

Complaint Investigation Report
Parents v. Sanford School Dept.
Complaint 20.075C
Complaint Investigator: David C. Webb
June 9, 2020

I. Identifying Information

Complainants: _____, Parents

Respondents: Sanford School Dept. (District), Stacy Bissell, Special Education Director; Matt Nelson, Superintendent;

Student: _____
DOB _____

II. Summary of Complaint Investigation Activities

On March 16, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on March 12, 2020.

The complaint investigator received 30 pages of documents from the Parents and 350 pages of documents from the District. Interviews were conducted with the following people: The Student's Parents; Tammy Delany, Asst. Special Education Director; Christen Suratt, Special Education Teacher/Case Manager; Elizabeth Cyr, Licensed Clinical Social Worker; Dr. Rebekah Bickford, BCBA; Julia Stanton, Ed Tech; Kristen Daly, General Education Teacher; and Erika Avery, LCSW (the Student's private counselor).

III. Preliminary Statement

The nine-year-old student resides with _____ family in _____, Maine. _____ is the educational responsibility of the Sanford School Dept. ("District") where _____ qualifies for special education and related services as a student with an Emotional Disturbance.

This complaint was filed by the Student's Parents ("Parent or Parents") alleging that the District violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the Parents' complaint, a Draft Allegations Letter was sent to the parties by the Complaint Investigator on March 30, 2020 alleging eight separate violations of the MUSER. A telephonic Complaint Investigation Meeting was held on April 10, 2020.¹

IV. Allegations

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

¹ Due to the COVID 19 pandemic and the limited availability of documents and as requested by the District, the Complaint Investigation deadline was extended by 30 days to June 16, 2020.

2. 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);
3. Not conducting a manifestation determination in violation of MUSER § XVII.1.E;
4. Not providing the parents with proper prior written notice of the District's proposals regarding the Student's educational program in violation of MUSER VI.2.I, VI.2(H); MUSER App. I (34 CFR §300.503 and MUSER App. 1 (34 CFR 300.501 (b) and (c));
5. Not properly developing or revising an IEP in connection with the Student's proposed tutoring program thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4), MUSER §IX.3.C and 34 CFR 300.101(a);
6. Not following requirements regarding proposed out of unit placements in violation of MUSER VI.2.H; MUSER IX.3.H and MUSER App. 1 (34 CFR 300.501 (b) and (c));
7. Not ensuring that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I; and,
8. 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), §VI.2(H) and MUSER App. 1 (34 CFR 300.501 (b) and (c))

The District concedes that “stay put” (MUSER XVI.20.A) shall operate to maintain the student in current educational placement pursuant to most recent IEP at the School.

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

V. FACTUAL FINDINGS

1. The Student is a nine year-old, third grade student who resides with adoptive parents and biological brother in Sanford, Maine. The Student was removed from biological parents at the age of 21 months. is the educational responsibility of the Sanford School Dept (“District”) where qualifies for special education and related services as a student with an Emotional Disturbance.
2. Following a neuropsychological evaluation conducted on April 9, 2018, Dr. James Harrison diagnosed the Student with the following:
 - Attention-Deficit/Hyperactivity Disorder, Combined presentation Moderate;
 - Post-traumatic Stress Disorder, With dissociative symptoms, Severe;
 - Disruptive Mood Dysregulation Disorder; and
 - Specific Learning Disability in Written Language (motor dysgraphia, visual divergence and poor tracking)
3. On October 4, 2018, the Student's IEP Team met at the Parents' request relative to concerns arising from an incident when the Student “began to bolt and perhaps a grab was necessary to keep in the vicinity...[and] was throwing furniture in the room.” At this meeting, the Parent stated that “she is concerned because [the Student] had a significant behavioral incident on September 24, 2018 and came home with scratches and marks on body. [The Parent] shared photos of fingerprints around the Student's

arm, bruises on clavicle and scratches on back. The Parent “is concerned that there is not a specific behavior plan for [the Student] and she would like a plan in place.” At this meeting, the Parent asked Mr. Potter (School Principal) for a copy of [the Student’s] safety plan as well as the techniques implemented for safety care however she has not received this information yet.

4. Pursuant to the written notice prepared in connection with the October 4, 2018 meeting, the IEP team made the following determinations:
 - A positive behavior support plan and crisis/safety plan will be added to the IEP;
 - The IEP Team will reconvene within 2 weeks to discuss academic concerns and review special education programming.
5. In the Fall of 2018, the Parents had the Student admitted to Psychiatric Hospital in Westbrook, Maine following the recent behavioral incident at school, and other concerning behaviors at home.
6. The Student’s IEP Team met again on October 23, 2018. The team discussed the Student’s behavior prior to leaving and going to , reviewed the crisis plan and adjusted the Positive Behavior Support plan. The Team noted that the Student had been displaying “unsafe behavior both verbally and physically. The self-contained setting would not be appropriate at this time due to the addition of more students in the room.”
7. The written notice prepared in connection with the October 23, 2018 meeting noted the following determinations:
 - Upon return from , [the Student] will return to the mainstream classroom with adult support;
 - Additions to Positive Behavior Support plan: [the Student] does not need to engage in the Brain breaks with the classroom. can choose to go for a walk or scoot or select from another list of options. will have designated timed motor breaks. Staff working with [the Student] will offer [] a movement break as observed during academic tasks. [The Student] can take a safe break in various locations as appropriate (hallway, room by OT, library, gym).
8. At an IEP Team meeting held on January 7, 2019, the Student’s IEP Team noted that for the Student “to be successful in the general education setting,” currently needs:
 - A positive behavior support plan that holds accountable for actions. (Due to the Student’s need for structure and routines.) ;
 - A quiet location either in the general education or special education setting to complete writing assignments. (Due to the Student’s need for quiet when is writing);
 - Social work services to work on emotional regulation and daily work on social interactions in the special education setting. (Due to the Student’s emotional disability); and

- Access to a quiet area, either in the general education setting or the special education setting, where can calm down. (Due to the Student’s needs when is having anxiety and requires assistance calming down.)
9. The IEP developed for the Student on January 7, 2019, provided that the Student would spend 91% of time with non-disabled children and provided the following classroom supports and services, supplemental aids, and modifications:
- Ed tech support, sensory breaks, writing supports and assistive technology to increase written output (if needed);
 - Specially designed instruction (“SDI”) SDI in behavior/social skills 45 minutes/day (with goals in social skills and behavior regulation (check out), and social skills);
 - Social work 30 minutes/week (with a goal in emotional regulation and cooperative social interactions);
 - Occupational Therapy (OT) consultation, 15 minutes per month (with a goal in sensory processing);
10. A document entitled “Current Classroom behavior plan” (“Classroom Plan”) with a handwritten date: “end of school year 18-19 and start of 19-20”² contained the following:
- Preventative:
 - i. Social skills form documenting what was addressed if needed. Specific to a behavior or preventative.
 - ii. Visual schedule printed and laminated to assist with independence in day.
 - iii. Visuals promoting self-advocacy, i.e. break card. / Visual expectations card on desk. (First Then) / Emotions card on 5 point scale.
 - iv. In class additional support for removal and breaks as needed.
 - v. Access to the self-contained class.
 - Incentive:
 - i. Daily Home Note providing positive feedback.
 - ii. Consistent, continuous silent or quiet praise for even the smallest tasks/behaviors (fade out if possible).
 - Crisis:
 - i. Do not speak; if possible use a visual card (calm hands or feet, pick something up, sit in seat) to achieve desired behavior, repeat only one phrase until desired response if non-verbal is not working.
 - ii. Good cop, bad cop, use your peers.
 - iii. Do not threaten removal of reward or parent contact.

² Tammy Delany stated that she added this handwritten date to this document after the Parents filed this Complaint Investigation, based on information she had received from the Student’s teacher.

- iv. Removal if continuous aggressions, self-injurious behavior or high magnitude disruption occurs and cannot be contained.
- v. Parent contact if situation cannot be contained after extended period (amount of time TBD).

- Post Crisis:

- i. Return to environment only when stable, do not speak of the incident until social skills or a special debriefing time is set, (this could occur with ESE or Principal or anyone that is comfortable with at the time).
- ii. Immediately continue the positive reward system for any good behavior, even return to class, move on as if it did not occur. "It's over, let's move on." "Thank you for returning, here is what we are working on..." "let's get you some more time for your break later!"
- iii. Make sure is still provided previously earned rewards (minutes for breaks, i-pad, Legos, choice activities).

- Document:

- i. Simple sheet, time it started, time it ended, possible antecedent, consequence, (removal from room, parent contact, loss of recess etc.)

11. An IEP team meeting was held on April 4, 2019 at the Parents' request due to concerns related to the Student's behaviors and a recent in-school suspension. Tammy Delaney stated that "administrators felt [the Student's] behavior at recess was not connected to disability" and that the "in-school suspension was to allow [the Student] access to education while at the same time allowing peers in classroom to feel safe. School staff felt the in-school suspension was an appropriate consequence for physical aggression as well as a learning situation. The Team also noted at this meeting:

...the difficulty with [the Student] is what strategy to use in the moment. The strategy that works one day may not work the next. Mrs. Surrat stated [the Student] participates in daily social skill lessons in the special education classroom during lunch... The 3 days [the Student] had incident reports were due to coming off the bus escalated. Behavioral data shows [the Student] often requires de-escalation strategies to help regulate behavior... [] has done great with strategies but when is explosive can be very explosive.

12. At the April 4, 2019 team meeting, no changes were made to the Student's IEP.

13. The IEP developed for the Student on April 25, 2019, provided that the Student would spend 89% of time with non-disabled children and provided the following classroom supports and services, supplemental aids, and modifications:

- Specially designed instruction ("SDI") in writing three times per week for 30 minutes;
- Occupational Therapy (OT) consultation, 15 minutes per month;

14. The IEP developed for the Student on April 25, 2019, provided the following supports supplemental aids, and modifications for the Student:

- Two line writing paper, positive reinforcement for tasks [the Student] finds difficult, consistent follow through with a classroom wide behavior management system;
- with preferential seating, needs to face instruction straight on; and use a 45 degree slant board for reading and writing tasks/assignments; and
- Positive Behavior Support Plan (free 5), Access to sensory tools.

15. The written notice prepared in connection with the April 25, 2019 meeting noted the following determinations made by the IEP team:

- Continue with specially designed instruction 45 min/day for check-in/check-out and social skills until June 19, 2019;
- Specially designed instruction for 30 min/day for check-in/check-out beginning September 1, 2019-April 24, 2020;
- Special education consultation 60 min/month with goal in behavior regulation will be provided beginning September 1, 2019-April 24, 2020;
- Social work services 30 min/week until June 19, 2019; social work services will increase to 60 min/week with goals in social interaction and emotional regulation beginning September 1, 2019-April 24, 2020;
- OT consult 15 min/month with a goal in self-regulation;
- Annual IEP Meeting is due on April 24, 2020;
- Re-Evaluation IEP Meeting is due on April 24, 2021;
- Special education transportation will be provided to/from school; and
- Extended school year services are recommended.

16. On September 12, 2019, a “physical restraint/seclusion report” documented a restraint and seclusion placed on the Student, resulting in a staff member “receiving several bite marks” and another staff member who kicked³ Attempted interventions prior to the use of restraint were: “Ms. M tried to prep [the Student] offering the bathroom prior to the gym.”

17. On October 1, 2019, a “physical restraint/seclusion report” documented a restraint placed on the Student involving the Student’s eloping and “an attempted biting” of a staff member.⁴ Attempted interventions prior to the use of restraint were: “Student was asked

³ The Restraint/Seclusion report provides further detail regarding the incident as follows: The Student asked to use the bathroom during gym class, but was refused by the gym teacher as he had given them all time at the beginning of class. [The Student] then started to elope from the gym at which point Melissa had to initiate safety care protocol and restrain The Student was escorted up to the break space via the school elevator by three staff to whom engaged in unsafe behavior. continued to scream and use profanities.

⁴ The Restraint/Seclusion report provides further detail regarding the biting incident as follows: Staff contacted special ed teacher for assistance. She found [the Student] on C floor and asked to come with her, then ran all the way down to A floor boys room where several staff were waiting to block started ripping the coating off the pipes, was behaving unsafely with toilet paper. to staff. then began dispensing soap and flinging it at the Vice Principal. started to hang on the stall and climb over at which point we started to

what needed. Offered sensory items. Offered quiet space to calmly work. Offered a break out of the room as well. Reminder of the token economy in the room.”

18. The written notice prepared in connection with the October 1, 2019 IEP team meeting noted the following determinations made by the IEP team:

- SDI [in Social Skills] for 60 min/week with goals in social skills/regulation strategies;
- Social work services will be decreased from 90 min/week to 60 min/week with goals in emotional regulation;
- Specially designed instruction in writing 90 min/week with goals in essay development and organization;
- Continue with OT Consultation 15 min/month;

19. The October 1, 2019 Written Notice also noted as follows:

- Data will be collected on both the duration and frequency [the Student] comes to check-in.
- The team considered not decreasing social work services from 90 min/week to 60 min/week however rejected this option as this related service is to support specially designed instruction in social/emotional functioning. This need will continue to be monitored closely.
- The Student’s written output is below grade level expectations.
- Parent stated [the Student] needs to use the slant board for all of reading.

20. On October 8, 2019, a “physical restraint/seclusion report” documented a restraint placed on the Student due to eloping behavior [to the girls’ bathroom] and unsafe bathroom activities.⁵ Attempted interventions prior to the use of restraint were: “Student was asked what needed. Was already on a break. Was offered multiple settings to keep calm.”

initiate a transport but started to come willingly with the social worker and another teacher. attempted to bite staff and then proceeded to try and elope at which point was restrained for five minutes to due imminent break down of transportation. was escorted upstairs to the social workers office due to the fact that the break space was occupied. began to upturn her office and dump toys, throw objects and attempted to tip the table and chairs. The break space was emptied and was able to be escorted in. spit on the window and continued to have unsafe behaviors for ten minutes. was able to deescalate and return to class to process with ed tech support and continued his day with no further issues.

⁵ Details of the incident are as follows: Staff contacted special ed teacher for assistance when she could not get [the Student] out of the bathroom. She found on B floor and asked to come with her using distraction techniques. then started to climb on bathroom floor and under stalls trying to lock out the staff. was making threats about running away. was escorted to the break space half way by Mrs. Suratt and then Mr. Day took over her position as [the Student] was able to get legs around hers and was tripping her. Once in the break space told us was going use the bathroom in the break space. engaged in unsafe behavior in the break space... ran at staff and tried to kick. Staff stepped back and used the door as a block. [the Student] e continued to attempt to kick. The door was shut. continuously kicked and slammed into the door. turned around and went to the floor. continued unsafe behavior in the break room. ... Staff opened the door and attempted to intervene. continued to stay heightened until 2:02 pm at which point staff distracted by asking if needed water. agreed and sat compliantly for two minutes before leaving the room to clean up hands.

21. On October 21, 2019, a “physical restraint/seclusion report” documented a subsequent restraint placed on the Student due to a subsequent attempt to bite staff members.⁶ Attempted interventions prior to the use of restraint were: “Stepping away from the room, suggestions of activities to settle down, redirection strategies including help/prompt to discuss what was bothering
22. At an IEP team meeting on October 24, 2019, the Team discussed incident reports prepared with regard to the Student’s behavior that occurred on September 12, October 1, October 8 and October 21, 2019. In the Written Notice, it was noted by the Student’s classroom teacher that when [the Student] is escalating, staff offer a break, sensory items or a break out of the room. also receives reminders of the token economy system. Parents stated at this meeting that they feel that a more appropriate and detailed behavior plan should be in place for the Student.
23. The written notice prepared in connection with the October 24, 2019 meeting noted the following determinations made by the IEP team:
 - The number of daily breaks, and time of breaks will be recorded on [the Student’s] daily report sheet
 - The % of completed academic tasks in reading, writing and math will be monitored closely
 - School staff will seek administrator approval for additional requests made in writing by the Parents
24. On November 8, 2019 Rebekah Bickford, Psy.D., BCBA-D was retained by the District to create a Positive Behavior Support Plan, (“PBSP”) outlining antecedents to behaviors, problem behaviors⁷, alternate behaviors, behavior teaching strategies, consequent strategies and a plan for supporting alternate behaviors, functional communication and calming strategies.
25. On November 13, 2019, a “physical restraint/seclusion report” documented a restraint and seclusion placed on the Student due to eloping and assaulting a teacher. Interventions that were tried prior to the restraint included offered break, access to the break space to

⁶ Details of the incident are as follows: [The Student] returned from lunch upset. All of the students were told the lunch period for the next day would be a silent lunch due to student behavior. [The Student] was following the lunch room rules so was upset would have to have a silent lunch. was flicking the light switch and clearly something was upsetting . After repeated requests to stop flicking the light was asked to step into the hallway to talk. [The Student] went into the hallway. spoke with the Ed Tech working with was visibly upset and [was] provided with options to access different places in the building as a way to calm down. [The Student] ignored and played with cords and other items in the hall. At one point moved in one direction and the Ed Tech moved a door and the door bumped [The Student] in the forehead. [The Student] immediately said was OK but the Ed Tech wanted to see the nurse. [The Student] refused the nurse. Still not settled, the Ed Tech offered more suggestions of taking a walk or accessing classrooms upstairs or the social worker’s office to talk about what happened at lunch. Back up was called when broke the shelf in the hallway. When help arrived attempted to bite that staff several times. [The Student] slapped the other Ed Tech. just then, students were entering the hallway and [The Student] ran from the Ed Tech. A second Ed Tech was there and they were able to stop [The Student] and ask for the halls to be cleared

⁷ behavior, Verbal threatening, Eloping, Aggression, and Self-Injury.

get wiggles out, time in the self contained room with therapy dogs and time to process in a calm place.

26. Dr. Bickford's November 16, 2019 Positive Behavior Support Plan also included an "Implementation Fidelity Checklist" which was to be completed & submitted monthly.
27. On November 18, 2019, a "physical restraint/seclusion report" documented a seclusion placed on the Student due to eloping and assaulting a teacher. Interventions that were tried prior to the restraint included offering time away and sensory items and trying to discuss strategies.
28. On November 19, 2019, a "physical restraint/seclusion report" documented an incident where the Student kicked at staff and put hands around his neck until "vomited several small piles of vomit and foam." Interventions that were tried prior to the restraint included offering the therapy dog and sensory items.
29. On December 9, 2019, a "physical restraint/seclusion report" documented the Student's assaulting staff including grabbing staff members on the break room floor and repeatedly slapping, punching and kicking staff until mother arrived." Interventions that were tried prior to the restraint included "Offered time away, offered sensory items, pillow. Tried to discuss strategies."
30. The written notice prepared in connection with the January 6, 2020 meeting noted the following determinations made by the IEP team:
 - Allow additional time for processing, modify assignments with specific plan to increase length of academic assignments as behavior regulates, unconditional positive regard, check-in/check-out, use of controlled choice for homework assignments, use of calming strategies, ed-tech support during transitions throughout the school day and access to a quiet work space (if needed);
 - Finalize behavior plan on Friday and implement on Monday, January 13, 2020. Dr. Bickford feels [the Student] should have a check-in in the morning in the self-contained special education classroom and have breaks in this classroom, as needed, while receiving the majority of academic instruction in mainstream classroom. The purpose of the plan is to decrease the baseline data in duration/frequency of breaks [the Student] needs throughout day. Incomplete academic work should stay at school so this doesn't feel like a punishment for [the Student]. Plan has a heavy emphasis on the positive with a 5:1 interactive ratio of positive:corrective feedback statements.
 - Psychological Consultation will be provided 60 min/month with a goal to manage data collected through [the Student's] positive behavior support plan; and
 - The Team will look into keyboarding for [the Student] that can use 3x week for 20 minutes.
31. On January 6, 2020, Dr. Bickford prepared an updated PBSB which included the following additions to the November, 2019 plan:

- An “elopement response plan;⁸”
 - Clarification of escalation cycles and responses for “inappropriate or behaviors”;
 - Clarification and detailed process regarding “Check in/Check out” plan (Student to receive feedback designed to support development of prosocial skills and access to reinforcement contingent on expected behavior);
 - Additional detail with regard to positive behaviors and rewards, including a clarification of the “point system” and that the Student may not earn points during major behaviors;
 - A procedure for developing a daily behavior report card that depicts the Student’s schedule; and
 - Strategies for corrective feedback.
32. The Student was given a one day suspension from school on January 10, 2020 for “continually provoking another student”, eloping and biting and breaking the skin of a staff member.
33. Dr. Bickford prepared an updated PBSB (document is dated January 6, 2020, the same date as previous PBSB) which included the following additions to the earlier January, 2020 plan:
- receive targeted social skills instruction designed to address the social skills deficits that are interfering with ability to interact with others in appropriate ways.
 - Clarification of “Choice Making Strategy” procedure and “Motivation Plan.”
 - Corrective feedback with a response continuum;
 - Identification of staff members responsible to implement different portions of plan.
34. On January 13, 2020, a “physical restraint/seclusion report” documented a restraint and seclusion placed on the Student due to eloping behavior and “repeatedly attacking staff... and repeatedly bit at, Ms Bissell was required to leave to go to urgent care due to the nature of her bite...[the Student] remained in the break space...screaming for help saying wanted to go to crisis and kill Interventions that were tried prior to the restraint included: “offered break, access to the break space to get wiggles out, time in the self contained room with therapy dogs and time to process in a calm place.”
35. On January 13, 2020, a second “physical restraint/seclusion report” documented a restraint placed on the Student due to eloping behavior, statements that wanted to kill

⁸ The Elopement Response Plan includes the following: When [the Student] elopes from the classroom, staff will ensure safety and supervision while attempting not to give chase. Instead, a response team of staff throughout the building will be identified who can respond and block exits in the event of an elopement. A method of alerting the response team will be identified and will be used as needed.

- and attempts to try to cut wrists on a piece of wood in the break space. Interventions that were tried prior to the restraint included: “Followed specific behavior plan. Offered break, access to the break space to get wiggles out, time in the self contained room with therapy dogs and time to process in a calm place.”
36. On January 14, 2020, a “physical restraint/seclusion report” documented a restraint placed on the Student due to eloping behavior, attempts to bite teacher and “attacking and threatening to kill staff.” These incidents resulted in “staff skin being pinched in the door and another’s head was hit by the door.” Interventions that were tried prior to the restraint included: offered break, access to the break space to get wiggles out, time in the self contained room with therapy dogs and time to process in a calm place.”
 37. On January 22, 2020, a “physical restraint/seclusion report” documented a restraint placed on the Student due to the Student’s attempt to damage school and teacher property, attempts to climb into the therapy dog kennel and grabbing the teacher. Interventions that were tried prior to the restraint included: “Followed specific behavior plan. Offered to cease the testing until another day.”
 38. On January 24, 2020, a “physical restraint/seclusion report” documented a restraint placed on the Student due to and assaultive behavior towards staff.⁹ Interventions that were tried prior to the restraint included “offered time to cool off in Mrs. S room. Followed specific behavior plan.”
 39. On January 24, 2020, a second “physical restraint/seclusion report” documented a seclusion placed on the Student due to putting “hands on students”, throwing objects at ed tech and threatening, punching and biting staff. Interventions that were tried prior to the restraint included: “followed specific behavior plan.”
 40. On January 27, 2020, a “physical restraint/seclusion report” documented a seclusion placed on the Student due to eloping, “being unsafe in the stair well leaning over the edge sliding on the rails” and charging at staff. Interventions that were tried prior to the restraint included: “followed specific behavior plan.”
 41. On January 28, 2020, a “physical restraint/seclusion report” documented a seclusion placed on the Student due to attempt to escape, charging and kicking the door and trying to put hands on staff. Interventions that were tried prior to the restraint included: “followed specific behavior plan.”
 42. On January 31, 2020, a “physical restraint/seclusion report” documented a seclusion placed on the Student due to punching, kicking and hitting teachers multiple times, grabbing ed tech’s , eloping, attempting to pull teacher’s pants down, pulling down another teacher’s shirt “exposing her chest”, and threatening to kill staff

⁹ Additional relevant details from this report are as follows: [The Student] ran into [Mrs. Cyr’s] office and started putting body parts on furniture and Mrs. Stanton and Mrs. Suratt. continued to put hands on Mrs. Cyr and push her in her chair. Mrs. Suratt asked to sit and talk, continued to try to get hands on Mrs. Cyr. Mrs. Suratt blocked and pushed hand into her ... reached twice and on the third try grabbed at the teacher’s area. had to be transported back to the break space as continued to try and grab her areas.

and attempting to bite teacher's . Interventions that were tried prior to the restraint included: "followed specific behavior plan. Timer was offered to get on task."

43. Dr. Bickford prepared an updated PBSB (same dates as previous PBSB with additional data) which included the following additions to the earlier January, 2020 plan:

- Receive targeted social skills instruction designed to address social skills and "thought error correction;"
- Mid-Day Staff Switch;
- School discipline system for major behaviors;
- A safety Plan; and,
- Updated responsibilities in Implementation Fidelity Checklist.

44. February 25, 2020, a "physical restraint/seclusion report" documented a seclusion placed on the Student due to eloping, threatening and assaulting staff. In this report, it was noted that staff "followed specific behavior plan to include; functional communication, modeling, providing options, planned ignoring, prompt wait, staff switch out, removal of work, change of environment. Offered work in the special ed self contained room."

45. On February 28, 2020, a "physical restraint/seclusion report" documented a seclusion placed on the Student due to threatening students and staff and repeatedly kicking, spitting and biting a teacher, and threatening to jump out of a window. In this report, it was documented that staff:

Followed specific behavior plan to include; functional communication, modeling, providing options, planned ignoring, prompt wait, staff switch out, removal of work, change of environment. Offered work in the special ed self contained room. Offered mindfulness activities to include breathing, ice cubes, five senses work and soft music. Attempted to use mats instead of hands on to help decrease the amount of stimulus.

46. The written notice prepared in connection with the February 24, 2020 meeting noted the following determinations made by the IEP team:

- a Functional Behavioral Assessment to aid in [the Student's] educational programming
- A writing achievement test will also be completed
- include the following accommodation: access the self-contained special education classroom, as needed

47. The written notice prepared in connection with the March 9, 2020 meeting noted the following determinations made by the IEP team:

- [the Student's] emotional needs are significant, requiring intensive services and a trained staff that understands trauma.
- The School and staff are not able to provide the needs documented at today's meeting and within the amended IEP. Additional needs and

accommodations include: extra processing time, pre-teaching of accommodations and of what is going to happen next in content areas as well as across day, direct adult support in close proximity, not across room if needed. needs cueing throughout work and continuous positive regard, opportunities to express how feels, to talk about feelings, trauma trained staff, minimal hands on during escalated situations,

- [The Student] will be referred to an Out of District Placement for all aspects of education.
 - Tutoring will be provided at a rate of 5 days/2 hrs each day, including social work services at 60 minutes/week as an interim placement until an [out of district placement] is secured.
 - [The Student] will have an updated Academic evaluation by Dr. Bickford. Parents signed consent at today's meeting. The team will reconvene when the evaluation is completed, not to exceed 45 school days from today.
48. The Student was suspended for nine days between March 3, 2020 and March 13, 2020 due to events on February 28, 2020.
49. The written notice prepared in connection with the March 30, 2020 meeting noted the following determinations made by the IEP team:
- For the duration of school closures due to COVID 19, [the Student's] school program will include:
 - updated information and conversation with teacher regarding current Math level as well as access to an on-line platform such as IXL or Moby Max.
 - [The Student] will receive weekly social skills instruction and resource room instruction for written language through the special ed department.
 - All other academics will be provided through regular education teacher, in equal format to other students in the classroom.
 - parents "paused" social work services during this time of COVID 19 school closure.
 - If school closure is still in effect during the summer, [the Student] would be able to access summer programming. The duration and frequency of services to be determined in an IEP meeting.
50. In an interview with the Complaint Investigator, the Parent stated:
- A functional behavior assessment (FBA) was requested starting in October, 2019, however the District refused. Instead, the District agreed to retain Dr. Bickford to create a Positive Behavior Support Plan for the Student. This plan, however, didn't get started until January, 2020.
 - The Student's 1:1 ed tech support sat in the back of the class and did not sit close to , which made it more difficult to help the Student when was struggling academically or behaviorally. Additionally, the Parents are concerned that the

District failed to provide the Student with a quiet room or to uniformly have use the slant board.

- She feels that the Student's behavior issues are related to academic challenges. She noted that most of the Student's "behaviors" start with an elopement and then staff over reacts, which causes the Student to escalate. She is unsure if the Student's Behavior Intervention Plan (BIP) is being followed.
- The Student's teacher modified assignments in October, 2019, making do 2 or 3 problems out of a possible 10 or 12 problems;
- The Student only receives two hours per day of tutoring by video, which includes writing in both individual and group sessions. The Student is getting homework assignments regularly, social skills work on a weekly basis, and monthly consults with the OT;
- The District has done a "decent job" since the COVID 19 closure; teacher has offered video instruction, 4 days/week. The Student's mother reached out to the parent of a typically developing peer and learned that the Student was getting "what the rest of class is getting."
- She is not opposed to special purpose private school placement, as she feels that the District is unable to handle the Student. She would prefer a placement at the school as there is a BCBA on staff. She does not agree that the Student should be placed at , as there is no BCBA on staff;

51. In an interview with the Complaint Investigator, Tammy Delany, Asst. Special Education Director, stated as follows:

- She has extensive training in behavior issues and has taken "almost all courses to be a board certified behavior analyst, however has not become certified;
- The District has a consulting relationship with Dr. Bruce Chemelski, a school psychologist. The District offered to provide the Parents with a consultancy for the Student's behaviors at home, which the Parents declined. The District did not consult with Dr. Chemelski with regard to the Student's school behaviors.
- After the "bolting" incident in September, 2018, staff realized that they "can't let get outside." There were several other behavior incidents during the 2018-2019 school year, but they were not on a daily basis and there were very few antecedents that would inform the District as to the cause of the behaviors;
- Due to escalating behaviors at both home and school, the family placed the Student in psychiatric hospital for two to three weeks.
- With regard to the Student's behavior plan in place during the 2018-2019 school year, she said that there was "a ton of stuff in storage" that may relate to the Student's file, and she didn't know where the "recorded plans" for how to respond to the elopement or bolting behaviors or protocols for safety care were located. She said that the behavior plan "should have been uploaded and attached to the IEP", however she believes that the plans may also just be in teacher's files. She

recalls having multiple conversations about behavior or crisis response plans referenced in the October 4, 2018 Written Notice and that they “should have been on a written plan.”

- She was unsure if there were other relevant documents that may be in teachers’ files or storage.¹⁰
- With regard to the document labeled “current classroom behavior plan”(S-201), she made the handwritten note at the top which stated “end of school year 18-19 and start of 19-20” after talking to Ms. Surrat, the Student’s teacher after the Parent’s complaint was filed. Ms. Delany was unsure, however, of when this plan started to be used for the Student.
- Dr. Bickford was called in to prepare a more detailed behavior plan and consultation on October 31, 2019. Even though there were three recorded incidents where the Student physically assaulted staff on September 12, October 1, and October 24, 2019, she didn’t see the need to bring in an outside consultant before then as she wanted to use “in-house” training and that she “sees a lot of odd behavior; [the Student] does things for shock value.” Ms. Delany noted that the District was operating on “best practices” and that their program wouldn’t work “if we doubt our own training or areas of expertise.”
- Dr. Bickford was brought in when the Student’s behaviors became more in nature.
- Ed techs working with the Student did receive safety care training. The ed techs working with the Student did not have other specific behavior intervention training, other than training provided by Ms. Delany, although some staff attended a workshop on trauma sponsored by the Maine Department of Education.
- The Student’s specially designed instruction for check-in/check-out was delivered by both the social worker and the special education teacher to help the Student integrate social skills with peers. She did not keep track of the time spent overseeing the delivery of this service, but trusted her staff to provide the requisite amount of time to the Student. She said that this instruction was decreased by 15 minutes per day beginning September 1, 2019 as the Student “was doing so well” in the spring of 2019.
- The reference to “specially designed instruction for 60 min/week with goals in social skills/regulation strategies on the October 1, 2019 Written Notice was in error and should say “60 min/day.”¹¹ She stated that that this service is not the

¹⁰ Ms. Delany stated that she received e-mails and texts from other staff relating to the Student which are “not really” kept in records if the purpose of the communication is “just giving information.” Whether a communication would be part of the Student’s records would be a judgment call that Ms. Delany would make.

¹¹ The Student’s amended IEP notes that the student was to receive SDI in “check in/check out” for 30 minutes per day from September, 2019-April, 2020. (S-225)

same as the “check in/check out” service referred to in the June, 2019 Written Notice insofar as the instruction is more like a formal class or lesson.

- The decrease in the Student’s social work services from 90 minutes per week to 60 minutes per week was determined due to the fact that the Student was receiving an increase in SDI in social skills.
- She said that she is “not sure” why the Student’s amended IEP does not include the SDI in social skills/regulation strategies as stated in the October 1, 2019 written notice.
- There are no completed versions of the “Behavior Support Plan: Implementation Fidelity Checklist”¹² prepared by Dr. Bickford as part of her November 2019 PBSP. She said that it was not initially used as “the process took a while” and that by the end of January, 2020 they had identified persons responsible for various parts of the form.¹³
- While Dr. Bickford met with staff to discuss the Student’s behaviors and her behavior plan, there are no minutes or records of these meetings, or any specific concerns or adjustments to the Student’s behavior plan other than what is noted in Dr. Bickford’s updated PBSP.
- She contacted _____ prior to the March 9, 2020 IEP team meeting and confirmed that it had openings for the Student. She did not invite a representative to the IEP team meeting, but this placement was discussed with the Parents.
- Although the IEP team made a determination to place the Student at an out of district placement on March 9, 2020, the District did not develop an IEP with regard to this proposed placement due to the COVID 19 school closure and guidance from the Maine Department of Education.
- The District did not develop an IEP with regard to the IEP team’s determination on March 9, 2020 to provide a tutoring program for the Student as an interim placement until an out of district placement could be secured.
- The District began to include more specific interventions on the restraint/seclusion reports in February at the request of the Parent.

52. In an interview with the Complaint Investigator, Dr. Rebekah Bickford, a licensed psychologist and BCBA retained by the District to help with the Student’s behavior programming, stated as follows:

- Tammy Delany contacted her on October 31, 2019 to provide a positive behavior support plan for the Student.
- She said that the District might have brought her in earlier to help with behaviors. She noted that the District first wanted to make every effort to exhaust

¹² S-104

¹³ S-169

responses to the Student's behavior without hiring an outside consultant, and that her contract was "for a limited amount of her time."

- When she started to meet with the Team, she helped them to understand and "buy in" to her plan. She found that staff were attentive and eager to learn about her approach with the Student. She said that it became clear that maintaining staff and student safety was a predominant concern. She said that she recommended an FBA in light of disagreements about cause of the Student's behavior.
- Over the course of her work with the Student, her plan evolved to four different versions modified over several months of her work, which is not uncommon.
- She feels that a setting like _____ or _____ would be a preferred placement for the Student, in part because they are better equipped and trained to work with children like the Student. For example, she noted that public schools are "not designed" for students who frequently elope.
- In addition to completing a functional behavior assessment, she recommended that the Student undergo an academic assessment, in light of her concerns regarding the Student's feeling of pressure on _____ academic work. Additionally, the Student's behavior plan should be a "function based support program" in that it should identify causes, antecedent modifications and responses to _____ behavior. She noted that it is vital that all staff working with the Student are trained in the behavior program that is created for _____.

53. In an interview with the Complaint Investigator, Liz Cyr, LCSW, a Social Worker for the District, stated as follows:

- She has worked for the District for seven years as a social worker and started working with the Student in September 2019. In her work with the Student, she observed that _____ has significant trust issues, is hyper vigilant and has a negative self image. She noted that if _____ has any unsafe feelings, those feelings trickle down to others working with _____. She noted that the Student "needs to have power and control over peers." She stated that some of her primary goals when working with the Student revolved around emotional regulation and social interaction.
- She initially provided the Student's social skills SDI and social skills in group work with other students in _____ class. She discontinued her individual social work with the Student at the Parent's request, but still sees _____ (via distance learning) when doing her group work with Ms. Surat. Prior to the school closure, she had regular conversations with the Student's private therapist, Erika Avery.
- She said that the "current classroom behavior plan (S-201) was in place as of the time that she started working with the Student. She doesn't know of any other behavior or crisis plans that were in place for the Student other than this plan.
- A lot of times the Student was dysregulated and needed ed techs in the room, since _____ was so unsafe, which made it hard for her to work with _____.

- She feels that the safety protocols in place were appropriate and disagrees that District staff overreacted when the Student eloped.
- She said that the check out-check in work as referenced in the Student's IEP was designed to change the Student's behaviors to more positive interactions with others in a socially responsible way.
- She feels that the family has done a good job supporting the Student during the time she has worked with .

54. In an interview with the Complaint Investigator, Christen Surrat, the Student's Special Education Teacher/Case Manager, stated as follows:

- She has worked with the Student since September, 2018. Prior to working with , she didn't know had behavior issues, and she understood that had a positive 2017-2018 school year. Beginning in October, 2018, however, the Student's behaviors escalated, resulting in hospitalization.
- Following the Student's hospitalization, would tend to "go a while" with better behavior, and then behavior would get worse.
- She felt that while some of the antecedents to the Student's behavior might include a fight with brother or a lack of sleep, she felt that the Parents were doing a good job with the Student at home.
- Prior to involving Dr. Bickford, the Student's behavior plans were "basic" and not based on consultation with a behavioral specialist;
- During the September 12, 2019 incident where the Student kicked ed tech in the stomach;
- When the Student's behaviors started to escalate, becoming more violent, explosive and , she asked for help from Tammy through e mails and verbally with regard to what "she could do differently." The District's "classroom behavior plan" was always brought up at IEP team meetings.
- Despite the Student's behavioral struggles, she has developed a positive relationship with and has taught to advocate for She said that the Student also "seeks her out through difficult times."
- With regard to the restorative justice circles, she said that they are the Principal's decision and part of the school's normal practice for certain behaviors/incidents. She is not aware of any reason the Student should be exempt from this practice.
- With regard to the Student's slant board use, she said that the Student would often refuse to use it, which she allowed with the understanding that this was only to be used if the Student wanted it.

55. In an interview with the Complaint Investigator, Trish Hussey, one of the Student's special education teachers, (along with Ms. Surrat) stated as follows:

- She has been a special education teacher for 20 years, and this is her 14th year at the Sanford School Department.

- She started working with the Student during first grade year, however she was not teacher during the second grade. When she began working with again in the third grade, she felt that writing had regressed. While was working at a second grade level, academic and organizational skills were negatively impacted due to frequent emotional deregulation.
- She worked with the Student for three 30-minute sessions per week. She felt that was making progress in writing, and was also able to use a keyboard which was available to as needed. The other two days the Student was in general educational session for writing. She felt that the Student didn't need direct instruction, just support, when had the ability to regulate emotions and behaviors.
- The Student had a behavior intervention plan, which was the same one used in previous years. The Student responded well to her incentive plan, earning stars and prizes from her "prize box." When did become dysregulated, became "silly" and had aggressive behaviors which she saw in the larger school setting, but not in class setting.

56. In an interview with the Complaint Investigator, Kristen Daly, the Student's third grade general education teacher stated as follows:

- She started working with the Student in September, 2019 as third grade teacher at the School. After Columbus day, (October 15, 2019) she started working part time as an Assistant Principal at the School, until late November when she assumed full time duties as an Assistant Principal.
- At the beginning of the 2019-2020 year the Student was quite successful and transitioned to the third grade and "new" school pretty well. The Student was a strong reader with great comprehension, was able to complete work both independently and with support/modifications, participated in morning meetings, and made connections with peers.
- The Student had a comprehensive behavior plan at the start of the year. In October, the Student's behavior was more challenging and more escalated and the Student would ask for breaks more frequently. Writing assignments can be a trigger for the Student's behavior as a form of work avoidance. She does have safety care training, and if the Student was being unsafe, she would coordinate with other staff using her radio, and would clear the hall.
- She feels that the District listened to the Parent's concerns, and the Student's behavioral programming changed and evolved, with regular check-ins with the Student. She doesn't feel that District should have consulted with a BCBA prior to the time that it started working with Dr. Bickford in November, 2019. She said that the Student routinely had a slant board available for use, but rarely chose to use it.

57. In an interview with the Complaint Investigator, Erika Avery, LCSW stated as follows:

- She started working with the Student at the end of October, 2019, and noted that the Student has “lots of trauma history.” She’s working on skill building and mindfulness strategies, gaining insight on how feeling, recognizing triggers and better ways to communicate needs. She noted that has a “low frustration tolerance” when doesn’t understand material, and then quickly gets overwhelmed. It is often hard to know “where is.”
- During their sessions, the Student would comment that “teachers are mean to and will draw pictures of teachers dragging by armpits and putting in restraint holds.
- She was surprised that based on the Student’s history, there wasn’t a more specific plan and a more comprehensive crisis plan in place to deal with behaviors. Without a more specific and well designed plan, she felt that the Student was able to “abuse” the School’s response if knows can “get out” of an assignment or activity doesn’t want to do.
- She doesn’t feel the school is well equipped to deal with level of behavior, especially with regard to the physical space at the school and the ability to address eloping behaviors. She learned that some of the Student’s teachers would also say things that would impact the Student in a negative way; for example they would say to the Student that “you should know” a particular thing, and then when didn’t, “feels dumb.”
- She noted that when the Student’s social work services decreased in the fall of 2019, she saw an increase in the Student’s negative behaviors.
- She feels that the Student’s behavior plan should include a 1:1 support and make sure that all staff are trained on restraint, eloping and preventative measures,

58. In an interview with the Complaint Investigator, Julia Stanton, the Student’s ed tech, stated as follows:

- She a certified ed tech 3, working as an ed tech 2 for the Sanford School Department, where she has worked for the last three years. She started working with the Student at the start of the school year in mid to late September, 2019. She was assigned to the Student after the Sept. 12, 2019 incident when the Student bit staff and kicked ed tech in the stomach.
- She did not see or have access to the Student’s IEP; she did see and use the Student’s Behavior plan on a daily basis.
- The behavior plan she remembers using was the form at S-230 [created by Ms. Surrat on October 10, 2019. She did not remember seeing or using the “current classroom behavior plan” document [S-201].
- She is not aware of a positive behavior support plan or crisis plan for the Student. She recalls that the elopement plan involved staying away and keeping your eyes on the Student. She doesn’t think the plan helped, as would learn and adapt, and behaviors “became bigger” especially if didn’t get break.

- When things were getting bad, there were occasions where it “looked like [redacted] was trying to launch [redacted] at other kids, being very unsafe...touching kids... [destroying] property.”
- The Student’s behaviors “happened a lot” beginning in January and February, where there was an incident almost every day. She said that she was slapped in the face, kissed on her chest area, punched, and kicked almost every time there would be a “behavior.”
- She said that the District tried to adjust the behavior plan, and that Ms. Surrat tried to get in contact with people- texting other staff, trying calming strategies, but by the end, nothing was working.
- It didn’t surprise her that the Student was still put in situations where [redacted] would potentially hurt
- A slant board was provided to [redacted] which the Student could use for reading if wanted.
- After the school closure, she was transferred to another class.

VI. DETERMINATIONS

Allegation #1. Failure to fully and adequately implement the Student's IEP in violation of MUSER §IX.3.B(3);

Allegation #2. Not providing behavioral intervention services and modifications designed to address the Student's behavior in violation of MUSER §XVII.1.D(1) and MUSER §IX.3.C (2)(a);¹⁴

NON COMPLIANCE FOUND; DENIAL OF FAPE FOUND

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.

¹⁴ MUSER §XVII.1.D(1) is not applicable in this case insofar as it pertains to a “child with a disability who is removed from the child’s current placement pursuant to paragraphs C (disciplinary changes in placement that would exceed 10 consecutive school days), or G(removal of a student to an interim alternative educational setting for not more than 45 school days).

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 (Endrew F.) were dissatisfied with his behavioral 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 Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism. *Id.* Six months after Endrew started classes at Firefly, the district presented a new IEP to the parents. *Id.*, *Slip Op* at 7. The parents rejected the district's plan as it did not differ meaningfully from the plan in his fourth grade IEP, and his experience at Firefly suggested that he would benefit from a different approach. *Id.*, *Slip Op* at 7. An Administrative Law Judge rejected the parent's claims seeking reimbursement for tuition reimbursement at Firefly, concluding that the annual modifications to Endrew's 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 *Andrew* 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 *Andrew* 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 *Andrew* court held that the “merely more than de minimis” educational benefit standard that had been used by the appellate court to evaluate Andrew's IEPs was insufficiently "demanding." *Id.* at 1000-01

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. Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs. 20 U.S.C. 1414(d)(3)(B)(i) and 34 CFR § 300.324(a)(2)(i) and (b)(2).

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. (emphasis added) see also *Andrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).¹⁵

In this case, the Student's academic history includes being removed from three day care centers between the ages of 21 months to three years old, where [redacted] was frequently in trouble for aggression. During the 2018-2019 school year, the Student eloped from school and climbed onto construction equipment outside the school building. In another incident that year, the Student punched an ed tech in the nose, resulting in injury.

In early October, 2018, the Parents admitted the Student to [redacted] psychiatric hospital due to behavioral incidents at school and other concerning behaviors at home. The Student's IEP Team met on October 23, 2018 after the Student was released from [redacted]. The written notice prepared in connection with this meeting noted that the Team determined that the Student's Positive Behavior Support Plan (PBSP) will contain the following additions: [The Student] does not need to engage in the Brain breaks with the classroom; [redacted] can choose to go for a walk or scoot or select from another list of options; [redacted] will have designated timed motor breaks; Staff working with [the Student] will offer a movement break as observed during academic tasks. [the Student] can take a safe break in various locations as appropriate (hallway, room by OT, library, gym). (emphasis added).

At an IEP team meeting on January 7, 2019, an IEP was developed for the Student with a combination of specially-designed instruction in behavior/social skills for 45 minutes day (with goals in social skills and behavior regulation), Occupational Therapy (OT) consultation, ed tech support, sensory breaks, a positive behavior support plan, writing supports and assistive technology supports as needed. Under [redacted] IEP, the Student was "with [redacted] non-disabled peers approximately 91% of the time." While the January 7, 2019 written notice provides documentation of general discussions held by the team regarding the Student's behavior, and the January, 2019 IEP references the PBSP, there is *no reference* to the specific additions to the PBSP plan as determined at the October 23, 2018 meeting.

While the District produced a one-page, undated document entitled "Current Classroom Behavior Plan,"¹⁶(the "Classroom Plan"), it is unclear when this plan was in place. The Classroom Plan does not contain any reference to any of the actual behaviors *reported* by staff nor does it have any response to the Student's eloping behavior, despite having a history of such behavior during the 2018-19 school year. Furthermore, the Classroom Plan does not contain the specific additions pursuant to the October 23, 2018 IEP team meeting, such as designated timed motor breaks, specific movement breaks, or selected options.

¹⁵ As noted in the *Andrew* decision, *supra*, the court held that the school's response to the student's *behavioral needs* was insufficiently demanding to provide a FAPE. *Andrew, Id.*

¹⁶ Tammy Delaney said that after this complaint investigation was filed, she added a handwritten date: "end of school year 18-19 and start of 19-20" based on information she received from Ms. Surrat.

Finally, the Classroom Plan specified that behaviors should be “documented” with a “Simple sheet, time it started, time it ended, possible antecedent, consequence, (removal from room, parent contact, loss of recess etc.)” The behavior tracking documents provided by the District included no behavior tracking data that complied with the documentation guidelines of this form. Instead, the District provided several variations of behavior tracking forms. One of the forms had staff document whether the Student was “depressed, normal or escalated” during the first half of the 2018-2019 school year, which was replaced in January, 2019 with a shorter form with check boxes for the Student demonstrating the ability to be safe, follow directions, be respectful and complete work.¹⁷ On April 29, 2019, the tracking form changed again to identify whether the Student needed “prompts” and the level of “elevation” at various periods throughout the day. On January 13, 2020, the behavior tracking form changed again to a “Daily Behavior Report Card” charting frequency of meeting goals of “safety, respect, responsibility and participation” and “what went well.”

Even the Student’s team noted the difficulty with tracking the Student’s behavior at the April 4, 2019 IEP team meeting when it was noted that “the absence of reliable tracking the difficulty with [the Student] is what strategy to use in the moment. The strategy that works one day may not work the next...Behavioral data shows [the Student] often requires de-escalation strategies to help regulate behavior...[] has done great with strategies but when is explosive can be very explosive.

Unfortunately, the 2019-2020 school year got off to a difficult start when the Student eloped, bit and punched staff and kicked an ed tech.¹⁸ The restraint and seclusion form stated that the Student’s behavior escalated when the Student asked to use the bathroom and “the gym teacher said it was not time to use the bathroom and that he and had given them all time in the beginning of class.” There is no evidence that the behavior/crisis plan put in place in the January, 2019 IEP team meeting, reiterated at the April 25, 2019 IEP team meeting, was in place and available to staff in September. Further, there is no evidence that the District convened a staff meeting or an IEP to discuss the incident or to adjust the Student’s behavior/crisis plan.¹⁹ School districts must take reasonable steps to train and prepare a student's teaching staff,

¹⁷ The completed behavior tracking forms, both blank and filled out, were requested by the Complaint Investigator as they were not provided by the District by the original document response deadline, which was extended to May 1, 2020.

¹⁸ In its May 1, 2020 position letter, the District disclosed that an ed tech had been injured during this interaction with the student.

¹⁹ Julia Stanton, the Student’s ed tech, had no recollection of using any plan prior to October 10, 2019 when a plan was developed by Ms. Surrat, the Student’s special education teacher to address negative behaviors. Ms. Surrat said that the Student’s behavior plans were “basic” and not based on consultation with a behavioral specialist. Liz Cyr, the school Social Worker said that she was not aware of a positive behavior support plan or other crisis plans that was in place for the Student.

including training in behavior management, inclusion, and crisis prevention and intervention. *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1230 (8th Cir. 1994).

Predictably, the Student's behaviors continued several weeks later on October 1, 2019, the Student again eloped and assaulted and attempted to bite a staff member. The District's held a "program review" IEP meeting on October 1, 2019. Rather than consider an increase in services at this meeting, however, the Team determined that the Student's social work services would be *decreased* from 90 min/week to 60 min/week.²⁰ October 8, 2019, the Student eloped, assaulted staff and ingested On October 21, 2019, the Student slapped and attempt to bite staff members and damaged school property.

On October 31, 2019, the District contacted Dr. Rebekah Bickford, a behavior specialist, to assist with the Student's behavior planning. Dr. Bickford's initial Positive Behavior Support Plan dated November 16, 2019 included eight pages outlining antecedents to behaviors, problem behaviors, alternate behaviors, behavior teaching strategies, consequent strategies and a plan for supporting alternate behaviors, functional communication and calming strategies. While this plan had significantly more elements to help the Student, the District did not implement this plan with fidelity. First, the plan was not implemented until January 13, 2020, almost two months after receiving Dr. Bickford's first PBSP. Furthermore, there is no evidence that the District prepared an "Implementation Fidelity Checklist" which was designed to track event strategies, antecedent strategies, behavior teaching strategies and consequent strategies and to submit to Dr. Bickford on a monthly basis.

The Student's behaviors in November and December, 2019 were not improving, with more frequent negative behaviors directed at other students. The "physical restraint/seclusion" reports provided by the District document the following incidents: November 13, 2019, "eloping and assaulting a teacher"; November 18, 2019, "eloping and assaulting a teacher;" November 19, 2019, "kicked at staff and put hands around his neck;" December 9, 2019, "assaulting staff including grabbing staff members, engaging in unsafe bathroom behavior, and repeatedly slapping, punching and kicking staff."

By January 6, 2020, the District again consulted with Dr. Bickford, but remained several steps behind the Student as it had not yet "finalized the Student's behavior plan", despite the increasing frequency of the Student's dangerous behaviors. Regrettably, the Student's behaviors in January and February, 2020 developed into even more frequent and negative behaviors, resulting in nine separate "restraint and seclusion" reports written with regard to these

²⁰ The written notice further provides that the "team considered not decreasing social work from 90 min/week to 60 min/week however rejected this option as this related service is to support specially designed instruction in social/emotional functioning. This need will continue to be monitored closely."

behaviors.²¹ The Student was suspended for nine days between March 3, 2020 and March 13, 2020 due to the February 28, 2020 incident.

While it appears from Dr. Bickford “service record” that she met with staff on January 6, 10, 17, 29, 2020 with a program review meeting on February 24, 2020, there are no records of these meetings or specific adjustments to the Student’s plan in response to the cumulative reports of injuries to staff and concerns regarding the safety of the Student and other students in the school.²²

The Second Circuit Court of Appeals held that a New York school district’s failure to implement a behavior intervention plan denied the student of a free appropriate public education violated his rights under the Individuals with Disabilities Education Act. *C.F. v. New York City Dep’t of Educ.*, 62 IDELR 281 (2d Cir. 2014). The failure to properly or consistently implement the behavioral interventions identified in a student’s BIP can also amount to a denial of FAPE. *Guntersville City Board of Education* 47 IDELR 84 (SEA AL 2006). In *Paris Sch. Dist. v. A.H* the U.S. District Court affirmed a hearing officer’s ruling that a school district’s misclassification of the student’s behavioral issues, coupled with the district’s failure to identify the reasons for her “noncompliant” behaviors and the failure to quickly develop a behavior management plan made the student’s BIP deficient. 69 IDELR 243 (W.D. Ark. 2017).

In the present case, the evidence supports a finding that the District’s failure to properly implement or revise the Student’s behavior plan on a timely basis resulted in the regression of the Student’s emotional, social and behavioral development, thereby denying a FAPE.²³

²¹ The “physical restraint/seclusion” reports provided by the District document the following incidents: January 13, 2020 (two separate reports) Eloping and biting staff (Ms Bissell was required to leave to go to urgent care due to the nature of her bite); statements that wanted to kill and attempts to try to cut wrists on a piece of wood in the break space; January 14, 2020 Eloping, attempting to bite teacher and “attacking and threatening to kill staff....resulting in “staff skin being pinched in the door and another’s head was hit by the door; January 22, 2020, attempt to damage school and teacher property, attempts to climb into the therapy dog kennel and grabbing the of teacher; January 24, 2020, and assaultive behavior towards staff; January 24, 2020, a second “physical restraint/seclusion report” documented a seclusion placed on the Student due to putting “hands on students”, throwing objects at ed tech and threatening, punching and biting staff; January 27, 2020, eloping, “being unsafe in the stairwell leaning over the edge sliding on the rails” and charging at staff; January 31, 2020, punching, kicking and hitting teachers multiple times, grabbing ed tech’s behind, eloping, attempting to pull , pulling down another teacher’s shirt and threatening to kill staff and attempting to bite teacher’s ; February 25, 2020, eloping, threatening and assaulting staff; February 28, 2020, threatening students and staff and repeatedly kicking, spitting and biting a teacher, and threatening to jump out of a window.

²² The District did not produce any of the “Implementation Fidelity Checklists” to further track monthly trends in the Student’s behavior that Dr. Bickford incorporated in her PBSP.

²³ The Parent expressed concern that the District failed to implement the Student’s use a 45 degree slant board or a keyboard. The Student’s teachers and ed techs noted that the Student routinely had access to the slant board and keyboard and that could use it as determined. The Student’s IEPs did not “require” the use of the slant board or assistive technology devices, but they were to be available “as needed.”

Allegations #2, #3: Not providing behavioral intervention services and modifications designed to address the Student's behavior in violation of MUSER §XVII.1.D(1) and not conducting a manifestation determination in violation of MUSER § XVII.1.E

NON COMPLIANCE FOUND; DENIAL OF FAPE FOUND.

MUSER § XVII.1.D.1 provides in relevant part that a child with a disability who is removed from the child's current placement pursuant to paragraphs (C), or (G)²⁴ of this section must—

(a) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(b) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

With regard to discipline issues and the relationship to a Student's disability, MUSER § XVII.1.E directs districts to "conduct a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct." In such an event, the regulations then set forth a series of specific steps the IEP Team must take to ascertain the relationship between the student's conduct and the disability, as well as whether the conduct is related to a district's failure to implement an IEP.²⁵

²⁴ MUSER § XVII.1.C provides as follows: For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (E) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (D) of this section. MUSER § XVII.1.G provides in relevant part that School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child possesses a weapon at school, knowingly possesses or uses illegal drugs or inflicts serious bodily injury upon another person while at school.

²⁵ **Manifestation Determination.**

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the SAU, the parent, and relevant members of the child's IEP Team (as determined by the parent and the SAU) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(b) If the conduct in question was the direct result of the SAU's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the SAU, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (E)(1)(a) or (1)(b) of this section was met.

As set forth in the above section, the trigger requiring a manifestation determination only applies if the code of conduct violation results in a “change of placement.” 34 CFR §300.536 defines “change of placement due to disciplinary removals” as follows:

A removal of a child with a disability from the child’s current educational placement is a change of placement if:

1. The removal is for more than 10 school days in a row; or
2. The child has been subjected to a series of removals that constitute a pattern because:
 - a. The series of removals total more than 10 school days in a school year;
 - b. The child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals;
 - c. Of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another; and

Whether a pattern of removals constitutes a change of placement is determined on a case-by-case basis by the SAU and, if challenged, is subject to review through due process and judicial proceedings.

Although the Student’s formal suspensions in the instant case were for 10 school days (a one day suspension on January 10, 2020 and a nine day suspension starting on March 3, 2020) the Student’s *series* of removals as documented in 15 separate behavior

(3) If the SAU, the parent, and relevant members of the child’s IEP Team determine the condition described in paragraph (E)(1)(b) of this section was met, the SAU must take immediate steps to remedy those deficiencies.

F. Determination that Behavior Was a Manifestation.

If the SAU, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team must—

(1) Either—

- (a) Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
- (b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (G) of this section, return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan.

and seclusion reports, reveal that the Student was removed for an additional 32 hours; the equivalent of five school days from educational placement.

In *School Dist. of the City of Flint*, 66 IDELR 197 (SEA MI 2015) the Michigan State Educational Agency held that the repeated removal of a student who was sent home for behavioral reasons (but not formally recorded as suspensions) should have been counted toward determining whether a manifestation determination report was required. Similarly, the U.S. Education Department has stated that "*portions of a school day* that a child has been suspended may be considered a removal in determining whether there is a pattern of removals." 71 Fed. Reg. 46,715 (2006)²⁶

The evidence in this case supports a conclusion that the Student's behaviors constituted a "pattern", as defined by MUSER § XVII.1.E. and 34 CFR §300.536, both with respect to the frequency and types of infractions that lead to the disciplinary actions. The incidents had a striking similarity, involving around the Student's eloping, engaging in unsafe behavior, biting or physically assaulting staff and destruction of property. Despite this pattern of behaviors and conduct violations, no manifestation determination was performed. Furthermore, during this time of removal during frequent "restraint and seclusion" episodes, the Student did not continue to receive educational services in another setting or to progress toward meeting the goals set out in IEP.

As noted, when a manifestation determination is triggered, the regulations set forth a series of specific steps to address the root causes and treatments for the underlying behaviors. Notably, the District, the parent, and relevant members of the IEP Team must review all relevant information in the Student's file, including IEP, any teacher observations and any relevant information provided by the Parents to determine if the conduct was a manifestation of the disability, or if the conduct was the direct result of the SAU's failure to implement the IEP. If the manifestation team determines that the behavior *is* related to the disability, IEP Team must conduct a functional behavioral assessment²⁷ and implement or modify any behavioral intervention plans, as necessary, to address the student's behavior.

Regrettably, it was just this type of focused approach on the Student's behavior that might have made a critical difference to special education programming or supportive services during the Student's third grade year. The manifestation determination would have caused the IEP team to more carefully consider other relevant information, such as teacher observations, discipline reports or Dr. Harrison's recommendations. It could have provided a

²⁶ The U.S. Dept. of Education Policy states: as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy. Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in § 300.536. In the present case, the restraint and seclusion reports indicate the time that the Student was *removed* from regular programming.

²⁷ MUSER §II.12 defines a functional behavioral assessment as a school-based process to determine why a child engages in challenging behaviors and how the behaviors relate to the child's environment. This includes direct and indirect assessments and data analysis designed to: identify the problem behavior in concrete terms; identify contextual factors that contribute to the behavior; and formulate a hypothesis regarding the general conditions under which a behavior usually occurs and the probable consequences that maintain the behavior.

more targeted functional behavior assessment and would have given attention to updating the Classroom Plan to address some of the behaviors in addition to those negative and hostile behaviors. The immediacy of the manifestation process would have provided a greater likelihood that some of these alternative placements and services would have been offered more rapidly.

Instead, the IEP developed continued to place the Student in regular education and breakout room setting, with inadequate behavioral supports which caused the multiple assaultive behaviors that were unsafe for the Student, staff and other students, and, by the late fall and winter of the 2019-2020 school year, created a school environment ripe with repeated restraints and seclusions further resulting in the denial of a FAPE for this Student.²⁸

Allegation #4: Failure to provide the parents with proper prior written notice of the district's proposals regarding the student's educational program in violation of MUSER §VI.2.I; VI.2(H) and MUSER App. I (34 CFR §300.503) and MUSER App. 1 (34 CFR 300.501 (b) and (c)).

Allegation #5. Not properly developing or revising an IEP in connection with the Student's proposed tutoring program thereby depriving Student of a Free Appropriate Public Education (FAPE) in violation of MUSER §VI.2.J.(4), MUSER §IX.3.C and 34 CFR 300.101(a);

Allegation #6. Not following requirements regarding proposed out of unit placements in violation MUSER VI.2.H; MUSER IX.3.H and MUSER App. 1 (34 CFR 300.501 (b) and (c));

NON COMPLIANCE FOUND, NO DENIAL OF FAPE FOUND.

MUSER §VI.2.J.(4), provides, in relevant part that the major responsibilities of an IEP Team are To develop or revise an Individualized Education Program (IEP) as described in IX to provide each identified child with a disability a free appropriate public education. 34 CFR 300.101(a) provides: "A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)."

MUSER §VI.2.H states in relevant part that each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including:

- (a) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (b) Scheduling the meeting at a mutually agreed on time and place.

²⁸ Trish Hussey, one of the Student's special education teachers, noted that the Student's frequent behavioral challenges during the 2019-2020 year impacted academic progress as well.

The notice must indicate the purpose, time, and location of the meeting and who will be in attendance, as well as the participation of other individuals on the IEP Team who have knowledge or special expertise about the child. MUSER §VI.2.H (2).

MUSER §VI.2.H (6) provides that a public agency must give the parent a copy of the child's IEP at no cost to the parent within 21 school days of the IEP Team Meeting. [20 U.S.C. 1414(d)(1)(B)(i) and 34 CFR 300.322 (a-f)]

MUSER §VI.2.I states that if the team cannot reach consensus, a district must provide the parents with prior written notice of the school's proposals or refusals, or both, regarding their child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing or a State complaint investigation. The written notice provisions of 34 CFR §300.503 require districts to give parents notice, according to specifically defined terms, at least 7 days prior to the date the district proposes to change or initiate programs for students.

The parental participation provisions of 34 CFR 300.501 (b) and (c) provides in relevant part:

(b) (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

- (i) The identification, evaluation, and educational placement of the child; and
- (ii) The provision of FAPE to the child.

...

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

MUSER IX.3.H addresses the IEP team process for proposed Out-of-Unit Placements and provides in relevant part:

Before an IEP Team decides to place a child with a disability in an out-of-unit placement, it shall initiate and convene an IEP meeting to develop an Individualized Education Program for the child. The IEP developed will reflect the Team's program design to meet the child's needs and will include goals for the child's growth in the areas of concern. The IEP Team shall discuss and document the program components of a placement that will support the IEP developed at this meeting. If the placement is known, a representative of the placement shall be involved in this meeting. If a representative cannot attend the meeting, the IEP Team shall attempt to use other methods, such as individual or conference telephone calls, to ensure participation by the receiving placement. If the placement is not known, another IEP Team Meeting shall be held to discuss the child's program at the new placement, including the representative of the private school or facility. If the representative cannot attend, the SAU must use other methods to ensure participation by the private school or facility, including individual or conference calls pursuant to 34 CFR 300.325(a)(2).

The SAU will locate a facility and finalize the child's placement. Any appropriate out-of-unit placements shall be as close to the child's home as possible.

The IEP Team will reconvene 30 days subsequent to placement to review the IEP and make any revisions required. In the interim, the IEP that has been developed for a child's current setting shall be utilized while the proposed placement is located and finalized.

In the present case, the Team determined that the Student would be referred to an out of district placement for all aspects of education at an IEP Team meeting on March 9, 2020. The Team determined that tutoring will be provided at a rate of 5 days/2 hrs each day, including social work services at 60 minutes/week as an interim placement until the out of district placement is secured.

The District concedes that the planned change of placement for the Student was on March 16, 2020 and that the Parents did not receive the written notice as to the Student's change of placement until March 12, 2020, which was just four days prior to the proposed placement and in violation of 34 CFR §300.503 which requires districts to give parents notice, according to specifically defined terms, at least 7 days prior to the date the district proposes to change or initiate programs for students.

The District also concedes that it did not develop an IEP with regard to the IEP team's determination on March 9, 2020 to provide an out of district placement, as it had not yet secured such a placement. MUSER IX.3.H, however, clarifies that districts are required to develop this proposed "out of unit" IEP even if the placement is unknown: "IEP Team *shall* discuss and *document* the program components of a placement *that will support the IEP developed at this meeting. If the placement is known*, a representative of the placement shall be involved in this meeting. (emphasis added).

As the District points out, MUSER X.2.A(4) lists tutoring and an abbreviated day among the types of services that constitute special education, in light of the individual needs of the child.²⁹ While MUSER X.2.A(4) requires that the IEP "must be revised" to add tutorial instruction, no such revision was made to the Student's IEP. Likewise, there is no evidence that the IEP Team considered the requirements of VI.2.L (Abbreviated school day) or MUSER XVII (Discipline issues) at this meeting as required by MUSER X.2.A(4).

²⁹ MUSER X.2.A(4) provides in relevant part: The IEP Team may consider tutorial instruction as a component of a child's program while assuring consistency with the federal requirements of least restrictive environment. Tutorial instruction may occur in school, during or outside of school hours, off site in a neutral setting, in an interim alternative education setting, in the child's home, or in a hospital setting. The IEP must be revised to add tutorial instruction. The IEP Team shall consider the requirements of VI.2.L Abbreviated school day and Section XVII. Discipline of Children with Disabilities in this regulation... There is no minimum or maximum number of hours a day that must be provided, rather this determination will be made by the IEP Team based on the child's individual educational needs. Receipt of tutorial instruction does not preclude a child's participation in other school administrative unit activities and programs. Tutorial instruction may not be used in lieu of specialized instruction.

Despite the procedural violation, the Student was not denied FAPE as a result of the COVID 19 closure on March 13, 2020 and the District's consent that stay put would operate following the Parent's initiation of this Complaint Investigation.

Allegation #7. Not ensuring that the Student's educational placement is in the least restrictive environment in violation of MUSER §X.2.B and MUSER §VI.2.I;

NON COMPLIANCE FOUND, DENIAL OF FAPE FOUND.

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

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

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

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).

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 *Burbank Unified Sch. Dist.*, an administrative law judge concluded that the proposed out of district placement at a private therapeutic program for an aggressive 9-year-old with autism would provide that student FAPE in the LRE. 64 IDELR 320 (SEA CA 2014). In *Trumbull Board of Educ.*, 118 LRP 15753 (SEA CT 10/27/17), a hearing officer held that student’s anxiety and dysregulation prevented him from receiving educational benefit in a less restrictive environment and therefore an out-of-district placement for the student was appropriate. 19 IDELR 908 (3d Cir. 1993).

During the 2018-2019 school year there were several dangerous and aggressive behaviors exhibited by the Student, resulting in the Student’s unsafe elopement, injuries to staff and Student suspensions. On April 4, 2019, an IEP team meeting was held at the Parent’s request due to concerns related to the Student’s behaviors. At the April 4, 2019 team meeting, no changes were made to the Student’s IEP. No additional behavioral supports or instruction was added to the IEP developed for the Student on April 25, 2019. While a PBSP was referenced at this meeting, not all staff were aware of this plan.

Even after the Student’s September 12, 2019 assault on an ed tech, the District failed to offer meaningful changes in supplementary services (such as resource room, BCBA support or itinerant instruction) or to make sure that the Student’s behavior/crisis plan was in place and being used by staff with fidelity. Despite a second “restraint and seclusion incident” documenting an eloping and “an attempted biting” of a staff member On October 1, 2019, the District *reduced* the Student’s social work services from 90 min/week to 60 min/week. As noted, the District failed to consult with a BCBA until the end of October, 2019, and the updated behavior plan was not implemented until January, 13 2020, with eight additional restraint and seclusion reports between October 8, 2019 and January 13, 2020 documenting more frequent and more escalated and assaultive behaviors.

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 evidence in this case supports the conclusion that while the District made some effort to provide a PBSP and other supports for the Student, it failed to review and develop a programming alternative, *on a timely basis*, once it became clear the Student's IEP and PBSP was not working.

While a timely introduced “programming alternative” *could have* prevented some of the Student’s escalated behaviors during the 2019-2020 school year, it became clear that by January, 2020, *after* Dr. Bickford’s detailed consultation relationship and behavior support plan was in place, the District was unable to provide an appropriate educational environment for the Student.³⁰

Allegation #8. 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 both 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.

When making a change in educational placement, a school must consider a parents' concerns must not predetermine the educational program for a disabled student prior to meeting with the parents, because the core of the IDEA is "the cooperative process that it establishes between parents and schools." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

In the present case, there is no evidence 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 from March 2019 to the present, and Parent concerns and points were routinely noted in each of the Written Notices corresponding to the IEP team meetings.

While the IEP Team should work toward consensus, the SAU [District] has ultimate responsibility to ensure that a child is appropriately evaluated; that the IEP includes the services that the child needs in order to receive FAPE; and that the child’s placement is in the least restrictive educational placement. MUSER VI(2)(I).

³⁰ In particular, several witnesses, including Dr. Bickford, noted that public schools like _____, with multiple doorways and entrances/exits, are particular risks for students who frequently elope.

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) Determine an appropriate out-of-district placement for the Student in a special purpose private school or other appropriate placement focusing on children with behavior and emotional/social challenges. This placement shall have BCBA support/consultation as well as ed techs and staff trained and experienced in behavior/socialization and safety issues to provide specialized instruction in a small group and individual settings for the Student;
 - b) The District shall arrange for a manifestation determination/functional behavior assessment on the Student and if needed the following testing/evaluations:
 1. Psychological testing, including behavior assessments, classroom observation, and an assessment of the Student's need for counseling and other supportive services to address behavior issues;
 2. An assessment of academic, intellectual & learning development, with a specific assessment of any deficiencies or decreases in the Student's current level as a result of lack of programming or behavior planning for the Student;
 - c) Review the findings of the evaluations with staff at the proposed placement to determine all necessary educational supportive services and specialized instruction that the Student requires, including ESY, emotional/social/behavioral support and additional academic supports;
2. Determine a schedule to review of progress within out of district placement along with appropriate opportunities for the Student to interact with typically developing peers and to return to placement within the District with appropriate instruction and supports;
3. Determine what compensatory education and services must be provided to the Student for equity in light of the District's failure to provide any meaningful social/behavioral educational programming to the Student for third grade year, taking into consideration the need for extended school year programming.
4. The IEP shall be amended to reflect all modifications of programming or services.
5. The District shall schedule training for all appropriate staff members in order to review state and federal regulations with respect to IEP Team responsibilities safety and documentation of behavior and supportive services offered to identified Students.
6. The following compliance documentation shall be sent to the Due Process Office and the Parents:
 - a copy of the IEP;
 - copies of all evaluation reports; and
 - a copy of the Written Notice (WN).
 - Copy of the staff training curriculum, trainers and staff members attending the training.