. This plan, as noted above, was not implemented with fidelity and the Student's negative behaviors did not decrease in frequency or severity. The Student's literacy instruction was similarly mishandled, with *decreases* in SDI in September, 2019, and continued use of a computer-based literacy program that failed to allow the Student to make more than minimal progress.

Even after Ms. Foss completed her FBA and revised BIP in November, 2019, the Student's negative behaviors in fact became more directed to other students, including incidents with . In January, 2020, when a 1:1 ed tech assigned to the Student to be "on like lint" stepped away from the Student for one or two minutes, the Student almost immediately became involved in a fight with another student on the playground. Even the District's tracking of behaviors has been spotty, with several aggressive and inappropriate behaviors not identified on the Student's behavior tracking sheets in January, 2020. In her interview with the Complaint Investigator, Ms. Foss noted her concerns about how the District is recording the Student's behavior even after her involvement in this case. Even as late as February 6, 2020

with a 1:1 Ed Tech assigned to closely monitor the Student, she could not stop the Student getting into a physical altercation with another student. At the March 3, 2020, IEP team meeting, the Parents voiced their concern for escalating behaviors at home, and Ms. Jurson reported that staff that work with the Student have been on 'high alert' to concerns of inappropriate t that were voiced at the last meeting.

As noted in *C.D. v. Natick Pub. Sch. Dist.* WL 3510291, at *3, the benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment." (internal citation omitted) (quoting *Roland M.*, 910 F.2d at 993). United States Court of Appeals for the First Circuit, May 22, 2019.

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

NO VIOLATION FOUND

MUSER §IX.3.C provides that an IEP Team must consider the concerns of the parents when developing each child's IEP. MUSER §§VI (2)(B) and (H) provide, in relevant part, that the IEP team must include the child's parents who must be afforded the opportunity to participate in all IEP team meetings. As noted in MUSER VI(2)(I), the IEP Team should work toward consensus, but the SAU [District] has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child's placement is in the least restrictive educational placement.

In the present case, there is no evidence to suggest that the District failed to adequately consider the concerns of the parents in the IEP decision making process. One or both of the Parents appears to have attended each of the IEP Team meetings during the relevant time periods, and their concerns and points were routinely noted in each of the Written Notices corresponding to the IEP team meetings. It appears that the Parents were given full opportunity to express positions and opinions, and on a number of occasions, the Parents requests resulted in modifications to the Student's program.²⁴ While the District ultimately rejected the Parents request for the Student to be placed in a special purpose school, these requests were documented in the Student's Written Notices.

5. Not providing qualified staff in violation of MUSER §X.2(5);

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

²⁴ For example, at the January 22, 2019 IEP team meeting, the Stop Sign" behavior system was discontinued after the Student's father noted that he feels that the "Stop Sign" system is not effective.

NON COMPLIANCE FOUND; DENIAL OF FAPE FOUND

MUSER X.2(5) provides that special education and related services must be provided by “appropriately certified education personnel, or licensed contractors...” 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.

MUSER §IX.3.B(3) provides as follows regarding the implementation of a student’s Individualized Education Program:

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

Mim Carter, the Student’s Speech-Language Pathologist, missed the first two scheduled sessions, on February 12, 2020 due to “scheduling conflicts”, and on February 14, 2020 due to her being at a “medical appointment with her spouse.” Sometime prior to the conclusion of February vacation Ms. Carter announced that she was taking family medical leave. As a result, the Student’s social skills SDI sessions were not provided for the Student in the two weeks following February break (weeks of February 24, 2020 and March 2, 2020).

Even though it appears from the record that the District was aware that Ms. Carter would not be available to provide services for the Student as early as February 14, 2020, (prior to the COVID 19 closure which did not take place until March 13, 2020), there is no evidence that the District made any effort to hire or contract with another SLP to implement the Student’s IEP with regard to necessary social skills training. Further, rather than convene an IEP team meeting to address this issue, the District arranged for Ms. Jurson, the Student’s special education teacher who is not a Speech and Language Pathologist, to take over the Student’s social skills instruction in early March, 2020.

While the District’s failure to provide the program constitutes a procedural violation, there must also be a finding that this procedural inadequacy was severe enough that is deprived the Student of a FAPE. *Roland M.*, 910 F.2d at 994. The question, therefore, is whether the implementation of the IEP, as a whole, provided a FAPE despite the procedural violation.

While the District argues that the failure to offer several weeks of social skills training is not a “material failure” to implement the Student’s IEP, it is clear from the record that the Student’s social skills training *was an essential* part of IEP. The training helped the Student with peer pressure and conflict resolution skills—skills that were sorely needed when the Student’s negative behaviors were becoming more frequent, severe and confrontational, especially to other students in late 2019 and early 2020. The IEP Team recognized this when it increased time for social skills training instruction from 30 minutes per week to 60 minutes per week at the February 4, 2020 IEP team meeting. Further, it was clear that the Student was benefitting from this part of instruction as Ms. Carter noted in the February 4, 2020 Written Notice that during the few times she had seen the Student was “attentive and engaged.” The District appeared to recognize the material nature of the Student’s missed social skills training when Dr. Flacke noted in her March 9, 2020 letter to the Parents that the District would be offering compensatory speech and language therapy services in the summer.

Accordingly, when carefully considering the student’s individual abilities and challenges, the record supports a finding that the Student was denied a FAPE as a result of the District’s failure to provide the Student’s social skills instruction.

VII. CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

1. The Student’s IEP team shall convene within 30 days of this report to:
 - a) Review the recommendations of the current evaluators, BCBA and staff to determine whether additional evaluations are needed, and if so, to conduct said evaluations within the time period required by MUSER V (1)(3);
 - b) Once said evaluations are completed, determine an appropriate placement for the Student. The Team’s determination *shall* consider either maintaining current placement *or* changing placement to a residential or a special purpose private school focusing on children with behavior challenges. Any placement chosen for the Student *shall have* BCBA support/consultation as well as ed techs and staff trained and experienced in behavior/socialization issues and specialized instruction in a small group and individual settings;
 - c) If the team determines that the Student’s placement shall be in a special purpose private school or residential placement, the team shall determine:
 1. Additional academic or behavioral supports or consultation necessary, especially in the area of literacy instruction, to provide a program appropriately ambitious in light of the Student’s circumstances;
 2. Determine a schedule to review progress within this placement along with appropriate opportunities for the Student to interact with typically developing peers.
 - d) If the team determines that the Student’s placement shall remain within Maine School Administrative District No. 70²⁵, the District shall provide the following:

²⁵ as a “receiving placement” for Maine EUT pursuant to MUSER IX.3(I).

1. Determine all necessary educational supportive services and specialized instruction that the Student requires, including ESY, emotional/social/behavioral support and additional supports in speech/language and literacy that offer training and lessons that do not primarily require the use of computer technology;
 2. Provide 50 hours of compensatory educational services in the area of social services skills training by a Speech Language Pathologist, a portion of which services shall include training with other students in small group settings;
 3. Provide training and ongoing consultation of all staff working with the Student with Maureen Foss or another qualified BCBA with regard to appropriate behavior interventions, monitoring and tracking student behaviors and implementation of the Student's behavior plan with fidelity;
 4. Provide ongoing consultation with Maureen Foss or another qualified BCBA at a level of no less than four hours per month for the Student and all staff working with the Student for ongoing behavior support, staff training and implementation of the Student's behavior plan;
 5. 150 hours of compensatory educational services for the Student in the area of literacy, focusing on reading comprehension, basic reading skills, oral reading fluency, and spelling;
 6. Determine which, if any of the above placements and supports must be delivered via distance learning in light of the COVID 19 emergency and make appropriate provisions in the Student's IEP so that said services may be delivered to
 - e) The IEP shall be amended to reflect any such modifications of programming or services.
2. The following compliance documentation shall be sent to the Due Process Office and the Parents:
 - A copy of the Student's revised IEPs developed from the above referenced meeting;
 - Copies of all evaluation reports; and
 - A copy of the Written Notices (WN).
 3. The Districts (MSAD #70 and Maine EUT) shall apportion financial responsibility for the Student's placement, evaluations, transportation costs and compensatory educational programming as they shall agree. If the Districts are unable to reach agreement, costs for compensatory educational services and any out of district placement shall be apportioned based on the amount of time each of the agencies were responsible for the delivery of educational services for the Student during the period was denied a FAPE (March 4, 2019-March 13, 2020): 40% for MSAD #70 and 60% for Maine EUT.