

Complaint Investigation Report

v. MSAD 61

December 4, 2020

Complaint # 21.013C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: October 13, 2020

I. Identifying Information

Complainant:

Respondent: Maine School Administrative District (“MSAD”) 61
Alan Smith, Superintendent
1435 Poland Spring Road
Casco, ME 04015

Lisa Caron, Director of Special Services

Student:

II. Summary of Complaint Investigation Activities

On October 2, 2020, the Maine Department of Education received this complaint. The complaint investigator was appointed on October 3, 2020. Therefore, the current investigation covers the period of October 2, 2019 to present. See MUSER XVI(4)(B)(3).

The complaint investigator received 227 pages of documents from MSAD 61 (the “District”). The investigator also received 216 pages of documents from the complainant, along with seven audio files, comprising approximately 3 hours and 52 minutes of recorded IEP Team Meetings. Interviews were conducted with the Student’s parents (“Parents”) on November 5, 2020 and November 18, 2020. Between November 13, 2020 and November 16, 2020, the following staff members from the District and from School were interviewed: the Director of Special Services, the Principal, the Assistant Principal, three of the Student’s Special Education teachers, two of the Student’s General Education teachers, the School Psychologist, the Student’s

Occupational Therapist, and the Student's Speech and Language Pathologist.¹ The complaint investigator reviewed all documents, emails, audio recordings, and information obtained through interviews, as well as the responses provided by the Parties to complete this complaint investigation.

III. Preliminary Statement

The Student is nine years old, and is in the second grade. The Student attends Elementary School in , Maine. was retained in Kindergarten, and at the request of parents, the Student was retained again after the 2019-2020 school year. Therefore, the Student is currently repeating the second grade. The Student lives with parents ("Parents") in , Maine, and qualifies for special education and related services under the "Other Health Impairment" category, based on diagnosis with Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Presentation. The Student's disability has a significantly adverse impact upon education and cognitive abilities.

The present complaint was filed by the Parents, alleging that the District has 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 October 16, 2020, alleging four violations of the MUSER. A telephonic Complaint Investigation Meeting was held on October 19, 2020.

IV. Allegations

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

- A. The District has not fully implemented the Student's IEP during the 2020-2021 school year, particularly with regards to Specially Designed Instruction for Math and Executive Functioning. MUSER IX(3)(B)(3).
- B. The District did not fully implement the Student's IEP between March 2020 and the end of the 2019-2020 school year, particularly with regards to Specially Designed Instruction and Speech and Language related services. MUSER IX(3)(B)(3).

¹As 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.

- C. The District did not develop an IEP that provides special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children. MUSER IX(3)(A)(1)(d); MUSER IX(3)(D). In particular, the IEP does not include increased services as recommended by the Student's Occupational Therapy evaluation. Additionally, the Student's IEP did not include Extended School Year services at the end of the 2019-2020 school year. MUSER IX(3)(A)(1)(b); MUSER IX(3)(A)(1)(d).
- D. The District made changes to the Student's IEP outside the IEP Team process without an agreement between the District and the Student's parents that an IEP meeting was unnecessary. MUSER IX(3)(C)(4).

V. Factual Findings

- 1. The Student is nine years old, and is in the second grade. The Student resides with Parents in , Maine.
- 2. The Student attends School in , Maine. The District maintains educational responsibility for the Student.
- 3. The Student was retained after Kindergarten year, and the Parents requested that the Student be retained again in second grade after the 2019-2020 school year. The Parents felt strongly that the Student should be retained again because was not achieving at grade level standards by the conclusion of the 2019-2020 school year. The administrators at School initially disagreed, arguing that the Student made exceptional progress towards IEP goals and towards grade level benchmarks during the 2019-2020 school year. The School staff also raised concerns that retention could have an adverse impact on the Student's social-emotional growth, particularly since the Student had been previously retained in Kindergarten. However, on June 9, 2020, the Principal of School notified the Parents that, due to the Parents' strong preference for retention, she would support the Student remaining in second grade during the 2020-2021 school year.
- 4. The Student qualifies for special education and related services in the "Other Health Impairment" category. The Student presents with significant Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Presentation, that has an adverse impact on education.

5. The Student's most recent educational assessments were conducted on March 16, 2020 by the School Psychologist.² As measured by the Weschler Intelligence Scale for Children – Fifth Edition (WISC-V), the Student's overall intellectual functioning falls within the 'Low' range (Full Scale IQ = 70; 2nd percentile). The Student was assessed in the 23rd percentile for verbal comprehension index, the 14th percentile for visual spatial index, the 3rd percentile for fluid reasoning index, the 0.2 percentile for processing speed, and the 0.3 percentile for working memory index. See Psychoeducation Evaluation, dated March 16, 2020.
6. The Student's academic achievement testing was also completed on March 16, 2020. The Student was administered the Feifer Assessment of Reading (FAR), and total index score fell into the 'Very Low' range compared to peers (1st percentile). On the Kaufman Test of Educational Achievement – Third Edition (KTEA-3), the Student's written language standard score was in the 'Low Average' range (Standard Score = 80; 9th percentile). Finally, the Student was administered the Feifer Assessment of Math (FAM), and total index score fell into the 'Low' range compared to peers (3rd percentile). Id.
7. The Student's behavior rating scales completed by the Student's teachers and Parent for the Psychoeducational Evaluation also suggested that the Student "struggles to sustain attention, has high activity levels, and displays weak executive functioning skills in school setting." As a result, the evaluator concluded that the Student continues to meet the criteria for a student with ADHD-Combined Presentation that impacts the Student's academic progress. Id.
8. The Student's most recent Individualized Education Program ("IEP"), dated April 14, 2020, as amended on November 5, 2020, provides for 5 x 60 minutes per week of Specially Designed Instruction ("SDI") for Reading, 5 x 60 minutes per week of SDI for Math, 5 x 30 minutes per week of SDI for Writing, and 5 x 30 minutes per week of SDI for Executive Functioning.³ See Student's IEP, dated April 14, 2020, as amended on November 5, 2020.

² The evaluator expressed significant concerns that the results of the Student's most recent Psychoeducational Evaluation are an underestimate of the Student's abilities. The evaluator observed a number of interfering behaviors during testing that were likely related to the Student's disability, including the Student's difficulty sustaining attention during the evaluation tasks, frequent talking and fidgeting in the middle of tasks, standing up to walk around the table during the evaluation, and the Student's need for repeated reminders (and eventually a positive behavior incentive) to remember to look consistently at the stimulus book.

³The Student receives the entirety of math SDI in a co-taught classroom with general education and special education teachers. The Student also receives a portion of executive functioning SDI in a co-taught classroom with general education and special education teachers.

9. Additionally, the Student receives 1 x 30 minutes per week of Occupational Therapy. Overall, the Student's IEP specifies that the Student currently spends 68% of educational time with non-disabled children. Id.
10. The Student's IEP also requires a number of supplementary aids, modifications, accommodations, and services, including, but not limited to, modeling of correct production of sounds across environments, prompting articulation and the use of conversational repair strategies, extra time for processing directions, preferred seating, positive reinforcement for work completion, the use of a wiggle seat & gum as needed, small group instruction with no more than three students, and various assessment accommodations. Id.
11. The Student entered School in the fall of 2016 for Kindergarten. transitioned from Child Development Services and was identified as a student with Multiple Disabilities due to a Speech-Language impairment and developmental delays. The Student initially received special education instruction in a self-contained classroom, but in March of 2017, the Student's IEP Team determined had made significant language, social, and behavioral gains. The IEP Team determined the Student would benefit from a less restrictive environment and more interaction with typically developing peers. Id.; Interviews with Parents on November 5, 2020 & November 18, 2020.
12. In the fall of 2017, the Student was retained in Kindergarten. Id.
13. In May 2017, the Student was reevaluated as part of triennial evaluations, and was diagnosed with Attention Deficit Hyperactivity Disorder, Combined Presentation. The IEP Team determined, based on the new evaluation, that the Student no longer met the criteria for Multiple Disabilities, and the IEP Team changed the Student's identification to "Other Health Impairment," due to ADHD that adversely impacts the Student's education. Id.
14. The Student continued to receive special education (both specially designed instruction and other related services) during first and second grade years. See Interviews with Parents on November 5, 2020 & November 18, 2020; Interview with the Director of Special Services on November 13, 2020.
15. On October 23, 2019, near the beginning of the Student's second grade year, the Student's IEP Team met to review a recent Occupational Therapy evaluation conducted by the District, dated October 9, 2019. The OT evaluation indicated that the Student had "some difficulty in the areas on sensory processing, visual

perception, and fine motor control.”⁴ The evaluator noted that the Student broke pencil on two occasions during the evaluation due to putting increased pressure on pencil while writing. The evaluation did not recommend a specific amount of OT related serviced for the Student, but the evaluation recommended a number of interventions and accommodations to be considered across all the Student’s learning environments. See Occupational Therapy Evaluation by Erin Jackson, Occupational Therapist R/L, dated October 9, 2019.

16. Based on the results of the OT evaluation described above, the Parents requested that the IEP Team add related services of 3 x 30 minutes per week of Occupational Therapy to the Student’s IEP. Instead, the evaluator recommended that the Student receive 1 x 30 minutes per week of OT. The Written Notice from the IEP Meeting on October 23, 2019 provides, “[The Parents’ request] was rejected due to [the Student’s] level of need does not warrant that amount of therapy and missing critical classroom instruction.” Because consensus could not be reached by the IEP Team, the District made the determination that the Student’s IEP should include 1 x 30 minutes per week of OT. See Written Notice from IEP Team Meeting on October 23, 2019; Student’s IEP dated June 10, 2019, as amended on October 23, 2019.⁵
17. During the same IEP Meeting, the Parents requested a discussion about the Student’s IEP goals, but the IEP Team facilitator stated that another IEP Team Meeting could be scheduled to discuss topics outside the scope of the IEP Team’s agenda, which only included reviewing the OT evaluation and possible OT services. See Written Notice from IEP Team Meeting on October 23, 2019.
18. Further, at the October 23, 2019 IEP Meeting, the Parents requested that the Student’s teachers begin using a “communication notebook” between school and home to provide more information about the Student’s progress with teachers and various related service providers. The Parents wanted to be better informed about the Student’s progress and services to support the Student at home, and the Student’s teachers agreed to utilize the communication notebook for school-to-home notes. See Written Notice from IEP Team Meeting on October 23, 2019.

⁴ During the OT evaluation, the Student used right hand to complete writing tasks, even though the Student is left-handed. The evaluator later explained to the IEP Team that testing protocol prevents the evaluator from correcting a student who is not writing with or her preferred hand during the assessment.

⁵ The Student’s IEP dated June 10, 2019, as amended on October 23, 2019, included 5 x 60 minutes per week of SDI in Reading; 5 x 60 minutes per week of SDI in Math; 5 x 60 minutes per week of SDI in Executive Functioning, and 5 x 30 minutes per week of SDI in Writing. The IEP also provided for 3 x 180 minutes per week of ESY services from July 8, 2019 to August 9, 2019, as well as 3 x 30 minutes per week of Speech and Language services and 1 x 30 minutes per week of OT services.

19. After October 23, 2019, the Parents and the Student’s teachers and related service providers began relaying information daily in the communication notebook, as discussed during the IEP Team Meeting. See Select daily notes from the communication notebook provided by the Parents, dated October 29, 2019 through March 3, 2020. The Student’s teachers and related service providers often wrote comments about the Student’s daily schedule, along with notes about the specific skills the Student was working towards. Id. The Parents reported to the complaint investigator that the information provided in the communication notebook was initially very robust and very helpful. See Interviews with Parents on November 5, 2020 & November 18, 2020.
20. The Parents also noticed that, according to the entries in the communications notebook, the Student was missing a significant number of Speech and Language sessions due to snow days, scheduling conflicts, and absences/unavailability of the Student’s Speech and Language pathologist. After making this observation, the Parents made inquiries in the communication notebook about when the Student’s Speech and Language sessions would be made-up, and the Parents contacted the Director of Special Services about missed Speech and Language sessions. Id. The Parents also used the communication notebook to request additional details about the Student’s progress towards IEP goals and towards grade level benchmarks. See Select daily notes from the communication notebook provided by the Parents, dated October 29, 2019 through March 3, 2020; Interview with Parents on November 5, 2020 & November 18, 2020.
21. During their interviews with the complaint investigator, the Parents expressed frustration that the volume of communication in the notebook suddenly decreased in December 2019.⁶ The Parents believe that was related to an email they received from the Director of Special Services on November 26, 2019. The Director stated, “[T]he questions being written in [the Student’s] home/school notebook will be answered at the IEP Team meeting as they are beyond the scope of home/school communication.” See Email from the Director of Special Services on January 2, 2020, quoting her previous email from November 26, 2019. On January 2, 2020, the Director of Special Services emailed the Parent again regarding the communication notebook, stating, “The type of information you are requesting staff to write in the notebook is unfortunately, beyond the scope of a

⁶ Copies provided by the Parents of select sections of the Student’s communication notebook indicate that the Student’s teachers and related service providers began providing significantly less detail about the Student’s specific daily learning activities during the first week of December 2019. The communications provided after that (between December 2019 and March 2020) largely reflect a simple list of the Student’s schedule, whereas prior communications in October and November 2019 often included more detailed descriptions of the classroom activities and the specific skills the Student was working towards.

- home/school notebook. [The Student’s] IEP details the special education goals that staff are addressing with and you receive progress reports on a regular basis about growth toward these goals...asking staff for the amount of detailed information on a daily basis is not reasonable.” Id.
22. Each of the Student’s teachers and related service providers was interviewed separately by phone. Every teacher reported genuine efforts to provide as much information as possible in the Student’s communication notebook between October 2019 and March 2020; however, the Student’s teachers also stated that they could not find sufficient time during the school day to add as much detail to the communication notebook as the Parents were requesting.⁷
23. The IEP Team did not reconvene for a program review until January 15, 2020.⁸ As a result of the Student’s significant progress towards a number of IEP goals, the Team agreed on January 15, 2020 to amend and update IEP goals. See Written Notice for the IEP Team Meeting on January 15, 2020.
24. At the January 15, 2020 IEP Meeting, the Parents also requested that the Student’s OT services be increased to two sessions per week, but the Student’s OT provider felt that the Student was making great progress with one OT session per week. The OT provider also observed the Student demonstrating the ability to carryover skills from OT sessions into classroom work. Since consensus still could not be reached on this issue, the District determined that the Student’s services would remain the same, in line with the recommendations of the Student’s therapist. Id.; see also Audio Recording of the IEP Team Meeting on January 15, 2020.
25. Additionally, the Parents requested a physical therapy (“PT”) evaluation, and the IEP Team agreed to order a PT evaluation. Finally, the Parents requested that the Student’s triennial evaluations (due by May 22, 2020) be completed as soon as

⁷ During interviews with the complaint investigator, all the teachers confirmed that they never felt pressure from the school staff or from District staff to decrease or limit communication with the Student’s parents in the communication notebook. Instead, the Student’s teachers reported that they were unable to keep up with the volume of daily communication requested by the Parents, and as a result, the communications in the notebook became more streamlined over time by necessity, purely due to time constraints in the teachers’ schedules.

⁸ According to emails provided to the complaint investigator, the Director of Special Services initially emailed the Parents on November 26, 2019, offering three possible dates in December 2020 (December 11 at 10:00am, December 16 at 8:00am, and December 18 from 12:30pm to 1:30pm) for an IEP meeting to follow-up on the requested changes to the Student’s IEP goals. The Parents requested an afternoon meeting time due to their work schedules, and the Parents requested more than one hour be set aside for the meeting “since there are multiple issues that need to be worked out to get things moving in the right direction.” See Emails between Parents and the Director of Special Services, dated November 26, 2019 to December 18, 2019. The next available IEP meeting time offered by the District was January 15, 2020.

possible, and the IEP Team agreed to expedite the evaluation process. See Written Notice for the IEP Team Meeting on January 15, 2020.

26. Notably, there was considerable disagreement between the IEP Team members during the January 15, 2020 IEP Team Meeting, with the Parents' advocate and the District's attorney interjecting frequently. The Parents and their advocate were largely focused on the Student's limited progress towards grade-level benchmarks, while other members of the IEP Team sought to measure the Student's progress towards specific IEP goals with consideration for unique circumstances as a learner. By the conclusion of the IEP Meeting, there was even disagreement about which reevaluations the Parents were willing to consent to and which evaluations the Parents planned to seek from outside providers. As a result, the Parents did not consent to reevaluations for OT and Speech and Language. See Written Notice for the IEP Team Meeting on January 15, 2020; Audio Recording of the IEP Team Meeting on January 15, 2020; Parent Consent for Evaluation Form, dated January 15, 2020.

27. On February 10, 2020, the Parents obtained an outpatient Occupational Therapy Evaluation at the Scarborough Neurodevelopment Center.⁹ The new OT evaluation concluded that the Student "would benefit from occupational therapy services to improve self-regulation skills, fine motor skills, hand strength, bilateral coordination skills, and visual-perceptual skills." See Outpatient Occupational Therapy Evaluation by Marijana Mitrovic, Occupational Therapist R/L, dated February 10, 2020. The evaluator recommended 2 x 30 minutes per week of OT services for the Student. Id.

28. On March 16, 2020, School, like all schools across the State of Maine, was forced to close entirely between March 16, 2020 and March 20, 2020 due to the national and emergency caused by the COVID-19 pandemic. See District's Response to Complaint 21.013C.

29. A week later, on March 23, 2020, School began providing alternative remote learning opportunities for all students, including all special education students. Special education students were provided with various combinations of synchronous and asynchronous Specially Designed Instruction and related services. Id.

⁹At the January 15, 2020 IEP Team Meeting, the Assistant Principal requested that the Parents allow outside evaluators to communicate with the school providers/evaluators. The Parents' advocate declined. There is no indication from the Occupational Therapy Evaluation by Marijana Mitrovic, OTR/L, that she received information from or communicated with the Student's OT provider at school.

30. Beginning on or around March 23, 2020, the Student began receiving synchronous and asynchronous Specially Designed Instruction from special education teacher. More specifically, the Student initially received written packets of academic work from general education teacher to complete. These initial packets of academic work were supplemented with assignments and materials provided by the Student's special education teacher to address unique needs. On or around March 23, 2020, the Student also began working remotely, one-on-one with special education teacher for 60 minutes each day, receiving synchronous specially designed instruction over the computer. Id.; see also Interviews with Parents on November 5, 2020 & November 18, 2020.
31. During an interview with the complaint investigator, the Student's special education teacher provided further details about the Student's remote learning schedule that commenced on or around March 23, 2020. The Student's teacher met with the Student online for 60 minutes each Monday, Wednesday, and Friday to deliver synchronous reading and writing instruction. On Tuesday and Thursday, the Student's special education teacher met with the Student online for 60 minutes to deliver synchronous math and executive functioning instruction.¹⁰ All synchronous learning sessions between March 23, 2020 and June 5, 2020 provided 1:1 instruction for the Student. teacher also confirmed that she provided also asynchronous instruction through the Student's specially designed google classroom work, which included independent reading, writing, math, and executive functioning assignments.¹¹ See Interview with Student's Special Education Teacher during the 2019-2020 school year on November 13, 2020.
32. Overall, the Student's special education teacher reported that the Student remained attentive and motivated during the entire period of remote learning, and she noted that the Student received exceptional support from the Parents. The Student always arrived on time to remote synchronous learning sessions, prepared to learn and engage, and a parent was often seated right beside the Student to assist as needed by the teacher. Further, the Student successfully submitted independent work in google classroom, indicating that the Student also received considerable support from the Parents during asynchronous learning. Finally, the Student's special education teacher reported that the

¹⁰ The Student's special education teacher noted that she roughly followed the schedule for providing reading and writing on Monday, Wednesday, and Friday and math and executive functioning on Tuesday and Thursday. The Student's teacher adjusted the schedule as necessary to best meet the Student's needs as reflected by progress and completion of asynchronous assignments.

¹¹The Student was also provided with access to synchronous distance learning opportunities with general education teacher between March 2020 and the end of the 2020-2021 school year. However, it is unclear how often the Student was able to access these resources due to conflicts between synchronous SDI sessions and online sessions with general education teacher.

- Student continued to progress towards IEP goals during synchronous and asynchronous learning between March 23, 2020 and the end of the 2020-2021 school year, and did not display any indications of regression or stagnation as a result of remote learning. Id.
33. The Student's special education teacher attributed the Student's continued academic growth to the Student's dedication to remote learning, to the support provided by the Parents, to the Student's ability to navigate technology, and to the 1:1 student-teacher ratio the special education teacher was able to provide for daily synchronous SDI sessions. In sum, despite the necessary changes in her delivery model for the Student's services during the pandemic, the Student's special education teacher reported with full confidence that she was able to deliver the same high quality special education services to the Student via synchronous and asynchronous instruction as she would have delivered to the Student in the absence of the COVID-19 pandemic. Id.
34. Beginning on or around March 30, 2020, the Student began receiving Speech and Language teletherapy two times per week for 30 minutes per session. During an interview with the complaint investigator, the Student's Speech and Language pathologist explained that, due to scheduling constraints related to the COVID-19 pandemic, she was unable to deliver three online 30-minute sessions per week of teletherapy. The Student also began receiving Occupational Therapy teletherapy one time per week for 30 minutes per session, in full accordance with IEP.
35. In a letter from the Director of Special Services on April 1, 2020, families of special education students were told that teachers and service providers were working diligently to make sure students could continue "to benefit meaningfully from the programming." The letter also stated, "We continue to monitor the guidance from the Maine and the U.S. Departments of Education. We have been advised that there is no obligation to provide an exact replica of each student's IEP and that to do so is simply impractical. Once this state of emergency is resolve and schools are reopened, we will revisit your child's needs and make appropriate determinations." See Letter from Special Services Department to Parents, dated April 1, 2020.
36. On April 14, 2020, the IEP Team reconvened virtually on Zoom for the Student's annual review and to review the Student's new evaluations, including Psychoeducational Evaluation. See Written Notice for the IEP Team Meeting on April 14, 2020.

37. The Parents again requested to increase the Occupational Therapy sessions to 2 x 30 minutes per week, as recommended by the Student's new, independent OT evaluation, dated February 15, 2020. However, the other IEP Team members agreed with the Student's OT provider, who recommended that OT services remain at 1 x 30 minutes per week because the Student was making adequate progress towards goals (as measured by all three of OT evaluations within the past 9 months). Since consensus on this issue still could not be reached, the District determined again that OT services would remain at 1 x 30 minute session per week. Id.
38. The IEP Team also reviewed a Speech and Language evaluation obtained by the Parents through an outside evaluator, dated August 26, 2020, which recommended that the Student receive 4 x 30 minutes per week of Speech and Language services. The Student's Speech and Language pathologist recommended that the school also complete a Speech and Language reevaluation because the outside evaluation did not utilize the most updated assessment tools. The Parents verbally consented to the school performing a Speech and Language reevaluation. Id.
39. Much like the previous meeting, the April 14, 2020 IEP Team Meeting was very contentious. There were heated disagreements about the mute function during a Zoom meeting, about the agenda,¹² about whether prior parental consent had already been provided for the District to conduct a Speech and Language reevaluation, and about the time limit for the meeting. Again, the District's attorney and the Parents' advocate interjected frequently, and consensus was not reached on multiple issues. Due to time constraints, the IEP Team was unable to start a discussion about the new IEP. The facilitator suggested scheduling another IEP meeting after the April vacation to discuss a draft IEP that would be emailed to the IEP Team in advance of the next meeting. The Parent was frustrated by the delay, requesting a firm date by which the draft IEP would be shared. See Audio Recording for IEP Team Meeting on April 14, 2020; Written Notice for the IEP Team Meeting on April 14, 2020.
40. On May 13, 2020, a draft IEP was shared with the Parent by email. See Written Notice form the IEP Team Meeting on May 27, 2020.
41. The IEP Team reconvened on May 27, 2020 to review the draft IEP. The Parent expressed serious concerns that Extended School Year ("ESY") Services were not reflected on the draft IEP, particularly since the Student demonstrated a

¹² The Parents wished to discuss the provision of a school laptop and the Student's retention in second grade, but the District staff insisted those items were not pertinent to the IEP team.

significant regression between kindergarten and first grade, but did not experience regression between first and second grade when was provided with ESY services. The Parent also expressed concerns about the Student's possible regression during remote learning between March 23, 2020 and the end of the 2020-2021 school year. The IEP Team members reviewed data about the Student's progress towards IEP goals during second grade between September 2019 and March 2020. The Student's special education teacher also presented data that the Student did not demonstrate any regressions of skills, nor did the Student require an extended period of time for recoupment of skills, following school breaks in December 2019 and February 2020. When consensus was not reached, the District determined that the Student was not eligible for ESY services.¹³ See Written Notice for the May 27, 2020 IEP Team Meeting; Audio Recording of the IEP Team Meeting on May 27, 2020.

42. At the conclusion of the May 27, 2020 IEP Team Meeting, the Parent requested that the IEP Team's ESY determination be revisited after the Student's end of year assessment were completed. Multiple individuals, including the Director of Special Services and the Attorney for the District, informed the Parent that the IEP Team would not be discussing the ESY issue further during the May 27, 2020 meeting. Id.
43. In keeping with the tone of previous IEP meetings, the May 27, 2020 meeting was largely uncollaborative. Disagreements continued about the mute function during a Zoom meeting, about whether the IEP Team could discuss retention of the Student in second grade, about the Student's related services, and about whether various comments and actions by IEP Team members were professional and/or appropriate. Again, the District's attorney and the Parent's advocate interjected frequently, and consensus was not reached on various issues. See Audio Recording for IEP Team Meeting on May 27, 2020; Written Notice for the IEP Team Meeting on May 27, 2020.
44. Following the May IEP Meeting, the Parent continued to request that the Student be retained in second grade. After additional meetings between the Parents and school administrators, the Principal notified the Parent on June 9, 2020 that the school would support the Parents' request to retain the Student in the second

¹³ During the May 27, 2020 meeting, the Parent also requested increased time for Occupational Therapy and Speech and Language services. The Team could not reach consensus on those issues, either. The District determined that OT services would not be increased and that additional direct Speech and Language services were not warranted. The IEP Team did reach consensus to add 15 minutes per month of consultation services for Speech and Language. See Written Notice for the May 27, 2020 IEP Team Meeting; Student's IEP dated April. 14, 2020, as amended.

grade for the 2020-2021 school year. See Letter from Principal to Parents, dated June 9, 2020. This decision was made outside the IEP Team process, as prescribed by the District's policy regarding student retention.

45. At the end of the 2019-2020 school year, the District and the Parents remained in disagreement about whether all Speech and Language services had been provided by the District in accordance with the Student's IEP. The District has acknowledged that the Student's Speech and Language pathologist was unavailable for a number of sessions during the 2019-2020 school year, but the District has submitted documentation establishing that, as of June 5, 2020, all missed Speech and Language sessions have been made up. During the 2019-2020 school year, the District documented a total of 12 missed Speech and Language sessions due to absences/unavailability of the Speech and Language pathologist (9/9/19, 10/8/19, 11/4/19, 11/21/19, 11/25/19, 11/26/19, 12/5/19, 1/2/20, 2/7/20, 4/2/20, 4/30/20, 5/26/20). Those sessions were made up with 12 extra Speech and Language sessions with the Student (9/25/19, 10/11/19, 1/8/20, 1/15/20, 1/22/20, 1/29/20, 2/5/20, 2/12/20, 2/26/20, 3/4/20, 5/6/20, 5/27/20).¹⁴
46. In multiple IEP Team Meetings, emails to the Director of Social Services, and in interviews with the complaint investigator, the Parents have argued that additional Speech and Language sessions are still owed to the Student. The Parents have not provided specific dates or numbers for those additional missed sessions, but the Parents base their count on the communication notebook, which detailed the Student's daily schedule between October 2019 and March 2020, including whether the Student attend Speech and Language services each day.¹⁵ See Select daily notes from the communication notebook provided by the Parents, dated October 29, 2019 through March 3, 2020.
47. Elementary School began the 2020-2021 school year on September 14, 2020. All parents of students in grades 2 to 5 were informed that the

¹⁴ Notably, the District documented a number of other sessions missed due to factors outside the control of the Speech and Language pathologist. For example, on September 23, 2019, the Student was unavailable due to ScanTron testing, a number of Speech & Language session dates fell on school holidays, and at least five Speech & Language sessions were missed due to snow days during the 2019-2020 school year. None of these sessions were made up by the District because these issues are built into the school year as unavoidable interruptions to instruction/services.

¹⁵ Based on interviews with the Parents and the Parents' own notations in the communications notebook, it appears that the Parents are reaching a different number of missed Speech and Language sessions than the District because the Parents are counting missed sessions on snow days. However, the Parents' position does not account for the fact that missed instructional time on snow days is made up (as necessary) at the end of the school year with additional school days. Excluding snow days and school holidays, the Parents' notations of missed session dates appear to be consistent with the list of dates provided by the District as "missed sessions." This supports the conclusion that the District's records are complete and accurate.

School would utilize a hybrid instructional model. Parents could opt for full-time remote instruction or for hybrid instruction, where students would attend school in-person for two days per week and receive remote synchronous and asynchronous instruction for three days per week.

48. The Parents opted to enroll the Student in the hybrid instructional model (as opposed to a fully remote instructional model).¹⁶ The Student currently attends school on Monday and Wednesday, and receives remote synchronous and asynchronous instruction on Tuesday, Thursday, and Friday.
49. The Student's IEP Team has not elected to create an Individualized Remote Learning Plan¹⁷ for the Student. Instead, the Student's IEP is being implemented in full during the hybrid instructional model. See Student's Hybrid Learning Schedule, effective September 24, 2020.
50. In terms of SDI for reading, the Student receives 90 minutes of SDI in-person on Monday and on Wednesday. On Tuesday and Thursday, receives remote synchronous reading SDI for 60 minutes each day. As a result, the Student receives the equivalent of 5 x 60 minutes per week of SDI in reading, and all of reading SDI is either in-person or synchronous with special education teachers. Id.
51. In terms of SDI for writing, the Student receives 30 minutes of SDI in-person on Monday and on Wednesday. On Tuesday and Thursday, receives remote synchronous writing SDI for 45 minutes each day. As a result, the Student receives the equivalent of 5 x 30 minutes per week of SDI in writing, and all of writing SDI is either in-person or synchronous with special education teachers. Id.

¹⁶ No students in the second grade at School, except second graders placed in a self-contained special education classroom, were given the opportunity to attend a full week of in-person learning. See District's Response to Complaint 21.013C.

¹⁷ An Individualized Remote Learning Plan ("IRLP") is defined by the Maine Department of Education as a "temporary plan describing changes to a student's IEP that are necessary to protect health and safety during the pandemic and provide a free appropriate public education." An IRLP is not required, but the Maine Department of Education has recommended the creation of an IRLP as a means for IEP Teams to navigate uncertainties related to the current pandemic. See Guidance Related to Individualized Remote Learning Plans at <https://www.maine.gov/doe/sites/maine.gov/doe/files/inline-files/IRLP%20Guidance%208-28-2020.pdf>; see also *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, dated March 12, 2020, Office of Special Education Programs at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf> ("IEP teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective school closure due to a COVID-19 outbreak.").

52. Looking at SDI for math, the Student currently receives 60 minutes of SDI in co-taught math classroom on Monday and Wednesday. On Tuesday, Thursday, and Friday, the Student receives remote synchronous math SDI for 30 minutes each day, and receives another 30 minutes each day of remote asynchronous math SDI. As a result, the Student receives the equivalent of 5 x 60 minutes per week of SDI in math; however, 90 minutes per week of total math SDI is provided through remote asynchronous assignments. Id.
53. Finally, considering the Student's SDI for executive functioning, currently receives 45 minutes of SDI in-person on Monday and Wednesday. A portion of SDI is received during a co-taught homeroom class with general education and special education teachers. On Tuesday and Thursday, the Student receives remote synchronous executive function SDI for 10 minutes each day and another 15 minutes each day of remote asynchronous executive function SDI. On Friday, the Student receives 10 minutes of remote asynchronous executive function SDI. In total, the Student receives the equivalent of 5 x 30 minutes per week of SDI in executive functioning; however, 40 minutes per week of total executive functioning SDI is provided through remote asynchronous assignments. Id.
54. The Parents feel strongly that the Student's asynchronous instruction does not satisfy the SDI required by IEP. However, the Student's current special education and general education teachers report that the Student is successfully completing the assigned work. During days when the Student attends school in-person, the Student receives math and executive functioning SDI in a co-taught general education classroom environment. Therefore, the Student's teachers have represented during interviews with the complaint investigator that the Student's asynchronous math and executive functioning assignments at home function similar to how they would in the co-taught classroom, as checks for whether the Student is able to independently complete math SDI or executive functioning SDI directly following a guided lesson from general education and special education teachers. Id.
55. During an interview with the complaint investigator, the Student's special education teacher for math and executive functioning¹⁸ explained that she creates the Student's asynchronous math and executive functioning SDI based on the exact types of independent work she requires the Student to complete on in-school days. She expressed great confidence in the asynchronous work provided, largely

¹⁸ The Student is currently receiving services from two special education teachers. One special education teacher provides all in-person SDI, plus remote SDI (both synchronous and asynchronous) for math, and remote asynchronous SDI for executive functioning. A second special education teacher provides the Student with all synchronous remote SDI for reading, writing, and executive functioning.

- because the same teacher has an opportunity to work with the Student every week both in-person and in a synchronous remote environment. As a result, special education teacher quickly recognizes the type of work the Student is capable of completing independently, as well as the time frame will likely require to complete asynchronous work. The Student's special education teacher receives completed asynchronous work through the SeeSaw application, allowing her to assess the Student's progress during asynchronous learning time and permitting her to specially design the Student's following day's lesson based on progress overall. Id.
56. The Student currently receives 1 x 30 minutes per week of Occupational Therapy related-services on Mondays while the Student attends in-person school. As such, the Student is receiving the full equivalent of IEP services for OT. Id.
57. Between September 24, 2020 and November 5, 2020, the Student received 3 x 30 minutes per week of Speech and Language related-services on Mondays and Wednesdays in-person, while the Student attended school, and on Thursdays through remote synchronous services. As such, the Student received the full equivalent of IEP services between September 24, 2020 and November 5, 2020. Id.; see also Written Notice for the IEP Team Meeting on October 27, 2020.
58. On October 5, 2020, the Student's Speech and Language pathologist completed a Speech and Language reevaluation. With respect to the Student's articulation delay, the evaluation concluded, "[The Student's] conversational speech is intelligible at the level of approximately 90%. The average level of intelligibility for children age is 95-100%. Observational assessment of [the Student's] conversational speech intelligibility indicates that is occasionally not understood by peers and adults across school settings; however when asked to repeat what has said/provide clarification is independently able to do so, in a manner commensurate with peers in second grade." With respect to other areas of speech and language, the evaluator found that the Student's "expressive and receptive language skills are within normal limits." See Speech-Language Evaluation, dated October 5, 2020.
59. On October 27, 2020, the Student's IEP Team reconvened virtually on Zoom to discuss the Student's Speech and Language reevaluation. All IEP Team Members aside from the Parent determined, based on the recommendation from the Student's Speech and Language pathologist, to discontinue the Student's Speech and Language services, effective on November 5, 2020. See Written Notice for

the IEP Team Meeting on October 27, 2020. The Parent strongly objected to this decision.¹⁹ Id.

60. During the detailed conversation at the IEP Team Meeting about the Student's Speech and Language needs, all the Student's teachers confirmed that the Student's "mild" articulation delay (as categorized by the Speech and Language reevaluation, dated October 5, 2020) did not interfere with the Student's ability to make progress in special education program. In response to questions from the Parent, a number of the Student's teachers confirmed that the Student is not understandable 100% of the time, but teachers also reported that they can simply ask the Student to repeat , and is able to correct articulation errors and/or slow down speech rate in order to be understood. The teachers also represented that the Student's non-disabled peers in second grade are also not understandable 100% of the time. The Student's general education teacher reported that she could not recall any occasion when she struggled to understand the Student, and she noted that the Student is very talkative, social, and willing to communicate ideas in the general education classroom. Id.; see Audio Recording of the IEP Team Meeting on October 27, 2020.

61. When consensus was not reached by the IEP Team, the District determined that the Student's Speech and Language services would be discontinued, and a number of speech-related accommodations were added to the Student's IEP, such as modeling correct production of sounds across environments and prompting articulation and/or the use of conversational repair strategies. See Written Notice for the IEP Team Meeting on October 27, 2020; see Student's IEP, dated April 14, 2020, as amended on November 4, 2020.

Other relevant facts are included in the determinations below.

¹⁹ Because the October 27, 2020 IEP Team Meeting occurred after the Parent filed the present complaint with the Department of Education on October 2, 2020, the Parent did not make a specific allegation with respect to the IEP Team's removal of Speech and Language services. Nevertheless, the complaint investigator informed the parties that the fourth allegation raised by the Parent encompasses the Parent's assertion that a determination about Speech and Language services (much like the other IEP Team determinations about SDI and related services) was reached by the IEP Team outside the IEP process and without proper consideration of the Parent's concerns. As such, the IEP Team's decision regarding Speech and Language services will be addressed as part of the fourth allegation.

VI. Determinations

- A. The District has not fully implemented the Student's IEP during the 2020-2021 school year, particularly with regards to Specially Designed Instruction for Math and Executive Functioning. MUSER IX(3)(B)(3). **COMPLIANCE FOUND. NO DENIAL OF FAPE 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 Maine Department of Education shall ensure the provision of appropriate services regardless of the nature and severity of the child's disability of developmental delay. MUSER I(2).

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 (10th Cir. 2005).

Neither the Individuals with Disabilities Act ("IDEA") nor Maine Unified Special Education Regulations ("MUSER") contemplate a scenario where public schools closures are required by a civil emergency. As such, there is currently no direct legal framework included in IDEA, Section 504, or MUSER detailing the rights of special education students during this unprecedented COVID-19 pandemic. Nevertheless, the Office of Special Education Programs ("OSEP"), within the US Department of Education's Office of Special Education and Rehabilitative Services, has provided limited guidance to assist states and special educators with their roles in continuing to satisfy federal guidelines. Specifically, OSEP has specified that, once a school begins providing educational services to the general student population,²⁰ a school district "must make every effort to

²⁰ By contract, OSEP provided that if a District "closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to student with disabilities during that same period of time." See *Questions and*

provide special education and related services” in accordance with each student’s IEPs and in a manner that ensures a free, appropriate public education for all eligible students. See *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak*, dated March 12, 2020, Office of Special Education Programs, available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. Importantly, the circumstances surrounding the COVID-19 pandemic do not necessitate a waiver of the District’s responsibility to provide the Student with a free, appropriate public education (“FAPE”), unless a school is unable to provide educational services in any form to its entire student population. Id.

Nonetheless, OSEP and the Maine Department of Education (“MDOE”) have both formally recognized that the provision of FAPE may look different during a pandemic than during a time of normal school operations. The US Department of Education’s Office for Civil Rights (“OCR”) and the Office of Special Education and Rehabilitative Services (“OSERS”) stated, “To be clear: ensuring compliance with [IDEA]...should not prevent any school from offering educational programs through distance instruction.” See *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary Schools While Serving Children With Disabilities*, dated March 21, 2020, Office for Civil Rights & Officer of Special Education and Rehabilitative Services, available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> (“It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency.”).

The MDOE also cites to March 2020 OSEP Guidance (<https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>) in clarifying that “SAUs are not required to provide the exact service hours of the IEP but should develop plans that are appropriately designed to support student learning in an alternative context.” See Office of Special

Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak, dated March 12, 2020, Office of Special Education Programs, available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. Notably, this scenario was applicable to School between March 16, 2020 and March 23, 2020.

Services COVID-19 Communication, available at <https://www.maine.gov/doe/learning/specialed/director>. The MDOE has further recognized that remote learning will never fully replicate a traditional school day. Instead, remote learning can take many forms, which includes both synchronous online learning, where an instructor provides lessons in real time to students by computer or telephone, and asynchronous remote education, where an instructor prepares a lesson in advance for students to engage in learning on a flexible timeframe. See Remote Learning Plan Guidance, Maine Department of Education, available at <https://www.maine.gov/doe/covid-19/planguidance>.

Finally, current guidance suggests that, in situations where special education services are unavoidably delayed due to alternative instructional models during the COVID-19 pandemic or where specialized services cannot be adequately delivered in an alternative method, once schools resume “normal” operations, IEP Teams must make an individualized determination as to whether compensatory services may be required. See Office of Special Services COVID-19 Communication, citing OSEP Guidance from March 2020, available at <https://www.maine.gov/doe/learning/specialed/director>.

In the present complaint, the _____ School is operating under a hybrid educational model for students in grades two through five. This alternative instructional model has been adopted by the District in light of the health and safety concerns associated with the COVID-19 pandemic. Nevertheless, the District has fully committed to providing for all the services in the Student’s IEP within the constraints of the hybrid instructional model. Although both OSEP and MDOE have recognized that SAU’s are not responsible for providing the exact number of service hours determined by a Student’s IEP in this alternative learning context, the District has remained committed to fulfilling the exact number of service hours for the Student during the 2020-2021 school year.

Understandably, the Parents have legitimate concerns about IEP implementation during the 2020-2021 school year because some of the Student’s remote SDI, including math and executive function SDI, is asynchronous. The complaint alleges that the Student’s IEP is currently not being fully implemented because the Student receives remote asynchronous SDI for 90 minutes per week in math and remote asynchronous SDI for 40 minutes per week in executive functioning.

However, the District has provided many indications that the Student's asynchronous lessons are an appropriate method for delivering the Student's special education services, particularly in combination with the extensive menu of in-person services and synchronous remote sessions which are also being provided to the Student each week. Importantly, the Student's asynchronous education is being specially designed, reviewed, and assessed by the same special education teacher who provides the Student with in-person SDI on Mondays and Wednesday and remote synchronous math instruction on Tuesdays, Thursdays, and Fridays. Additionally, the asynchronous math instruction is delivered from 9:00am to 9:30am on Tuesdays, Thursdays, and Fridays, immediately following a synchronous math session from 8:30am to 9:00am with the same special education instructor, on the same days. As a result, the Student's special education teacher can prepare for independent success with asynchronous math SDI, much like she would in the co-taught general education classroom when the Student receives in-person SDI services during normal school operations.

When interviewed by the complaint investigator, the Student's special education teacher explained that the work she designs and provides for the Student during both asynchronous math and asynchronous executive function sessions is the same work she would provide to evaluate the Student's independent understanding, skills, and abilities if the Student were present in the classroom for those particular SDI sessions. Specially designed instruction, even in the live classroom environment, does not require that students with disabilities have constant, direct assistance from a special education teacher during the lesson. While this type of 1:1 adult support may certainly be necessary for some special education students with unique needs, many students with disabilities benefit from regular opportunities to demonstrate independent progress and growth. Therefore, it would be inappropriate to assume that SDI cannot be delivered effectively (and in a manner that addresses a student's unique circumstances), simply because the instruction occurs in a remote asynchronous fashion.

Where the District has provided for the full implementation of the Student's IEP as written, including both SDI in reading, writing, math, and executive functioning, as well as the Student's related services, the District has complied with MUSER IX(3)(B)(3)

with respect to this allegation. There has been no violation of law or regulation regarding this allegation.

- B. The District did not fully implement the Student's IEP between March 2020 and the end of the 2019-2020 school year, particularly with regards to Specially Designed Instruction and Speech and Language related services. MUSER IX(3)(B)(3). **COMPLIANCE FOUND. NO DENIAL OF FAPE FOUND.**

As detailed in the proceeding section, there is emerging guidance, but no full legal framework as yet, to evaluate whether or not a District has fully implemented a Student's IEP during this unprecedented national health crisis resulting from the COVID-19 pandemic. In contrast with the first allegation regarding the 2020-2021 school year, the Parents' allegation that the Student's IEP was not fully implemented between March 23, 2020 (when School began offering remote educational resources to all students) and the end of the 2019-2020 school year is a much closer question.

During the Spring of 2020, the Student received one hour per day of synchronous SDI, as well as remote synchronous OT and Speech and Language related services. Notably, the 60 minutes of daily synchronous SDI provided to the Student between March 2020 and June 2020 was delivered in a 1:1 remote environment, allowing the Student to have greater access to special education instructor strictly in terms of student-teacher ratio than the Student would have accessed in in-person environment.

In addition to 5 x 60 minutes per week of synchronous SDI, the Student also received a combination of paper and computer-based remote learning materials for asynchronous learning, both from general education teacher and from special education teacher. Of course, during the time period in question, the Student was also receiving related services remotely (in a synchronous environment), but only received 2 x 30 minute sessions per week of Speech and Language services, rather than the 3 x 30 minute sessions per week required by the Student's IEP at the time.

During interviews with the complaint investigator, both the Student's special education teacher from 2019-2020 and the Student's Speech and Language pathologist explained that they faced considerable scheduling challenges and impracticalities when moving, without warning, from in-person services to remote synchronous instruction. Both teachers credibly explained that they offered the Student as much synchronous

instruction as their schedules would allow, while also continuing to provide services to many other students and continuing to create and assess new asynchronous remote curriculum. The teachers also detailed the challenges presented when working with a student population with diverse needs. While some students had access to the internet and technology, other students did not. The variety of student needs significantly increased the workload for teachers who were forced to quickly design brand new curriculum, as well as flexible delivery models for their students.

During the Spring of 2020, the Parents requested more robust services for the Student in a number of different ways (at IEP Team Meetings in April and May 2020, through emails to the Director of Special Services and the Superintendent, and during communications with the Student's special education providers), but the Parents were told repeatedly that no additional services could be provided to the Student at that time.

The District fully acknowledges that the special education services provided to the Student between March 23, 2020 and June 4, 2020 were not equivalent in terms of the number of service hours required by the Student's IEP, particularly when considering the limited availability for synchronous remote instruction. Nonetheless, there is no legal requirement that any student's remote learning plan be fully equivalent to in-person learning – such an equivalency would be impracticable. Instead, the question is whether the District made every effort during the Spring of 2020 to provide special education and related services that could best satisfy the Student's needs as reflected on IEP plan and that would ensure the Student received a free, appropriate public education.

It cannot be ignored that the District began providing the Student with robust, synchronous and asynchronous, specially designed instruction within just one week of learning about a national health emergency that exceeded the scope of anything any school or District staff member could have ever anticipated. Considering the speed with which the District put together and began implementing the Student's specially designed instruction, and taking into account the high quality of the 1:1 SDI that was provided by the Student's special education teacher (as detailed during interviews with the Student's parents and the Student's special education teacher during this period of time), there is no reason to believe that the Student's programming was not the best effort of the District to provide the Student with services to best satisfy IEP and ensure FAPE. In fact, the

Student's continued growth and significant advancement towards both academic and Speech and Language goals on IEP (and lack of regression and/or stagnation in any area) during the Spring of 2020 indicates that the Student received FAPE through alternative remote curriculum at the conclusion of the 2019-2020 school year.²¹

At the same time, a student's learning needs, and the presentation of a student's learning deficits can be fluid, and the School has by no means returned to "normal operations" yet. As recommended by both federal and state guidance, the Student's IEP Team must convene again at the conclusion of the COVID-19 pandemic to assess whether or not the cumulative effect of remote learning has negatively impacted the Student's progress towards IEP goals. Specifically, the Student's IEP Team must make an individualized determination as to whether compensatory services are required due to the COVID-19 pandemic's impact on the Student's special education services.

The District has provided sufficient documentation to demonstrate that the twelve Speech and Language sessions that were originally not delivered to the Student as a result of absences and unavailability of the Speech and Language pathologist (two of which occurred between March 23, 2020 and June 5, 2020) were properly addressed with 12 make-up Speech and Language sessions, as requested by the Parents.

Therefore, in light of the unique circumstances created by the COVID-19 crisis and the resulting unavoidable changes to the Student's learning environment, the District did properly implement the Student's IEP to the best of their ability, through a combination of synchronous and asynchronous remote learning. Where FAPE was delivered to the Student, there has been no violation of law or regulation regarding this allegation. Nevertheless, whenever the School returns to "normal operations," the Student's IEP Team should consider individual data from the full-period of remote and hybrid learning to determine whether the cumulative impact of the Student's alternative learning plan has created a need for compensatory services.

²¹ Of course, the Parents deserve significant credit for the Student's continued growth (and lack of demonstrated regression) during remote learning period between March 2020 and June 2020. The Parents ensured that the Student was ready to learn and attentive throughout sessions, and the Parents supplemented the Student's academic work with additional reading, writing, and math opportunities above and beyond the Student's curriculum at school. It is impossible to determine whether the Student would have continued to move forward towards IEP goals without the support and assistance of Parents, but common sense dictates that the Student would not have been successful without their efforts, regardless of what remote services the school provided.

C. The District did not develop an IEP that provides special education, related services, and supplementary aids and services sufficient to enable the Student to advance appropriately toward attaining annual goals, to be involved in and make progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate in those activities with other children with disabilities and with non-disabled children. MUSER IX(3)(A)(1)(d); MUSER IX(3)(D). In particular, the IEP does not include increased services as recommended by the Student's Occupational Therapy evaluation. Additionally, the Student's IEP did not include Extended School Year services at the end of the 2019-2020 school year. MUSER IX(3)(A)(1)(b); MUSER IX(3)(A)(1)(d). **COMPLIANCE FOUND. NO DENIAL OF FAPE FOUND.**

A student's IEP must "provide personalized instruction with sufficient support services to permit the child to benefit educational from that instruction." *See Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203 (1982). In order to fulfill the responsibility to provide a meaningful educational benefit, districts must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas City School Dist.*, 137 S.Ct. 988, 1000 (2017)

In the present complaint, the Student's IEP contains measurable and attainable goals, carefully designed by the IEP Team based on the Student's needs and skills, as reflected by recent evaluations. The Student's teachers have remained carefully focused on the Student's progress towards IEP goals, and progress reports and assessments demonstrate significant gains.

Although the Parents repeatedly sought to increase the Student's Occupational Therapy services at four consecutive IEP Team Meetings on October 23, 2019, January 15, 2020, April 14, 2020, and May 27, 2020, the Student's OT provider has maintained that the Student receives an appropriate level services at 1 x 30 minute per week. The IEP Team has remained open to considering outside evaluations provided by the Parents, even when the outside evaluators have not communicated with the Student's current providers. During an interview with the Student's OT provider, it quickly became evident that the OT provider based her recommendations solely on her professional opinions about the Student's needs and her observations of the Student. The Student's OT provider did not feel pressured by the District staff or any other members of the IEP

Team to limit or reduce the Student's OT services. While it is concerning that the IEP Team has not been able to reach consensus over a long period of time about the Student's OT needs and it is also concerning that the tone of the IEP Team Meetings has become so contentious over time, a review of both the Written Notices and the Audio Recordings from each IEP Team Meeting reveals that the lack of consensus is largely based on a fundamental disagreement between the Parents and other members of the IEP Team about the best balance between special education services, related services, and general education services to enable the Student to progress most successfully in the general education curriculum. Although the Parents have legitimate and specific reasons to seek additional OT services, the District's ultimate reasoning to keep the Student's OT services at 1 x 30 minutes per week is based on sound reasoning from the Student's current OT provider who is making weekly observations about the Student's progress towards IEP goals and about the Student's progress in applying newly acquired OT skills in general education classroom. The District's decision is also based on input from other members of the Student's IEP Team who provide educational services to the Student yet do not believe that the Student's educational progress would be better facilitated by increasing OT services. As such, there has been no violation of law or regulation regarding this allegation about OT services.

The Parents requested Extended School Year ("ESY") services for the Student following 2019-2020 school year. ESY are special education and related services that are provided beyond the normal school year. MUSER X(2)(A)(7) states, "ESY services must be provided only if a child's IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child." There are three criteria outlined for the IEP Team to consider: "(a) A review by the child's IEP Team of relevant information including, but not limited to, progress reports and relevant assessments, parent report, observations or documentation; (b) Consideration by the child's IEP Team of the significance of the child's disability, progress toward IEP goals; and (c) Consideration of the impact of previous service interruptions, if applicable, and the probability that the child is unable to recoup, in a reasonable amount of time, skills previously mastered."

While the IEP Team did not reach consensus about ESY services, the IEP Team diligently discussed all the factors required by MUSER X(2)(A)(7), including the Student's progress reports, assessments, parent observations, and the impact of prior service interruptions on the Student's progress towards IEP goals. Again, District made the final decision about ESY services after no consensus was reached by the IEP Team. However, both Written Notices and Audio Recordings from the IEP Team Meetings where ESY was discussed indicate that the District's reasoning was rooted in a data-based determination that ESY was not required to ensure the provision of FAPE for this particular Student.

Nonetheless, there is a component of the IEP Team's discussion about ESY that requires additional attention. While the academic data about the Student's process is always an important factor in a determination about ESY services, MUSER also specifically highlights the significance of a parent's perspective in an ESY determination. Right now, where the Parent has been heavily involved in assisting the Student with remote learning curriculum on a daily basis since March 23, 2020, the Parent had a particularly valuable set of observations to share (in addition to the valuable report a parent can always provide as the person who likely knows the child best). The Parent was repeatedly instructed that the decision for ESY was to be based on data from the start of the 2019-2020 school year until mid-March 2020 when the COVID-19 pandemic hit.²² As such, the Parent's valuable report was not fully solicited by the IEP Team Members at the May 27, 2020 meeting, and the Parent's request to discuss the provision of ESY further or to revisit the ESY determination after the Student's end of year assessments were completed was denied.

All that is not to say that the IEP Team limited the participation of the Parent or the Parent's advocate in any substantial way. The Parent's disagreement was certainly heard, and the Parent effectively communicated concerns regarding ESY to the IEP Team. However, the IEP Team may have missed a valuable opportunity to solicit further information from the Parent and weigh the Parent's information with the other pieces of

²² Notably, data about the Student's progress prior to the 2019-2020 could also be informative about the impact of service interruptions on the Student's learning patterns.

information presented by the team regarding ESY due to the contentious nature of the discussion.²³

Fortunately, in this Student's case, the District's ultimate decision about the Student's need for ESY has been confirmed by the Student's continued progress towards academic goals during the 2020-2021 school year (and by the Student's lack of demonstrated regression or need for any substantial recoupment time). As such, it is reasonable to conclude that the Student did not require ESY services to obtain FAPE, and there has been no violation of law or regulation regarding this allegation about ESY services.

- D. The District made changes to the Student's IEP outside the IEP Team process without an agreement between the District and the Student's parents that an IEP meeting was unnecessary. MUSER IX(3)(C)(4). **COMPLIANCE FOUND.**

There is no indication from this complaint investigation that changes were made to the Student's IEP outside the IEP Team Process. Although the COVID-19 pandemic changed the nature of the Student's instructional delivery, there was no legal requirement that the District hold an IEP meeting to make changes to the methods of delivering the Student's special education services.

Nonetheless, the IEP Team has lots of options going forward. Current guidance suggests that IEP Teams can engage in contingency planning. While the IEP Team is not required to consider prospective solutions, the IEP Team could reconvene to discuss potential options for the Student in the event that the Student's hybrid learning schedule becomes impracticable in the coming months as COVID-19 cases surge in Maine. See *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, dated March 12, 2020, Office of Special Education Programs, available at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

²³ It appears likely that the ongoing pattern of tense and contentious IEP Team Meetings has also impacted the Team's ability to find avenues for collaboration. Where it is so evident that all members of the IEP Team are highly motivated to serve the Student's educational needs, there is hope that the IEP Team can continue to exploring options for more effective communication.

Although the Parents feel strongly that the Student's IEP Team is reaching conclusions as a group prior to the start of the Student's IEP Meetings,²⁴ all the other individuals interviewed were adamant that no decisions about the Student's IEP or the Student's special education services were reached outside of the IEP process. All teachers and staff members interviewed also explained that they felt no pressure from the District staff (or anyone else) to present any particular opinion or recommendation regarding the Student at IEP Team Meetings. Multiple IEP Team members also shared that they rely upon the individual reports from various IEP Team members **during** the Student's IEP Team meetings to reach a conclusion, and as a result, each IEP Team is entering the meeting with an open mind about the topics to be covered. As such, there has been no violation of the procedures for amending an IEP outside the IEP Team process, as outlined by MUSER IX(3)(C)(4).

Finally, it is abundantly clear from reviewing the IEP Team Written Notices and the Audio Recordings from multiple IEP Team Meetings that the Parents do not currently feel heard by the IEP Team. As the regulations make clear, 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. **The IEP Team should work toward consensus.**” *Id.* (emphasis added); see also MUSER VI(2)(B)(I).

Additionally, MUSER IX(3)(C)(1)(b), states that the IEP Team must consider “the concerns of the parents for enhancing the education of their child.” Despite the Parents' understandable frustration with the IEP Team decisions regarding Occupational Therapy

²⁴ The Parents presently suspect that various IEP Team Members feel silenced or pressured to reduce the Student's special education services due to pressure from the District staff or the Director of Special Services. This allegation is not supported by the factual findings of this investigation.

services, Speech and Language services, and ESY services, the Parents are critical members of the IEP Team and must continue to be considered as equal partners in the IEP process.

VII. Corrective Action Plan

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

Dated: December 4, 2020

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Complaint Investigator