

**Complaint Investigation Report**  
v. Maine Virtual Academy  
June 12, 2020

Complaint # 20.079C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: April 17, 2020

**I. Identifying Information**

Complainant: \_\_\_\_\_, Parent

Respondent: Maine Virtual Academy  
Melinda Browne, Superintendent, Director of Special Education, Principal  
6 East Chestnut Street  
Augusta, ME 04330

Student:  
DOB \_\_\_\_\_

**II. Summary of Complaint Investigation Activities**

On April 15, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on April 17, 2020. Therefore, the current investigation covers the period of April 15, 2019 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 166 pages of documents from Maine Virtual Academy, along with audio/video recordings of IEP Team Meetings on April 17, 2020 and April 30, 2020.<sup>1</sup> The investigator also received 62 pages of documents, and an additional 60 email communication chains from the complainant. Interviews were conducted with the Student on May 20, 2020 and with the Student’s parent (“Parent”) on May 28, 2020. On May 20, 2020, the following school staff were interviewed by phone: the Student’s Educational Technician (“Ed Tech”), the Superintendent/Head of School/Director of Special Education for Maine Virtual Academy, the Assistant Director of Special Education/Student’s Special Education Teacher/Student’s Case Manager, the Student’s General Education English Teacher, an Academic Advisor, and the Student’s

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<sup>1</sup> At the request of the Parent, the complaint investigator also requested audio/video recordings of IEP Team meetings on March 27, 2020 and May 28, 2019, but recordings were unavailable. None of the parties created video or audio recordings of those IEP Team Meetings.

Speech and Language Pathologist. On May 22, 2020, phone interviews were conducted with the Student's Service Provider from the Maine Educational Center for the Deaf and Hard of Hearing ("MECDHH") and with the Student's Occupational Therapist.<sup>2</sup> The complaint investigator reviewed all documents, videos, email chains, information, and responses provided by the parties.

### **III. Preliminary Statement**

The Student is 14 years old. [redacted] qualifies for special education and related services as a student with a Specific Learning Disability ("SLD"), Other Health Impairment ("OHI"), and a Hearing Impairment. [redacted] has a variety of diagnoses that have an adverse impact on [redacted] education, including dyslexia, dysgraphia, dyscalculia, and dysautonomia/postural orthostatic tachycardia syndrome ("POTS"). [redacted] is currently enrolled at the Maine Virtual Academy as an 8th grade student. The Student resides with [redacted] mother in [redacted], Maine.

This complaint was filed by the Student's parent ("Parent") alleging that Maine Virtual Academy ("MEVA") violated the Maine Unified Special Education Regulations ("MUSER"). After the receipt of the Parent's complaint, a Draft Allegations Letter was sent to the parties by the complaint investigator on April 29, 2020, alleging three violations of the MUSER. A telephonic Complaint Investigation Meeting was held on May 1, 2020. A revised Allegations Letter was sent to the parties by the complaint investigator on May 1, 2020, alleging four total violations of the MUSER.

### **IV. Allegations**

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

- A. MEVA did not fully implement the Student's IEP, and as a result, MEVA has not provided special education, related services, and supplementary aids and services

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<sup>2</sup>As per the standards of practice for conducting complaint investigations, the complaint investigator used her discretion with regards to which witnesses were interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation. Notably, although the COVID-19 pandemic has changed the educational landscape all over the State of Maine, the day-to-day educational operations at MEVA were largely unaffected because of MEVA's remote-instruction model. Therefore, the complaint investigator faced no significant hurdles contacting potential witnesses during the pendency of this complaint investigation. At the time of publication, the complaint investigator feels confident that all her investigative resources have been exhausted and that complete information was collected about all the allegations raised in the present investigation, despite the circumstances surrounding the COVID-19 pandemic.

- sufficient to enable the Student to advance appropriately toward attaining annual goals and to be involved in and make progress in the general education curriculum. Specifically, MEVA has not provided the following: (a) Educational materials; (b) Supplies; (c) Technology; (d) Support staff; (e) Required training for staff; and (f) ESY services during the summer of 2019. See MUSER IX(3)(B)(3); MUSER IX(3)(A)(1)(d).
- B. The Student’s IEP did not consider the full academic, developmental, and functional needs of the Student. Specifically, the Student’s IEP does not address recent diagnosis of dysautonomia/POTS and associated academic, developmental, and functional needs as a result of this diagnosis. See MUSER IX(3)(C)(1)(d).
- C. MEVA did not allow the Student’s parent a full opportunity to participate in multiple IEP Team meetings. Specifically, parent participation has been restricted due to the following: (a) MEVA set a time limit on discussions at IEP meetings; (b) MEVA set a limited agenda for topics of discussion at IEP meetings; (c) MEVA did not communicate transparently at IEP meetings with the Student’s parent about the IEP process and about information used to inform IEP team decisions. See MUSER VI(2)(H); MUSER VI(2)(I).
- D. MEVA did not amend information contained in Written Notices, alleged to be inaccurate or misleading, at the request of the Student’s parent within a reasonable period of time, or else notify the parents of its refusal to do so. See MUSER XIV(8); MUSER App. 1 at 220; 34 CFR 300.503(9).

## V. Factual Findings

1. The Student is 14 years old, and is currently enrolled at the Maine Virtual Academy (“MEVA”), as an 8<sup>th</sup> grade student. The Student resides with parent in , Maine.
2. The Student has a variety of diagnoses that have an adverse impact on education, including dyslexia, dysgraphia, dyscalculia, and dysautonomia/(POTS). As a result, the Student is eligible for special education under the Specific Learning Disability (“SLD”), Other Health Impairment (“OHI”), and Hearing Impairment categories.
3. The Student’s most recent educational evaluations, dated May 8, 2019, show the Student’s average range or higher cognitive abilities, as measured by the Weschler Intelligence Scale for Children – Fifth Edition (WISC-V) and the Kaufman Test of Educations Attainment, third edition (KTEA-III).

4. The Student's WISC-V scores fall within the Average range (Full Scale IQ = 100; 50<sup>th</sup> percentile). The Student was assessed in the 66<sup>th</sup> percentile for verbal comprehension index, the 23<sup>rd</sup> percentile for visual spatial index, the 58<sup>th</sup> percentile for fluid reasoning index, and the 50<sup>th</sup> percentile for processing speed. The Student's strongest skills were in the working memory index with a performance in the High Average range (75<sup>th</sup> percentile). The evaluator summarized, "when [the Student's] performance today was compared to [the Student's] performance in 2017, [the Student] has made more than the expected maturational gains in [the Student's] processing speed. [the Student's] verbal, fluid reasoning, and working memory abilities have remained stable. [the Student's] visual spatial ability has not kept pace with developmental projections." See Neuropsychological Evaluation conducted by Dr. Christine Fink, PhD., dated May 8, 2019.
5. On the KTEA-III, also administered on May 8, 2019, the Student was assessed as average in all areas, including phonological processing, receptive language, and expressive language. Id.
6. The Student was also reassessed with the Wechsler Individual Achievement Test-3<sup>rd</sup> Edition (WIAT-III) on May 8, 2019. The Student was scored in the Borderline range for reading composite, the Very Low Average range for written expression composite, and the Low Average range for mathematics composite. The evaluator concluded, "when [the Student's] academic achievement data is compared to [the Student's] 2017 WIAT-III administration, [the Student] has made the expected maturational gains to keep [the Student's] Mathematics Composite stable over time. However, [the Student's] Reading and Written Expression Composites have not kept pace with developmental projections—even with additional enriching Orton-Gillingham instruction." Id.
7. The Student's most recent Individualized Education Program ("IEP"), dated November 6, 2019, and amended on March 30, 2020 and on April 30, 2020, requires Specially Designed Instruction in English and Math for 1 hour and 30 minutes, three times per week, 60 minutes per week of consultation services through the Maine Center for Deaf & Hard of Hearing, 60 minutes per week of OT consultation, and 60 minutes per week of Speech/Language Services. The IEP specifies that the Student currently spends 15% of [the Student's] educational time with non-disabled children.
8. The Student's current IEP also provides a vast array of supplementary aids and services, including, but not limited to, 1:1 in-person Ed Tech III

support, as needed to support student learning and objectives, detailed requirements for the presentation of learning materials to ensure accessibility for the Student (for example, the use of open dyslexic font is required for all written materials and closed captioning is needed for all supplemental video and audio materials shown during class or assigned for viewing), modified math curriculum, structured literacy intervention programming for reading and writing, frequent breaks, and 1:1 training by MEVA for support staff 1 time per month for 1 hour. See IEP, dated November 6, 2019, amended on March 30, 2020 and on April 30, 2020.<sup>3</sup>

9. The Student first began attending MEVA, which is a public charter school authorized by the Maine Charter School Commission, at the start of the 2018-2019 school year as a 7<sup>th</sup> grade student.
10. MEVA is a unique educational setting that serves children in grades 7 to 12. MEVA teachers deliver live instruction via the Internet from MEVA's offices in Augusta, Maine. Students live all over the State of Maine, and they are provided with laptops and Internet access at home. Students interact with their teachers and their classmates remotely throughout their school week, during academic lessons, extra-curricular activities, and small group learning sessions.
11. MEVA's student body has grown rapidly since it opened approximately five years ago, and the special education needs of MEVA's students have changed significantly over time as well. MEVA originally employed just two special education teachers when it opened, but now there are seven special education providers on staff.
12. MEVA's Superintendent/Head of School also currently serves as the Director of Special Education. MEVA also has an Assistant Director of Special Education, who currently serves as the Student's Case Manager and the Student's Special Education Teacher. According to multiple staff members who were interviewed, MEVA intends to hire a full-time Director of Special Education for the coming 2020-2021 school year.
13. When the Student enrolled at MEVA in August 2018, had an active Section 504 Plan from former local school district. At that time, the

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<sup>3</sup> Please see Section VI, Part A below for a full list and discussion of the supplementary aids, services, modifications, and supports provided by the Student's IEP.

Student was not yet identified as a student who qualified for special education services.

14. During entire enrollment at MEVA, the Student has also accessed privately scheduled educational services through the Children's Dyslexia Center in Bangor, Maine, two days per week. The Student has been able to benefit from a structured literacy program at the Children's Dyslexia Center, which assists with dyslexia and dysgraphia.<sup>4</sup>
15. In October 2018, an initial IEP was developed for the Student, and the IEP Team found eligible for special education services based on a neuropsychological evaluation from 2017 under the SLD, OHI, and Hearing Impairment categories.
16. In December 2018, the IEP Team reconvened to make a number of adjustments to the original IEP, including the addition of a number of accommodations, a revision of certain IEP goals, and a request for updated evaluations to better assess the Student's current learning needs. See Written Notice from IEP Meeting on December 14, 2018.
17. In January 2019, the IEP Team met again at the Parent's request. The Team added adult support for the Student's math and literacy classes, agreed to procure 'Math-U-See' curriculum, and determined that the Student required specific technology to support learning, including an Apple computer (instead of a computer with a Windows-based operating system), text to speech software, and speech to text software. See Written Notice from IEP Meeting on January 18, 2019.
18. In May 2019, the IEP Team convened again to consider an updated neuropsychological evaluation completed by Dr. Christine Fink, PhD. The Team agreed to a number of amendments to the Student's IEP based on the new recommendations, including but not limited to, moving the Student to an abbreviated schedule to allow for the Student's continued participation at the Children's Dyslexia Center two days per week, increasing the Student's specially designed instruction, providing accessible materials for the Student that address learning needs in a

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<sup>4</sup> The current COVID-19 pandemic has caused the suspension of the Student's programming at the Children's Dyslexia Center. Due to the Student's medical conditions, it is unlikely that the Student will be able to resume in-person schooling at the start of the 2020-2021 school year, even if social distancing requirements are relaxed more broadly and even if the Children's Dyslexia Center is able to resume normal operations. The Student's IEP team is currently making plans to offer the Student a structured literacy program, Reading Horizons, through MEVA if needed during the 2020-2021 school year.

clear and uncomplicated manner, and providing a face-to-face Educational Technician three days per week during content classes. See Written Notice from IEP Meeting on May 28, 2019.

19. According to Written Notice from the May 28, 2019 IEP Meeting, the Team agreed that the Student's new accommodations and services, including abbreviated day schedule, would begin at the start of the 2019-2020 school year. The Team also agreed that a speech and language evaluation was needed. Id.
20. Notably, there is no indication in Written Notice from the May 28, 2019 IEP Meeting that the Team agreed to implement ESY services for the Student during the summer of 2019. There is also no indication in the Student's IEP that ESY services for summer 2019 were determined to be necessary. Id.
21. However, Written Notice<sup>5</sup> from the May 28, 2019 IEP Meeting does quote the recommendations of the Student's neuropsychological evaluation, as follows, "...[The Student] requires daily, not weekly, specially designed Math and Language Arts instruction to make meaningful gains, counteract learning/memory challenges, and continuously reinforce learning. Relatedly, [the Student] needs *year-round instruction* in core subject areas to reduce risk for forgetting." Id. (emphasis added).<sup>5</sup>
22. When speaking to the complaint investigator, the Parent reported a high degree of frustration about the start of the 2019-2020 school year. Specifically, the Parent explained that MEVA was initially unable to secure a 1:1 Ed Tech III to work with the Student face-to-face, which led the Parent to recommend a family friend, who held a masters degree in counseling, for the position.

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<sup>5</sup>At the request of the Parent, the complaint investigator requested an audio and/or video recording of the May 28, 2019 IEP meeting. That particular IEP Team meeting occurred in person at the Maine Virtual Academy offices in Augusta, Maine, and MEVA reported that no audio/video recording was created by the school. Additionally, the Parent did not make a recording. Therefore, the content of the meeting could not be further reviewed. Nonetheless, the Written Notice and the Student's amended IEP from October 2018 are both silent about ESY services, other than the above-mentioned reference to the recommendations by Dr. Fink. As such, there is no record that the IEP Team adopted a recommendation for ESY services during the summer of 2019. Additionally, the complaint investigator was not provided with any email correspondence chains where the provision of such services was discussed.

23. The Head of School/Director of Special Education and the Assistant Director of Special Education explained during separate interviews with the complaint investigator that the Ed Tech III position was posted promptly after the May 28, 2019 IEP meeting, but MEVA initially received no applications for the job during the spring and summer of 2019. When the Parent suggested a potential applicant, MEVA was immediately receptive; however, the process of hiring, certifying, and training the person who eventually became the Student's Ed Tech III took some time.
24. Both the Head of School/Director of Special Education and the Assistant Director of Special Education at MEVA reported that the Student's Ed Tech III was properly trained and certified before began working with the Student. Additionally, the Student's Ed Tech received additional training throughout the 2019-2020 school year, including training about the Student's specialized math curriculum, Math-U-See, and individualized training from the Assistant Director of Special Education regarding the Student's learning, the Student's curriculum, and the Student's IEP.
25. Because the Student's face-to-face Ed Tech III was unavailable to begin working with at the start of the 2019-2020 school year, MEVA initially provided the Student with a dedicated Special Education teacher to support the Student virtually.<sup>6</sup> The Parent reported, and a number of MEVA staff members who were interviewed confirmed the same, that this virtual teaching arrangement was largely unsuccessful because the Student was not able to digitally receive the educational materials that needed and then independently organize those materials for effective learning without in-person adult support.
26. Additionally, the Parent reported to the complaint investigator that, particularly at the start of the 2019-2020 school year, MEVA was very slow to deliver the Student's accessible curriculum, various pieces of necessary equipment/technology, and many of the accommodations and services that are specified in the Student's IEP. The Parent also

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<sup>6</sup> According to Google Maps, the Student's home in , Maine is located about 112 miles away (and a 2 hour and 15 minute drive) from MEVA's office location in Augusta, Maine. Because daily travel to and from the Augusta area to would be impractical, MEVA specifically sought applications from Ed Tech III's who were able to travel to the Student's home in . Where MEVA did not initially have any applicants for the Ed Tech III position, MEVA determined that the next best option for the Student was a dedicated Special Education teacher who could offer 1:1 virtual support. The IEP Team did not reconvene at that time to discuss MEVA's inability to provide the Student with an in-person Ed Tech.



represented that frequently had to make repeated, time-consuming complaints to the Assistant Director of Special Education/the Student's Case Manager and the Head of School/Director of Special Education before MEVA responded to the Student's needs as outlined by IEP.<sup>7</sup>

27. On or around September 27, 2019, the Student began working with Ed Tech III in-person at home in , Maine, three times per week, on Tuesdays, Thursdays, and Fridays.<sup>8</sup> On Mondays and Wednesdays, the Student received educational services through Children's Dyslexia Center in Bangor, Maine.
28. The Parent, the Student, and numerous staff members at MEVA who were interviewed for this investigation, reported that the Student's educational needs were exceptionally well-served by in-person Ed Tech. Everyone agreed that the Student and the Ed Tech had a successful learning dynamic. The Ed Tech worked face-to-face with the Student and remotely, at least two times per week, with the Student's Special Education Case Manager/Teacher and, as needed, with the Student's General Education English teacher to collaboratively deliver specially-designed literacy and math instruction.
29. The IEP team met again on October 18, 2019 for an Annual Review. According to Written Notice, a number of the Student's goals were updated to reflect progress. Additionally, based on the Student's new speech and language evaluation, two speech goals were added to the IEP, along with speech and language services. See Written Notice from IEP Meeting on October 18, 2019.
30. With respect to ESY services for the summer of 2020, Written Notice indicated that the IEP Team would "meet again 45 days prior to the end of school, March 13<sup>th</sup>, 2020, to determine an extended school year schedule as [the Student] does require services over the summer. At that time, IEP will be amended to have ESY services added and to determine if OT and [speech/language services] will remain the same."

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<sup>7</sup>Please see Section VI, Part A below for a complete discussion of the individual components of the Student's IEP that were allegedly not implemented by MEVA (or not implemented by MEVA within a reasonable period of time).

<sup>8</sup> The Student began classes for the 2019-2020 school year on September 3, 2019. Other MEVA students began their coursework on August 26, 2019. It appears from email correspondence shared with the complaint investigator that the Student started one week later than peers to allow time for modifications to the Student's virtual general education curriculum to comply with the Student's learning needs and IEP.

Additionally, “the team considered not qualifying [the Student] for Extended School Year services but rejected that option as [redacted] does show regression of skills if they are not consistently practiced.” See Written Notice from IEP Meeting on October 18, 2019.

31. The Student’s Ed Tech created a summary for each of her learning sessions with the Student between September 27, 2019 and February 28, 2020, and those summaries were shared with the Parent and the Student’s teaching team on a daily basis. The summaries demonstrate that the Ed Tech, under the guidance of the Student’s Case Manager/ Special Education Teacher, was carefully implementing supplementary aids, services, modifications, and/or supports as noted in the Student’s IEP. For example, the Ed Tech ensured that accessible materials were prepared and printed as required by the IEP (with limited visual stimuli, in open dyslexic font, free from extra words, graphics, pictures, etc.). The Student’s Ed Tech also utilized graphic organizers for English and Math, provided access to multi-sensory learning strategies, checked for understanding, facilitated the frequent use of a calculator, developed alternative activities, repeatedly reviewed concepts, and tied the Student’s own experiences to [redacted] learning to facilitate understanding and engagement. Occasionally, the Student’s Ed Tech’s summaries also indicate the use of technology provided by the Student’s IEP (such as the C-Pen or headphones) and the summaries also reference the Ed Tech’s training about various technology or equipment.
  
32. The Ed Tech summaries indicate that, as of Thursday, October 24, 2019, the Student was working on the modified coursework from [redacted] general education English course from the week of October 7, 2019 to October 14, 2019. By November 22, 2019, the Ed Tech summaries reported that the Student was working on the modified coursework from [redacted] general education English course from the week of October 24, 2019. See Ed Tech’s Summaries, dated September 28, 2019 to February 28, 2019.<sup>9</sup>

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<sup>9</sup> It appears that the Student, despite diligent work with [redacted] in-person Ed Tech was falling increasingly further behind her non-disabled peers in her general education course work. In October, [redacted] was approximately three weeks behind, and by November, [redacted] was about four weeks behind. The Parent was very concerned about the Student being behind in [redacted] coursework. However, this trend is unsurprising because the Student was learning on an abbreviated day schedule and [redacted] IEP called for a number of important modifications in the curriculum and in the delivery of that curriculum, including pre-teaching, frequent opportunities for review, checks for understanding, and opportunities for the Student to connect the curriculum to [redacted] personal experiences.

33. In terms of math, the Ed Tech’s summaries indicate that the Student progressed steadily through the Math-U-See curriculum lessons and assessments. The Student, the Parent, and the Ed Tech were all very pleased with progress in Math. For example, on Thursday, November 7, 2019, the Ed Tech noted, “All in all a terrific day. I told [the Student] that I think is doing fantastic with Math; stated that never thought would hear that.” Id.
34. Other than one summary on November 1, 2019 which indicates that the Student and the Ed Tech were unable to access the virtual curriculum provided by MEVA due to an isolated technological problem with the remote classroom forum, there are no indications from the Ed Tech’s summaries that the Student lacked access to educational materials, supplies, technology, or equipment that were needed for the Student to access special education. Id.
35. At the beginning of December 2019, the Student became extremely ill. According to the Parent, was hospitalized multiple times. The Student was absent from school the week of Thanksgiving 2019 (due to extended family travel), and then was unable to participate in 1:1 Ed Tech learning sessions due to illness on December 3, 2019, December 5, 2019, December 6, 2019, December 12, 2019, and December 19, 2019. As a result of health, the Student was largely unable to participate in school from November 25, 2019 until mid-January 2020.
36. In January 2020, the Student was diagnosed with dysautonomia/(POTS). An undated notice provided by the Student’s doctor at states that the Student’s diagnosis may limit ability to attend school and may limit the amount of schoolwork is able to complete. See Letter from Dr. Thomas Martin, MD, FAAP, FACC, regarding the Student’s dysautonomia/(POTS) diagnosis.
37. Dysautonomia/(POTS) causes the Student to fatigue very quickly if remains in an upright position for too long, and it also impacts the Student’s ability to utilize certain technology because increased screen time can worsen symptoms. In an interview with the complaint investigator, the Student described most frequent symptoms as headaches, dizziness, stomach aches, and overall fatigue. explained that some days has lots of energy and can handle a full school day and farm chores, but other days feels unwell and cannot tolerate any

screen time or any activity at all. The Student's Ed Tech also reported to the complaint investigator that the Student's symptoms impacted the Student's ability to fully participate and concentrate in academic sessions.

38. As a result of the Student's continued illness (and a number of snowstorms), the Student's Ed Tech was only able to work with the Student on four occasions during the whole month of January 2020.
39. On January 15, 2020, MEVA met and developed a Section 504 Plan regarding the Student's new diagnosis of dysautonomia/(POTS). The 504 Plan provides the Student with a modified school day due to needs for medical appointments and due to unpredictable fatigue. Additionally, the school agreed not to penalize the Student for absences, to prioritize core academics during optimal learning time, to allow for frequent breaks and/or hydration, and to adjust the Student's curriculum as needed for comprehension struggles resulting from 'brain fog' that can be associated with dysautonomia/(POTS).
40. Again, the Student's ability to participate in academic sessions was limited by medical condition in February 2020. was unable to fully participate on February 7, 2020, February 12, 2020, February 14, 2020, February 18, 2020, February 27, 2020, due to illness or medical appointments. See "Student Absences," provided by MEVA.
41. The Ed Tech's summaries indicate that was able to work with the Student for a total of six sessions in February 2020, and it appears that the Student largely picked up where left off in November with English and Math instruction. The final in-person learning session with the Student and Ed Tech occurred on February 28, 2020.
42. On March 3, 2020, the Student's older sister, who lived out-of-state, unexpectedly died in an accident. The Student was forced to cope with the tragic loss of best friend, and was unable to attend school for approximately two and a half weeks, between March 4, 2020 and March 22, 2020 due to family travel arrangements and grieving time.
43. While the Student was away from school, beginning on March 16, 2020, social distancing measures took effect across the State of Maine, due to the COVID-19 pandemic. This prevented MEVA from offering any

further face-to-face Ed Tech support to the Student during the 2019-2020 school year.

44. Less than two weeks after social distancing measures began and only days after the Student became available for schooling again after sister's passing, the Student's IEP Team reconvened on March 27, 2020. During that IEP meeting, the Student and the Parent requested a break from academic classes because was still struggling with dysautonomia/(POTS) diagnosis, recent loss, and the inability to receive face-to-face support from Ed Tech. The IEP Team agreed that the Student could change mind at any point if felt that was ready to resume classwork, and the IEP Team agreed that the Student should retain related-services, including OT, speech and language services, and consultation with the Maine Educational Center for the Deaf and Hard of Hearing during the pandemic and during the upcoming ESY term, all of which could be delivered virtually to the Student. See Written Notice from the IEP Team on March 27, 2020.
45. Unfortunately, the Student's medical conditions continued to interfere with schooling at the end of March, and was unable to participate in related services on March 24, 2020, March 27, 2020, and March 31, 2020 due to illness. See "Student Absences," provided by MEVA.
46. Shortly after the IEP Team Meeting on March 27, 2020, the Student changed mind about academic classes. The Student contacted Special Education Case Manager by email on April 3, 2020, asking to resume coursework because now felt well enough to begin school again. The Student's Ed Tech remained virtually available to the Student three days per week, but the Student, Parent, and the Ed Tech all reported that the adult support could not be effectively delivered virtually considering the Student's learning needs.
47. Throughout the COVID-19 pandemic, MEVA has continued to communicate with the Student and the Parent regarding ability to participate in academic instruction and related services, while also recognizing the fact that the Student's needs are best served when receives in-person Ed Tech support. Both the Student's Case Worker and the Student's Ed Tech have remained available for 1:1 virtual support for the student. MEVA continues to mail accessible educational materials to the Student's home and continues to coordinate for the

provision of the Student's related services. However, due to the Student's difficulties with screen time and the Student's related need for in-person Ed Tech support during core academics, the Parent and the Student have periodically declined certain offers for support.

48. After receiving Written Notice from the March 27, 2020 IEP Team meeting, which was sent to the Parent on April 3, 2020, the Parent contacted the Director of Special Education and the Assistant Director of Special Education to request an amendment. Specifically, the Parent wanted Written Notice to include a statement that the IEP Team had determined that, if the Student decided to resume academic classes during the pandemic, could do so immediately and face-to-face Ed Tech services would be necessary to assist the Student in learning.
49. After the Parent requested these changes to Written Notice, there was some factual disagreement about what had occurred at the March 27, 2020 IEP meeting. At the Parent's request, the IEP Team reconvened on April 17, 2020 to resolve this dispute. The IEP Team then agreed to amend Written Notice from the March 27, 2020 IEP Meeting, as requested by the Parent. Nonetheless, the Head of School/Director of Special Education maintained that the original Written Notice was more than sufficient because a Written Notice does not need to contain every detail from the discussion at an IEP Meeting.<sup>10</sup>
50. On April 30, 2020 the IEP team met again to create a transition plan for the Student and to plan for the Student's ESY session. The IEP Team accepted a transitional plan, implemented ESY decisions, and increased the Student's MECDDH consultation from 30 minutes per week to 60 minutes per week. The IEP Team agreed again that the Student requires face-to-face assistance from an Ed Tech III to fully access academics and make progress. MEVA agreed that, if a face-to-face Ed Tech III cannot be provided during ESY, then compensatory services will be offered. See Written Notice from IEP Meeting on April 30, 2020.
51. The complaint investigator was provided with an audio/video recording of the IEP Meeting on April 30, 2020, and it is very apparent that the

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<sup>10</sup> It should also be noted that the information sought to be included by the Parent was originally left out of the Written Notice because the discussion itself touched upon issues outside the scope of the IEP Team process – the hiring of school personnel, and more specifically, whether or not MEVA should consider hiring the Parent as the Student's face-to-face Ed Tech during the COVID-19 pandemic. The Head of School/Director of Special Education believed that this discussion was irrelevant to the IEP process and not needed in the Written Notice.

IEP meeting ended with heated disagreement between the Parent and the Director of Special Education. The dispute was related to whether or not the Student required an in-person, dedicated Special Education teacher to access IEP going forward (as opposed to receiving adult support from an in-person Ed Tech III) and about whether or not a vote should be taken about the issue.

52. The IEP meeting on April 30, 2020 lasted approximately 2 hours and 14 minutes, according to the audio/video recording. The recording makes it clear that all IEP Team members were given a full opportunity to weigh in on the issues presented, and the meeting was only concluded after it was readily apparent that the IEP team had reached a stalemate on the remaining issue.
53. On May 29, 2020, the IEP Team met again at the Parent's request, with a purpose of covering topics of discussion that were left over from the last IEP Team meeting on April 30, 2020. The Team agreed to provide additional supplementary aids and services, with a focus on multi-sensory learning, repetition, and additional technology support, including but not limited to green screens for all staff who work with the Student virtually.
54. Additionally, the IEP team agreed on May 29, 2020 to formally incorporate the accommodations from the Student's 504 plan for dysautonomia/(POTS) into IEP. The IEP Team also approved ESY services for the Student during the upcoming summer of 2020 and discussed scheduling aspects for the ESY.
55. The IEP Team meeting on May 29, 2020 lasted for approximately 2 hours and 14 minutes, according to Written Notice, and the IEP Team agreed to meet again in July to discuss any remaining agenda items, including the Assistant Director of Special Education/Student's Case Worker's belief that the Student's time with non-disabled peers needs to increase and the Parent's belief that the Student requires a special education teacher who is dedicated full-time to the Student's educational needs.

Other relevant facts are included in the determinations below.

## VI. Determinations

- A. MEVA did not fully implement the Student's IEP, and as a result, MEVA has not provided special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining annual goals and to be involved in and make progress in the general education curriculum. Specifically, MEVA has not provided the following: (a) Educational materials; (b) Supplies; (c) Technology; (d) Support staff; (e) Required training for staff; and (f) ESY services during the summer of 2019. See MUSER IX(3)(B)(3); MUSER IX(3)(A)(1)(d). **COMPLIANCE FOUND.**

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

Federal and State law provide that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. See 34 CFR 300.101; 34 CFR 300.531; MUSER I. A failure to implement a student's individualized education plan can result in a denial of FAPE. See *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (2017). However, not every deviation from an IEP results in a denial of FAPE. See *L.C. and K.C. v. Utah State Bd. Of Ed. et al.*, 43 IDELR 29 (10<sup>th</sup> Cir. 2005).

As noted above, the Student's disabilities require a vast array of supplemental aids and services, and current IEP dated November 6, 2019, amended on March 30, 2020 and on April 30, 2020, includes all of the following supplemental aids, services, modifications, and/or supports:

### **Presentation of Material/Support**

- Limited visual stimuli/materials presented
- Use of open dyslexic font for all presented material and created material
- Use of Beeline Reader
- Access to audio books
- Access to text-to-speech software for independent reading
- Graphic organizers for all assignments (use of an assignment book, grid, or list)
- Graphic organizers for all writing assignments
- Graphic organizers for all reading comprehension assignments
- Use of visuals paired with reading material
- Clean slides of presented material (free from extra words, graphics, pictures, etc.)
- Webcam turned on for all live class presentations or interactions
- Access to multi-sensory learning strategies
- Allow wait time for responses and answers
- Pre-teach material



- Check for understanding
- Pre-training of technology usage

### **Math Assignments**

- Allow use of calculator/computer
- Modified math curriculum based upon 3<sup>rd</sup>/4<sup>th</sup> grade level
- Scaffolding of material to build upon previously taught concepts
- Content delivered outside of the general education setting at a slower pace
- Use of visuals for mathematical problem solving
- Use of simple 4-function calculator
- Use of multiplication chart
- Use of base-ten blocks
- Use of manipulatives

### **Assessments/Testing/Grading**

- Extended testing time
- No grading penalties for spelling/grammar errors (unless directly assessed)
- Modified test format, if applicable
- Immediately test for concept understanding after learning the concept
- Open book/use of notes for assessments
- Test read to student
- Use of scribe if necessary
- Small group or individual setting for testing
- Verbal responses to questions
- Ability to take test orally, if necessary

### **Special Instructional Materials/Equipment/Other Resources**

- Assorted classroom materials appropriate to student's needs
- C-Pen
- Use of Bee-line reader for all presented and student created materials
- Use of circum-aural headphones that allow to wear hearing aid
- Background noise needs to be minimized to allow for full auditory hearing
- Use of FM system if participating in face-to-face group setting with more than 10 participants
- Strategic seating (right ear towards speaker, horseshoe configuration, or other options to ensure visibility of all speakers/teachers)
- Reduce background noise and distractions from student's work area

### **Support to Classroom Teachers**

- Ed Tech III
- Supportive teaming
- 1:1 Ed Tech III in person to support student learning and objectives

### **Supplemental Service Training of Staff**

-1:1 training by MEVA for support staff one time per month for one hour.

See Student's IEP dated November 6, 2019, as amended on March 30, 2020 and April 30, 2020.<sup>11</sup>

The Parent contends that MEVA has not provided the following as required by the Student's IEP: (a) Educational materials; (b) Supplies; (c) Technology; (d) Support staff; (e) Required training for staff; and (f) ESY services during the summer of 2019. Each of these will be considered in turn.

First, with respect to educational materials, the Parent argues that MEVA failed to provide modified and accessible materials from the Student's English class. The Student's case manager and the Parent have developed a system for regularly modifying general education materials and providing those materials to the Student in a format that complies with the "presentation of materials" requirements listed in the Student's IEP. For example, the power point slides from English class are converted to open dyslexic font, and any distractions must be removed entirely from the individual slides (such as images or graphics or unnecessary words). The case manager emails those materials to the Student's Ed Tech, the Parent, and the Student, and the case manager also prepares a printed binder with the same materials to mail to the Student to allow for a multi-sensory learning experience.

Although the Parent has expressed frustration about MEVA's inability to maintain a timeline for the production of these materials, all parties agree that the Student never reached a point in modified curriculum where could not continue because the materials had not arrived yet. The efforts of MEVA to transfer these materials both electronically and in print-form have continued during the COVID-19 pandemic, and although the Parent has ongoing concerns about the organization of the printed binder of materials and about the completeness of certain lessons, there is no basis to conclude that MEVA failed to provide the Student with access to modified English materials.<sup>12</sup>

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<sup>11</sup> The Student's IEP also includes a detailed list of supplemental aids, services, modifications, and/or supports for District-wide assessments and State assessments. Those items are not described here because they do not relate to any of the allegations. See Student's IEP dated November 6, 2019, amended on March 30, 2020. Additionally, according to Written Notice from the recent IEP Team meeting on May 29, 2020, numerous supplemental, aids, services, modifications, and/or supports are to be added to this list when the Student's amended IEP is created, including increased amount of weekly face-to-face Ed Tech III support, green screens for the Student's teachers, supportive teaching teaming for one hour per week, tool summary sheets for the Student's teachers, multi-sensory repetition elements, written words on the screen when the teacher is reading aloud, and Ed Tech III training for one hour per week in applicable programming for the Student.

<sup>12</sup> The Parent also expressed concerns about the slow delivery of an ASL curriculum for both the Student and the Student's Ed Tech, but those materials are not specifically provided for in the Student's IEP, and the materials are likely to arrive prior to the time when the Student needs them for a fall ASL course hopes to take in the community.

With respect to supplies and technology, the parties have not provided any specific information for the complaint investigator to conclude that MEVA has not implemented the Student's IEP fully with regards to these items. MEVA has provided the supplies and technology set forth in the IEP, and MEVA has provided the Parent and the Student with multiple opportunities for input regarding how each purchase can best serve the Student's individual needs. The Parent has expressed frequent disappointment about various items being delayed, such as a larger computer monitor and a FM system compatible with the Student's new hearing aid. However, all items discussed by the IEP Team were eventually ordered and delivered, following a purchasing process where MEVA's business manager, CFO, and accountant approved the individual orders. While delays did occur, none of the items that were delayed have prevented the Student from accessing FAPE.

The Parent contends that the Student was not provided with support staff, as required by IEP, and that the Student's Ed Tech did not receive proper training, as required by the Student's IEP. There was a three-week delay in the provision of face-to-face Ed Tech services at the start of the 2019-2020 school year.<sup>13</sup>

MUSER IX(3)(B)(3) provides, "All identified children with disabilities shall have a current Individualized Education Program in effect at the start of each school year. If a school unit is unable to hire or contract with the professional staff necessary to implement a child's Individualized Education Program, the SAU shall reconvene an IEP Team to identify alternative service options."

In the present situation, however, the Student's Ed Tech was already hired by the start of the 2019-2020 school year, and moving through the background check and training process with MEVA. For those first three weeks, the Student was provided with the next best alternative – a dedicated, 1:1 Special Education teacher to support the Student virtually for the first three weeks of school.

When the Student's Ed Tech was able to begin, was properly certified and trained by MEVA.<sup>14</sup> MUSER X(2)(5) provides,

"Qualified staff. Special education and/or related services provided to a child with a disability shall be considered as a part of the child's special education program, shall be specified in the child's IFSP/IEP and shall be provided by appropriately certified education personnel, or licensed contractors."

There is no finding or determination that MEVA failed to provide qualified staff to deliver the Student's services.

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<sup>13</sup> The Student began school on September 3, 2019, and did not have in-person adult support available until September 27, 2019.

<sup>14</sup> The Parent has raised multiple concerns about whether the Student's Ed Tech was trained on particular concepts central to the Student's IEP or regarding curriculum that was specific for the Student. However, the individual decisions about how to train personnel is a matter for MEVA to determine, outside of the IEP process.

Separately, the Parent alleges that MEVA has failed to provide the Student with in-person Ed Tech support between March 16, 2020 and the present, and this denial of support services has resulted in the denial of a free appropriate public education for the Student. While there is no question the COVID-19 pandemic has rendered MEVA unable to implement face-to-face adult support, MEVA maintains a responsibility to provide the Student with a free and appropriate education during these unprecedented times. However, by necessity, the provision of FAPE may appear different during mandatory periods of social distancing than the provision of FAPE during a regular school year. During the pandemic, MEVA has offered to provide continued specially designed instruction with ongoing virtual Ed Tech support and 1:1 virtual support from the Student's Special Education teacher.<sup>15</sup> MEVA has also continued to provide the Student with accessible educational materials, related services, and necessary supplies and technology. The Student's IEP team has continued to meet frequently to discuss new ways to best address the Student's needs during these uncertain times (such as the decision to provide green screens to all the Student's providers during the May 29, 2020 IEP Team meeting).

According to Written Notice from the April 30, 2020 IEP Meeting, the IEP Team has already concluded that, if in-person Ed Tech services cannot be provided to support the Student's ESY curriculum, compensatory services will be provided for the Student at the conclusion of social distancing requirements. Considering all these efforts, and without even allowing MEVA the opportunity to follow-through with a plan for compensatory services when in-person adult support becomes possible again, it would be premature to issue a finding that the Student has not received a free appropriate public education during the COVID-19 pandemic.

Finally, the Parent asserts that ESY services should have been implemented in the summer of 2019. While it is accurate that the Student's neuropsychological evaluation from 2019 recommended that the Student participate in "year-round" schooling, there was no decision made by the IEP Team in May 2019 to add ESY services to the Student's IEP. Both the Student's IEP and the Written Notice from May 2019 support this conclusion, and despite regular email communications between the Parent and various IEP Team members, none of the emails discuss or reference ESY services during summer 2019.<sup>16</sup> As such, there was no failure by MEVA to implement ESY services during the summer of 2019.

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<sup>15</sup> The Parent and the Student have periodically declined those services due to the reduced benefit to the Student and due to the increased screen-time such interactions would require. However, at other times, the Parent and the Student have elected to take advantage of these services and supports.

<sup>16</sup> The IEP Team has, however, decided that the Student will receive ESY services during the summer of 2020.

- B. The Student's IEP did not consider the full academic, developmental, and functional needs of the Student. Specifically, the Student's IEP does not address recent diagnosis of dysautonomia/(POTS) and associated academic, developmental, and functional needs as a result of this diagnosis. See MUSER IX(3)(C)(1)(d). **COMPLIANCE FOUND.**

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

While MEVA developed a Section 504 Plan for the Student after was diagnosed with dysautonomia/POTS in January 2020, the Parent feels strongly that the Student's IEP is incomplete without addressing the Student's significant medical needs that directly interfere with ability to learn. However, Student's current IEP already encompasses all of the academic, developmental, and functional needs of the Student that result from medical diagnosis of dysautonomia/(POTS). The 504 plan calls for: a modified school day, a prioritization of core academics during optimal learning time, frequent breaks, and adjustments to the Student's curriculum as needed for possible comprehension struggles.

The Student is already classified for special education services under the "Other Health Impairment" category, and IEP already requires an abbreviated and flexible school day, specially designed instruction in English and Math, 1:1 adult support that adjusts to the Student's desired pace, and frequent checks for understanding to ensure comprehension. Therefore, all of the components of the Student's 504 plan related to dysautonomia/(POTS) are already incorporated currently in the Student's IEP dated November 6, 2019, amended on March 30, 2020 and on April 30, 2020.

Additionally, at the most recent IEP meeting, held on May 29, 2020, at the request of the Parent, the Team agreed to formally incorporate the Student's dysautonomia/POTS into IEP and to provide a number of additional accommodations to address the Student's medical needs related to dysautonomia/(POTS). In conclusion, the Student's IEP addresses recent diagnosis of dysautonomia/(POTS), as well as associated academic, developmental, and functional needs as a result of that diagnosis.

- C. MEVA did not allow the Student's parent a full opportunity to participate in multiple IEP Team meetings. Specifically, parent participation has been restricted due to the following: (a) MEVA set a time limit on discussions at IEP meetings; (b) MEVA set a limited agenda for topics of discussion at IEP meetings; (c) MEVA did not communicate transparently at IEP meetings with the Student's parent about the IEP process and about information used to inform IEP team

decisions. See MUSER VI(2)(H); MUSER VI(2)(B)(I). **COMPLIANCE FOUND.**

Parents are key players in the IEP Team Process. MUSER VI(2)(I) outlines the IEP decision making process as follows:

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to make joint, informed decisions regarding: (1) the children's needs and appropriate goals; (2) the extent to which the child will be involved in the general curriculum and participate in the regular education environment and State and district-wide assessments; and (3) the services needed to support that involvement and participation and to achieve agreed-upon goals. Parents are considered equal partners with school personnel in making these decisions, and the IEP Team must consider the parents' concerns and the information that they provide regarding their child in determining eligibility; developing, reviewing, and revising IEPs; and determining placement. See also MUSER VI(2)(B)(I).

By all accounts from the Student's IEP Team members, the Parent has played a very central role in the IEP decision-making process. Additionally, all Team members believe that the Parent's voice is being heard during IEP discussions and decisions. While the Assistant Director of Special Education/Student's Case Manager acts as the facilitator and presents agenda items for discussion at IEP Team Meetings, the Parent has a full opportunity to provide input on the agenda of each IEP meeting. Furthermore, members of the IEP team are permitted to raise topics outside the scope of the agenda, when necessary. Many of the IEP Team meetings have exceeded the two-hour goal for the meeting's length, and there was no indication in Written Notices of in the audio/video recordings that the Assistant Director of Special Education had a practice of terminating relevant discussion due to an arbitrary time-limit for the meetings.

The Student's IEP Team has met six times during the 2019-2020 school year, oftentimes at the request of the Parent, with plans to meet again in July 2020. These meetings have allowed the Parent to fully participate in the IEP decision making process as designed by the MUSER.<sup>17</sup> Therefore, MEVA has complied with law and regulations regarding this allegation.

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<sup>17</sup> The Parent was taken aback by information that the Head of School/Director of Special Education shared during the April 17, 2020 IEP meeting that the DOE advised her that MEVA was not permitted to hire the Parent to serve as the Student's Ed Tech III during the COVID-19 pandemic. Because the Director did not share the source of this information, the Parent felt she was unable to properly respond. Nevertheless, the discussion in question is well outside the scope of MUSER and within the purview of MEVA's personnel decisions. As such, this concern cannot be addressed here.

- D. MEVA did not amend information contained in Written Notices, alleged to be inaccurate or misleading, at the request of the Student's parent within a reasonable period of time, or else notify the parents of its refusal to do so. See MUSER XIV(8); MUSER App. 1 at 220; 34 CFR 300.503(9). **COMPLIANCE FOUND.**

MUSER XIV(8) provides parents with the right to seek the correction of educational records that are inaccurate or misleading. Once a parent has made a request for an amendment, the District must either decide amend the information, as requested, within a reasonable period of time, or inform the parent of the refusal to amend.

In the present case, the Parent sought to add information to the Written Notice from the IEP Team Meeting on March 27, 2020, and the Parent also requested that the Student's IEP Team reconvene to correct the perceived omission. MEVA granted the Parent's request for another meeting, which was scheduled shortly thereafter on April 17, 2020, and based on the discussion at the second meeting, MEVA agreed to amend Written Notice from March 27, 2020 as the Parent requested. This was done promptly and reasonably, and as such, MEVA has complied with both law and regulation regarding the accuracy of the Student's educational records.<sup>18</sup>

## **VII. Corrective Action**

As this complaint investigation has found no violations, no corrective action is required.

Dated: June 12, 2020

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Julia N. Pothen, Esq.  
Complaint Investigator

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<sup>18</sup> Notably, the requirements of Written Notice, as outlined by MUSER App. at 220, do not require that Written Notice serve as a transcript for each discussion that occurred an IEP meeting. However, because MEVA agreed to amend Written Notice as requested by the Parent after the IEP Team Meeting on April 17, 2020, this report does not further analyze whether the requested information was necessary to meet the formal requirements of Written Notice.