

Complaint Investigation Report

v. School

January 26, 2021

Complaint # 21.030C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: November 30, 2020

I. Identifying Information

Complainant: Parents

Respondent: School District

, Director of Special Services

Student:

DOB

II. Summary of Complaint Investigation Activities

On November 24, 2020, the Maine Department of Education received this complaint. Therefore, the current investigation covers the period of November 24, 2020 to present. See MUSER XVI(4)(B)(3). The complaint investigator was appointed on November 30, 2020.

The complaint investigator received 454 pages of documents from the School (“District”). The investigator also received 393 pages of documents from the complainant. An interview was conducted with the Student’s foster parent (“Foster Parent”) on December 21, 2020. On December 22, 2020, the following staff members were interviewed: the Director of Special Services, the Superintendent & Principal of School, the District’s part-time Special Education teacher, and the District’s Board Certified Behavioral Analyst (BCBA).¹ The Special

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.

Education Director from RSU 73, the Student’s prior school district, was also interviewed on December 22, 2020. The complaint investigator reviewed all documents, emails, and information obtained through interviews, as well as the responses provided by the Parties to complete this investigation.

III. Preliminary Statement

The Student is _____ years old, and _____ is in the _____ grade. The Student presently attends _____, a special purpose private school in _____, Maine. The Student lives with _____ foster parents and IDEA surrogate parents (“Foster Parents”) in _____ Maine, and _____ qualifies for special education and related services under the “Multiple Disabilities” category, based on _____ diagnoses of Autism Spectrum Disorder (“ASD”), Attention Deficit Hyperactivity Disorder (“ADHD”), and Adjustment Disorder with Anxiety.

The present complaint was filed by the Foster Parents’ counsel, 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 December 2, 2020, alleging three violations of the MUSER. A telephonic Complaint Investigation Meeting was held on December 3, 2020.

IV. Allegations

The Parents have alleged the following three violations in the present complaint:

- A. The _____ School (“District”) has not provided a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because the District did not implement the Student’s existing IEP when the Student transferred to the District from another school in the State of Maine on October 21, 2020. MUSER IX(3)(B)(5)(a)(i). Specifically, the District did not provide services comparable to those described in the Student’s prior IEP. Id.
- B. The District has not made available a continuum of alternate placements for the IEP Team to consider. In particular, the District did not make placements available for students requiring access to special education program settings for more than 60% of the school day. MUSER X(2)(B); MUSER X(2)(C)(2)(c).
- C. To the extent that the District proposes the _____ Program as a placement, the _____ Program would not provide the Student with a free and appropriate public education in the least restrictive environment (LRE). MUSER X(2)(B).

V. Factual Findings

1. The Student is _____ years old (DOB _____), and _____ is in the _____ grade. The Student resides with _____ foster parents and IDEA surrogate parents (“Foster Parents”) in _____, Maine.
2. The Student currently attends a special purpose private school, _____, in _____ Maine. The _____ School (“District”) maintains educational responsibility for the Student.
3. The Student qualifies for special education and related services under the category of “Multiple Disabilities,” based on _____ diagnoses of Autism Spectrum Disorder (“ASD”), Attention Deficit Hyperactivity Disorder (“ADHD”), and Adjustment Disorder with Anxiety. The Student’s disabilities have an adverse impact on education.
4. The Student’s most recent educational assessments were conducted in April 2018.² As measured by the Weschler Intelligence Scale for Children – Fifth Edition (WISC-V), the Student’s composite IQ scores are average to high average (Full Scale IQ = 100). The Student’s reading comprehension is a relative strength, even when the presented text is challenging for _____ but the Student’s processing speed score falls into the low average range. See Student’s IEP, dated January 21, 2020, as amended on February 21, 2020, March 31, 2020, May 24, 2020, and December 2, 2020.
5. A recent Functional Behavior Assessment (“FBA”) was conducted by Michael Butler, MS. Ed., a school, psychological service provider, in January 2020. Mr. Butler based his opinions upon interviews with school staff, but he was unable to speak with the Student’s foster parents (at the time).³ The FBA concluded that the Student’s “interfering behaviors have been remarkably consistent over time...[the Student’s] underlying emotional status, given _____ history of reported trauma, significant caregiver changes, inconsistent educational programming, and multiple mental health diagnoses makes it nearly impossible for _____ to maintain appropriate emotional regulation within a public school environment.” Mr. Butler stated, “it may be that, even more important than educational instruction, is an intensive program of therapeutic counseling, in a restrictive, long term treatment

² The Student’s IEP Team ordered updated assessments at the IEP Team Meeting on December 2, 2020 in anticipation of the Student’s annual IEP review.

³ The foster parents referenced above are not the Foster Parents with whom the Student currently resides and who have filed this complaint.

center. It is suggested that once [redacted] becomes emotionally able to cope with educational programming [redacted] may begin to be reintegrated, slowly, back into an educational program.”

6. The Student also had an FBA in March 2020, conducted by Dr. Audrey Batholomew. Dr. Batholomew was unable to conduct a full assessment without direct observational data in a classroom setting.⁴ However, she recommended that the Student’s IEP Team develop a consistent procedure for the collection and analysis of behavioral data.
7. Additionally, while the FBA did not recommend a specific placement for the Student, Dr. Batholomew made a series of short-term transition planning recommendations in the event that the Student’s IEP Team recommended placement in a behavior resource room. These recommendations included: 1) a collective, team-based discussion about needed supports and transition goal in terms of target behaviors, data collection, and data analysis; 2) a high level of social work services during the transition period; 3) beginning with preferred class activities in a secluded area with a slow transition to a full day of class activities with peers; 4) a detailed Positive Behavior Support Plan; 5) less demanding academic tasks while the Student is being introduced to the routine and structure of the classroom; 6) one-on-one Ed Tech support; and 7) consistent consultation between the Student’s teacher, BCBA, and Director of Special Education. See Independent Evaluation, dated March 15, 2020, by Dr. Audrey Bartholomew.
8. The Student’s most recent Individualized Education Program (“IEP”), dated January 21, 2020, as amended on February 21, 2020, March 31, 2020, May 24, 2020, and December 2, 2020 provides for Specially Designed Instruction at a special purpose private school with a clinical education focus (currently [redacted]) 5 x 6 hours and 30 minutes per week, in accordance with the school calendar.
9. Additionally, the Student receives 1 x 60 minutes per week of Speech and Language Services, 1 x 60 minutes per week of Occupational Therapy, 1 x 60 minutes per week of Social Work Services, 1 x 60 minutes per bi-weekly period of BCBA consultation services, and Special Transportation. Overall, the

⁴ At the time of Dr. Bartholomew’s assessment, the Student was engaged in one-on-one tutoring in the administration offices of RSU 73, and [redacted] most challenging behaviors were described as “low frequency but highly disruptive and dangerous.” As such, the evaluator was unable to complete a detailed Antecedent Behavior Consequence (ABC) data to analyze within the time frame of her evaluation. Dr. Bartholomew recommended a full FBA be completed for the Student at a later date. See Independent Evaluation, dated March 15, 2020, by Dr. Audrey Bartholomew.

- Student's IEP specifies that the Student spends 0% of educational time with non-disabled children "due to need for a clinical education/behavior day treatment program to address social/emotional and behavioral dysregulation and academic skill deficits." See Student's IEP, dated January 21, 2020, as amended on February 21, 2020, March 31, 2020, May 24, 2020, and December 2, 2020.
10. The Student attended and the first half of grade in Brewer, Maine. reportedly struggled with aggressive behaviors, and was restrained during four incidents between September and October 2015. The Student was admitted to Hospital in the middle of -grade year, after which the Student was transferred to the See Parent v. Regional School Unit No. 73, No. 20.068H (Nov. 8, 2020).
 11. The Student remained at the until the middle of grade (November 2018). Between February 11, 2016 and October 11, 2018, the Student was restrained or secluded under Chapter 33 a total of 126 times at the program. Id.
 12. In November 2018, the Student was removed from the custody of biological parents and placed into the temporary custody of the State due to an immediate risk of harm. The Student was put in foster care, and biological parents' parental rights were ultimately terminated in January 2020. Id.; see also Program Review on Behalf of [the Student], dated November 13, 2020.
 13. The Student was hospitalized numerous times between November 2018 and May 2019, and lived in seven different foster placements during the same short period of time. When the Student was discharged from a hospitalization on May 7, 2019, was placed with new foster parents in a therapeutic foster home. At that time, the Student began attending school in RSU 9, which was third school placement during grade. The Student was placed in a resource room setting due to RSU 9's day treatment program being full at the time. See Parent v. Regional School Unit No. 73, No. 20.068H (Nov. 8, 2020).
 14. In September 2019, the Student's foster parents (at the time) moved to Jay, Maine. The Student was then enrolled in RSU 73 at the start of -grade year (2019-2020). was initially placed in a self-contained behavior program with a Positive Behavior Support Plan ("PBSP"). The student-teacher ratio was 2:1. Id.

15. In September and October 2019, the Student engaged in numerous, significant aggressive incidents directed towards staff members and others. The Student was suspended for a total of 14 out of the first 32 days of school. On October 29, 2019, the Student’s IEP Team determined that behaviors were a manifestation of disabilities, and the Team agreed that the Student would be temporarily educated in a 1:1 tutorial setting for 6 hours per day, four days per week.⁵ RSU 73 began searching for an out-of-district placement for the Student, and an FBA was also ordered. Id.
16. The Student originally received 1:1 tutorial instruction in the self-contained behavior classroom, but after a subsequent behavior incident in December 2019, the RSU 73 determined that tutoring would occur in a conference room located in RSU 73’s Central Office.⁶ Id.
17. In May 2020, the Student’s IEP Team met to consider a detailed behavior plan drafted by RSU 73’s BCBA. The IEP Team determined that the Student would enter the self-contained behavior program at School for the 2020-2021 school year, “in accordance with the behavior plan, reentry plan, and crisis plan that the Team is developing.” See Written Notice from the IEP Team Meeting on May 24, 2020.
18. The Student’s amended IEP,⁷ based on the IEP Team’s decision on May 24, 2020, called for Specially Designed Instruction 5 x 6 hours and 30 minutes per week, Speech and Language Services 1 x 60 minutes per week, Occupational Therapy 1 x 60 minutes per week, Social Work Services 1 x 60 minutes per week, and BCBA consultation services 1 x 60 minutes per bi-weekly period. See Student’s

⁵ *Parent v. Regional School Unit No. 73*, No. 20.068H (Nov. 8, 2020) concluded that RSU 73 “had obligation to give [the Student’s foster parents at the time] the proper information about the result of a manifestation determination in order to properly participate in the discussion” regarding RSU’s obligation to return the Student to behavior program unless the foster parents agreed to a change in placement. As such, the IEP Team’s “agreement” to move the Student into a 1:1 tutorial setting was later determined to be improper.

⁶ The location of the Student’s tutorial instruction and the extended nature of the tutorial arrangement that was originally meant to be temporary were subjects of much legal dispute, and these issues were ultimately addressed in *Parent v. Regional School Unit No. 73*, No. 20.068H (Nov. 8, 2020). The details of the disagreement are not relevant to the present case, but the Student remained in 1:1 tutorial instruction at the RSU 73 district office for the remainder of the 2019-2020 school year.

⁷ Due to an oversight, RSU 73 neglected to amend the Student’s IEP to reflect the IEP Team’s decision on May 24, 2020. It was not until the Student began seeking educational services at School in October 2020, that the Director of Special Services recognized that the Student’s IEP was out-of-date. At that point, RSU 73’s Director of Special Education amended the Student’s IEP to reflect the Team’s determinations on May 24, 2020 as detailed by the Written Notice for the IEP Team Meeting on May 24, 2020. The amended IEP was forwarded to Director on November 3, 2020. See District’s Complaint Memorandum; Letter from Special Education Director in RSU 73 to Director of Special Services in , dated November 3, 2020.

IEP, dated January 21, 2020, as amended on February 21, 2020, March 31, 2020, and May 24, 2020.

19. The Student's amended IEP specified that the Student "would transition to the school and attend the behavior resource room, where would spend 0% of educational time with non-disabled children." Id.
20. The IEP Team also incorporated a detailed Positive Behavioral Support Plan ("PBSP") into the Student's amended IEP. The PBSP called for a number of environmental requirements, including but not limited to, a low student to teacher/paraprofessional ratio, targeted professional development for all staff working with the Student prior to the start of the school year, setting up the classroom to minimize distractions, and a designated space for the Student to take breaks. The PBSP called for data collection in 15-minute intervals for defined behaviors throughout the school day. The PBSP also noted, "[The Student] is extremely sensitive to physical contact. Any touch (including elbow check and supportive guide as taught through Safety Care)...can be very escalating for [the Student] and may increase aggressive responses to both. [The Student] has an extensive history of restraint and seclusion within the school setting throughout elementary school years. It is very likely that the use of restraint or seclusion is triggering for ." See Positive Behavior Support Plan, dated 5/18/2020, as revised on 6/4/20, 7/9/20, 8/24/20, 9/8/20, and 9/16/20.
21. The amended IEP also incorporated a detailed Re-Entry Plan for the Student, which included programming needs, staffing needs, and transition planning needs. The plan outlined three phases for establishing "a highly predictable, highly structured program, within the behavior intervention classroom." The plan utilized a biofeedback device program (Heartmath) for all three phases. See Re-Entry Plan, dated 5/18/20, as revised on 6/4/20, 6/12/20, 7/7/20, and 7/8/20.
22. Phase 1 of the Student's Re-Entry Plan called for all educational programming to be delivered **individually** within the behavior intervention classroom. Phase 2 involved small group interaction for the Student within the self-contained behavior classroom during preferred tasks and low stress activities. Other activities would continue to be delivered individually. During the final phase of the Re-Entry Plan, the Student would increase the number of activities to be delivered through small group instruction, as well as the duration of small group work, based on information provided by behavioral data. Specific activities would continue to be delivered individually. Also, during Phase 3, the goal would be "continued implementation of a highly predictable, highly structured program, within the behavior intervention classroom setting **and other educational**

settings as determined by the team based on behavioral data.” Id. (emphasis added). All three phases of the Student’s Re-Entry Plan required an additional adult available within the school setting.⁸ Id.

23. Finally, the amended IEP also incorporated a detailed Individual Crisis Response Plan. This plan was “intended to be an informative and helpful tool in aiding early detection and management of escalating behavior.” The Crisis Response Plan detailed early warning signs of crisis and escalation for the Student, as well as actions that would be helpful or unhelpful to deescalate the Student. See Student’s Individual Crisis Response Plan, dated 5/18/20, as revised on 7/8/20.

24. Neither the PBSP nor the Re-Entry Plan required a specific educational setting (self-contained behavior classroom vs. special purpose private school) for the implementation of the Student’s plans, but various details and notations within the PBSP, the Re-Entry Plan, and the Individual Crisis Response Plan indicate that these three documents were specifically written with the self-contained behavior classroom at _____ School at RSU 73 in mind. All three of these plans contemplated adequate staffing, an appropriate classroom environment, and very specific training for all staff members prior to the Student’s transition into the program. None of the plans specified that the Student would be educated with _____ non-disabled peers, although the plans did contemplate further IEP Team discussions about possible opportunities for the Student’s participation in “other educational settings” outside the self-contained behavior classroom in Phase 3 of the Re-Entry Plan. See Positive Behavior Support Plan, dated 5/18/2020, as revised on 6/4/20, 7/9/20, 8/24/20, 9/8/20, and 9/16/20; Re-Entry Plan, dated 5/18/20, as revised on 6/4/20, 6/12/20, 7/7/20, and 7/8/20; Student’s Individual Crisis Response Plan, dated 5/18/20, as revised on 7/8/20.

25. On September 8, 2020, after more than six months of 1:1 tutorial instruction at RSU 73’s district office, the Student began attending the behavior program at _____ School, as planned. The Student attended the program for six consecutive school days (through September 15, 2020). On Day 2 through Day 6, behavior data was collected by the Student’s teachers, in accordance with the Student’s IEP and PBSP. During the five days where data was collected, the Student had no incidents of work refusal (verbal or physical), no disruptive behaviors, no aggressive behavior (verbal or physical), no peer conflict, and no

⁸ However, in Phase 3 of the Student’s Re-Entry Plan, the additional adult, “may not need the staff to be working directly with [the Student] at all times.” See Re-Entry Plan, dated 5/18/20, as revised on 6/4/20, 6/12/20, 7/7/20, and 7/8/20.

- elopement. See Student’s Behavior Graphs from School, dated 9/8/20 to 9/15/20.
26. Overall, the Student’s transition was moving along smoothly, and as RSU 73’s BCBA described later, the Student appeared to be getting adequate adult support in the classroom. See Email, “Behavior Graphs,” from the Student’s BCBA at RSU 73, dated November 2, 2020.
27. Unfortunately, the Student did not attend School again regularly after September 15, 2020.⁹ Id.
28. At some point thereafter, the Student’s foster parents (at the time) moved to a different school unit, Regional School Unit 18, in the Belgrade area. On October 7, 2020, the Student was formally unenrolled in RSU 73’s school district system. See *Parent v. Regional School Unit No. 73*, No. 20.068H (Nov. 8, 2020). Yet, the Student was never enrolled in RSU 18. See District’s Complaint Memorandum.
29. A few weeks later, in mid-October 2020, the Student was moved out of foster home, and was placed in the care of current Foster Parents in , Maine. At this point, the Student had missed a month of school, and was facing another simultaneous change in home and school environment.
30. The School (“District”) operates a small elementary school for approximately 150 students in kindergarten through grade 8. The District does not operate a high school, so families living in Maine can choose which regional high school their children will attend. The District then pays tuition to the high school of each family’s choice. See District’s Complaint Response; Interview with the Superintendent/Principal on December 22, 2020.
31. During an interview with the complaint investigator, the Special Education Teacher who works with school students (grade to grade) at the School described the school’s current school special education program in detail. She explained that the special education program structure and classroom environment has been significantly impacted by the unprecedented COVID-19 pandemic.
32. Specifically, all school students at the School utilize the hybrid model, where students physically attend school two days per week and

⁹ The Student was absent from school on September 16, 2020. On September 17, 2020, the Student showed signs of illness and was sent home with an order to quarantine or obtain a COVID-19 test. See Program Review on Behalf of [the Student], dated November 13, 2020

learn remotely three days per week. Currently, the Special Education Teacher is also teaching a General Education math class every morning for two hours, so she only provides specially designed instruction part-time. Additionally, as part of the social distancing efforts by the school, all specially designed instruction is currently being delivered in the school's art room, which presents unique environmental challenges due to the nature of the space and the equipment located within an art classroom (i.e., large sinks, an exterior exit, a working kiln and stove, open shelves of art supplies, etc.). See Interview with Special Education Teacher on December 22, 2020.

33. The Special Education Teacher also explained that she works directly with the Director of Special Services and the Superintendent/Principal to design each school student's special education program on an individual basis. This has been especially true during the 2020-2021 school year where 100% of each student's IEP services need to be delivered, despite the challenges presented by the COVID-19 pandemic.¹⁰ School does not currently operate a self-contained Special Education classroom, and there is only one educational technician working with school students. However, the Special Education Teacher insisted that each child's IEP is considered individually to determine how resources can be fully utilized to meet the needs of each child with special needs. She asserted during her interview that all staff members at the School are open-minded about possible changes to ensure that each special education student's needs are being met as indicated by their IEPs. Id.

34. School is a member of the which is an organization of 21 school units that have come together to develop programming and placement options for certain high-need services in a regional fashion. The goal of the District's membership in is to expand the continuum of possible placements available for lower frequency, high-needs students. oversees the Program (" "), a special purpose private school. serves children with high behavioral needs in a therapeutic day treatment setting, and it is operated by the School Department. See District's Complaint Memorandum; Interview with Superintendent/Principal on December 22, 2020.

¹⁰ Since School aims to keep all students in their own grade-level cohort during the COVID-19 pandemic, the Special Education Teacher is required to provide services for students one grade level at a time, which significantly complicates scheduling for specially designed instruction.

35. During separate interviews with the complaint investigator, the Director of Special Services, Superintendent/Principal, and the Special Education Teacher all expressed a shared viewpoint that the _____ School must be flexible and creative when designing individual programming for each special education student. Similarly, they all described options for partnering with other schools, such as _____, or _____, when _____ resources are insufficient to meet a child's needs. See Interview with Director of Special Services, Superintendent/Principal, and Special Education Teacher on December 22, 2020.
36. On October 19, 2020, the Student's new Foster Parent contacted the District's Director of Special Services to inform her that the Student would be enrolling in the District. On October 20, 2020, the Foster Parent formally enrolled the Student.
37. The Director of Special Services made immediate attempts to access the Student's records from RSU 18. Because the Student was never enrolled in RSU 18, RSU 18 did not have any documents to share with the Director. The Director then made contact with RSU 73, and she was provided with an outdated version of the Student's IEP, dated January 21, 2020, as amended on February 21, 2020 and March 31, 2020. The Foster Parents were also provided with the same outdated version, which did not reflect the substantial changes that were made by the Student's IEP Team in May 2020. Instead, the IEP incorrectly stated that the Student required placement in a special purpose private school.
38. On October 22, 2020, the Director and the Foster Parent had an informal meeting by Zoom to discuss programming. After the informal meeting, the Director made inquiries about placing the Student at the _____, which was initially agreeable to the Foster Parent, only because the Foster Parent did not have updated information about the Student's IEP and educational history.¹¹
39. The next day, on October 23, 2020, the Director learned that the Student's IEP should have been modified by RSU 73 after the Student's IEP Meeting in May 2020. The Director requested an amended IEP from the Director of Special Education in RSU 73. Based on this new information, the Foster Parent requested by email to the Director that the Student be placed at the _____ School in a self-contained behavior classroom, instead of the _____ Program. See

¹¹ The District and the Foster Parent were also unaware at this point that the Student had attended the _____ from February 2016 to October 2018. They had no knowledge about the Student's experience at the _____, including the fact that the Student was restrained or secluded 126 times during _____ enrollment at the _____. See Interview with the Director of Special Services on December 22, 2020.

Email from the Foster Parent to the Director of Special Services on October 23, 2020.

40. The Director contacted the _____ School regarding the self-contained behavior program, but she was quickly informed that the _____ School self-contained behavior program would not accept tuition students. See District's Complaint Memorandum.
41. During an interview with the complaint investigator, the Foster Parent explained that she developed serious reservations about placing the Student at the _____ after the Student communicated to her, without prompting, that _____ did not want to attend _____ again. When the Foster Parent and the Student were traveling by the _____ school building by car, the Student said something to the effect of, "that is a bad place. They hurt me. They restrained me." See Interview with the Foster Parent on December 21, 2020. Later, the Foster Parent received documentation about the 126 times the Student was restrained and/or secluded under Chapter 133 at the _____ between February 2016 and October 2018. See Incident Reports for Physical Restraint or Seclusion of a Student from the _____ Program, approximately 321 pages, dated February 2016 to October 2018.
42. At that time, the Director of Special Services reached out to a number of out-of-district placements in an attempt to bring options to the Student's IEP Team. As stated above, the Director learned that _____ School was not accepting tuition students into their self-contained behavior program. The Director contacted _____, but there was no space available for tuition students. She contacted RSU 19's _____ school self-contained behavior program and _____ School's self-contained behavior program, but the programs were at capacity. _____ had eight students on a waitlist, and they were not accepting any new students until after the COVID-19 pandemic subsides. RSU 67 and RSU 68 had no school-based behavior programs. The only programs with immediate space for the Student were the _____ Program, and possibly the _____ program in _____ Maine. _____ stated that there might be availability depending on the Student's behavioral needs and the application process. See Written Notice for the IEP Team Meeting on November 6, 2020.
43. During an interview with the complaint investigator, the Director of Special Services communicated that she was open to any ideas for the Student's placement. However, it was clear that many educational programs were limited in their capacity to take new students as a result of the COVID-19 pandemic. See Interview with the Director of Special Services on December 22, 2020.

44. On November 3, 2020, the District received a properly amended IEP from RSU 73, reflecting the most recent changes to the Student's program and incorporating the Student's PBSP, Re-Entry Plan, and Individual Crisis Response Plan into the Student's IEP. See Letter from Special Education Director in RSU 73 to Director of Special Services in _____, dated November 3, 2020.
45. The Student's IEP Team Transfer Meeting occurred on November 6, 2020.¹² According to Written Notice, the IEP Team considered the District's proposal that the Student be placed at the _____. A placement at the _____ had been available for the Student starting on October 22, 2020. The District's position was that _____ School did not operate a self-contained behavior program, and the Director expressed concerns about the resources, staff, and space to implement the IEP that was received from RSU 73, especially considering the requirements of the Student's detailed PBSP, Re-Entry Plan, and Individual Crisis Response Plan. See Written Notice for the IEP Team Transfer Meeting on November 6, 2020.
46. The Foster Parent rejected the proposal for placement at the _____, citing a desire for the Student to attend a self-contained behavior program at public school, just as the Student would have done if _____ remained enrolled in RSU 73. The Foster Parent raised valid and specific concerns about the Student's prior traumatic experiences at the _____. Id.
47. The IEP Team elected to ask the Student's BCBA from RSU 73 to work with the District's BCBA to review the school's current resources, space, and staffing through observations at the _____ School to make a recommendation about whether the Student's IEP could be successfully implemented in the _____ School. Id.
48. In the interim, the IEP Team agreed that the Student would engage in 100% remote learning. The Foster Parent had enrolled the Student in a program at the local _____ where the Student could potentially engage in remote schoolwork, and she reported that the Student was successful at the _____ program so far. Id.
49. The Student began remote learning on November 12, 2020. See Email from the Director of Special Services to the Foster Parent on November 10, 2020.

¹² The Director of Special Services originally aimed to meet with the Foster Parent informally on October 27, 2020 to discuss initiating services in light of the new IEP information. But, when the Foster Parent elected to bring an attorney to the meeting, the Director cancelled the informal virtual meeting and rescheduled the meeting for November 6, 2020 to allow the District's attorney to also join the meeting.

50. On November 19, 2020, the Foster Parent notified the District that the Student was removed from the _____ program due to significant aggression towards peers. See Foster Parent’s Email to District on November 19, 2020; Program Review on Behalf of [the Student], dated November 21, 2020. Because the Student was unable to continue remote learning at the _____, the Foster Parents decided not to have the Student participate in further remote learning classes. See Written Notice from the IEP Team Meeting on December 2, 2020.
51. On November 21, 2020, the two BCBA’s completed a program review as directed by the Student’s IEP Team. The Program review considered various options within _____ Schools, including providing the Student with an individualized learning space or providing instruction in the mainstream _____ grade classroom. The biggest concerns presented by the BCBA’s review related to physical space limitations in the small _____ School building. The Student would be unable to receive services in the resource room because the art room was an unsafe environment. The general education classroom for the _____ grade did not provide sufficient space (due to the 6-foot social distancing classroom set-up requirements) to allow for the Student to take a break when needed, which was a critical component of the Student’s PBSP and Re-Entry Plan. Additionally, the BCBA’s found that there would be insufficient space for the Student to receive one-on-one adult support in the classroom, if needed. The BCBA’s next considered utilizing a small staff room for an individualized learning program/space for the Student, but they worried that windows from the staff rooms into the student hallways would provoke anxiety and distractions for the Student due to a “fishbowl” effect. See Program Review on Behalf of [the Student], dated November 21, 2020.
52. Moreover, the BCBA’s concluded that the option of utilizing the mainstream grade classroom would be the equivalent of throwing the Student immediately into Phase 3 of _____ Re-Entry Plan, skipping the necessary Phases 1 and 2. They also determined that the individual learning space option would have been a more restrictive setting than an out-of-district placement because the Student would receive 1:1 instruction, with no opportunity to interact with _____ peers. Additionally, the BCBA’s considered that any placement at the _____ School would require the Student to learn remotely for three days per week (due to the hybrid model adopted for COVID-19 purposes), and this presented concerns because the Student was no longer able to access a remote education classroom at the _____. The BCBA’s noted the frustrating reality that hiring, and training two additional staff members could take a considerable amount of time, particularly during the COVID-19 pandemic where the District

has been struggling to find sufficient staff for the school on a daily basis. Currently, does not have a social worker on staff, and the Student’s PBSP called for significant support from a social worker for the Student. Id.

53. Ultimately, the BCBAs concluded, “Based on the developed re-entry plan, behavior support plan, and crisis plan...we believe the best placement for [the Student] at this time is an out of district placement at one of the proposed day-treatment programs. We feel these programs will best meet emotional and behavioral needs, allow to learn in a setting with peers, and allow access to the clinical services requires at this time.” Although the BCBAs recommended a special purpose private school, they did not recommend placement at Program due to the Student’s prior negative and/or traumatic experiences there. Id.

54. On December 2, 2020, the Student’s IEP Team reconvened and agreed that the Student requires a clinical education program, five days per week, in an out-of-district placement to meet unique needs. The Team considered the possibility of an in-home tutor or educational technician in the event that the Student was not accepted to in , Maine. The IEP Team “denied attorney and foster parent request for placement at School at the present time based on report by BCBAs.” See Written Notice from the IEP Team Meeting on December 2, 2020.

55. On December 7, 2020, the Student was accepted for admission to in , Maine, and began attending the program on December 14, 2020. See District’s Complaint Memorandum; Interview with Foster Parent on December 21, 2020.

Other relevant facts are included in the determinations below.

VI. Determinations

- A. Schools (“the District”) has not provided a free appropriate public education (FAPE) (see MUSER II(13); 34 CFR 300.101(a)) because the District did not implement the Student’s existing IEP when the Student transferred to the District from another school in the State of Maine on October 21, 2020. MUSER IX(3)(B)(5)(a)(i). Specifically, the District did not provide services comparable to those described in the Student’s prior IEP. Id. **PROCEDURAL 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).

MUSER IX(3)(B)(5)(a)(i) provides that “If a child with a disability (who had an IEP that was in effect in a previous SAU in the same State) transfers to a new SAU in the same State, and enrolls in a new school within the same school year, the new SAU must provide FAPE to the child (including services comparable to those described in the child’s IEP from the previous SAU), until the new SAU either adopts the child’s IEP from the previous SAU or develops, adopts, and implements a new IEP that meets the applicable requirements in 300.320 through 300.324 [34 C.F.R. 300.323(e)].

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

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

Id.; 20 USC §1412(a)(5); 34 CFR 300.114.

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

The Student enrolled in the _____ School (“District”) on October 20, 2020, as a transfer student with an existing IEP. Although there was some initial confusion about the content of the Student’s current IEP due to the Student’s former school district, RSU 73, failing to update _____ IEP, the Student’s amended IEP, as sent to the District on November 3, 2020, placed _____ in a special education self-contained behavior program at _____ School. The Student’s IEP incorporated a detailed Positive Behavioral Support Plan (PBSP), a Re-Entry Plan, and an Individualized Crisis Response Plan. In accordance with the details of the Student’s PBSP and Re-Entry Plan, the student to teacher ratio at the _____ School was extremely low: 3:3.

The Student’s transfer IEP called for Specially Designed Instruction 5 x 6 hours and 30 minutes per week, Speech and Language Services 1 x 60 minutes per week, Occupational Therapy 1 x 60 minutes per week, Social Work Services 1 x 60 minutes per week, and BCBA consultation services 1 x 60 minutes per bi-weekly period. See Student’s IEP, dated January 21, 2020, as amended on February 21, 2020, March 31, 2020, and May 24, 2020.

The IEP further specified that the Student “would transition to the _____ and attend the behavior resource room, where _____ would spend **0%** of _____ educational time with non-disabled children.” Id. (emphasis added). The Student’s Re-Entry plan contemplated three phases of instruction for the Student. The first two phases of the Student’s plan did not recommend any educational time with non-disabled children, while the third phase of the Student’s Re-Entry plan allowed the IEP Team to consider whether the Student would engage with “another educational setting,” implying the

possibility that the Student could spend educational time with non-disabled children if the IEP Team decided it was appropriate based upon behavioral data.

There is no question that the School has no comparable program to the self-contained behavior classroom contemplated by the Student's IEP from RSU 73. The School does not operate any self-contained special education classroom for school students. If the District were to create a program for the Student, would have been the sole participant of self-contained classroom, which would be an exceptionally restrictive environment. Additionally, Phase 2 of the Student's Re-Entry Plan contemplates small group work within classroom, which would not be possible in an individualized classroom setting. Beyond that, the resources, environment, and staff members required for the implementation of the Student's detailed PBSP are currently non-existent at the District's public school setting.

While the Foster Parents argue that the Student should have been allowed to access the public school at the time of enrollment on October 20, 2020, the lack of anything approaching an appropriate program for the Student in the School would have likely been detrimental to the Student and contrary to the District's obligation to provide FAPE. The Student's Re-Entry Plan and PBSP both emphasize the critical nature of pre-planning, acquiring resources, and providing specific staff training to ensure a successful transition for the Student. In fact, the same BCBA in RSU 73 who created the Student's PBSP, Re-Entry Plan, and Crisis Response Plan conducted a joint review of the School with the District's BCBA and concluded that the Student's plans would be best implemented in an out-of-district placement.¹³

¹³ Notably, the BCBA's conclusion was influenced heavily by environmental obstacles created by the COVID-19 pandemic. For example, the BCBA's considered: 1) the Student would only attend in-person school for 2 days a week due to the hybrid model; 2) the resource room is temporarily located in the art classroom; 3) the grade classroom is not big enough to provide 6-feet of spacing for the Student to take breaks or to have adult support in the classroom; 4) if the Student's support staff is forced to quarantine, the Student will not be able to access program; 5) hiring staff members during the COVID-19 pandemic would likely be time consuming, as indicated by the school's inability to retain substitute teachers, etc. 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. 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

Although access to public schools is a fundamental principle of the IDEA, the law makes clear that placement outside the neighborhood school may be required when the nature or severity of the disability means that the education in the local school cannot be satisfactorily achieved. See 34 C.F.R. 300.550(b). Therefore, when a transfer IEP describes a program that does not exist in the receiving school, the District’s only remedies are to attempt to create a program within their school or pursue placement options that will ensure that the Student’s IEP can be fully implemented.

The Director of Special Services took appropriate steps to investigate options for the Student’s tuition placement at another public school, including contacting multiple public schools with self-contained behavior programs. Likely due to the COVID-19 pandemic or perhaps due to the nature of self-contained behavior classrooms which require strict, low student to teacher ratios, the District was unable to secure a tuition placement for the Student immediately in a self-contained behavior program.

However, because the Student’s transfer IEP called for 0% of time with non-disabled peers, and IEP, PBSP, Re-Entry Plan, and Crisis Response Plan are all able to be fully implemented in a special purpose private school setting, the District was able to offer placement in the Program as of October 22, 2020. Based on the Student’s trauma history and prior experiences at the , the Foster Parent understandably declined the District’s offer to implement the IEP at the . In light of this, the District continued searching for other placement options, offered remote learning opportunities in the interim, and eventually helped secure admission for the Student at in , Maine.

Education and Rehabilitative Services, has provided limited guidance to assist states and special educators with their roles in continuing to satisfy federal guidelines. 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.”).

Importantly, the Student's current placement in a special purpose private school does not prevent the IEP Team from later considering the Student's placement at

School, perhaps when the Student enters into Phase 3 of Re-Entry Plan (or sooner if the IEP Team deems it appropriate). The IEP Team would then have the opportunity and the responsibility to implement the detailed and thoughtful transition strategies discussed in the Student's PBSP and Re-Entry Plan, including the extensive training, resource gathering, and staffing required to help the Student succeed in a new setting.

Because the District immediately offered to place the Student at the , where transfer IEP could be fully implemented, the District complied with its procedural obligations to implement the Student's transfer IEP by providing services comparable to the Student's transfer IEP.¹⁴ See also *MSAD No. 37*, 43 IDELR 133 (SEA Me. 2004) (finding that placing a transfer student with a disability in a local day treatment facility instead of a public self-contained classroom, as required by IEP, did not violate the child's right to FAPE in the least restrictive environment).¹⁵

- B. The District has not made available a continuum of alternate placements for the IEP Team to consider. In particular, the District did not make placements available for students requiring access to special education program settings for more than 60% of the school day. MUSER X(2)(B); MUSER X(2)(C)(2)(c).
COMPLIANCE FOUND – NO DENIAL OF FAPE FOUND.

¹⁴ Of course, if the Student's transfer IEP could have been feasibly implemented within the District, it would not be satisfactory for the District to insist on placement at a special purpose private school. The reason that a more restrictive environment satisfies the IDEA in this instance is based on a factual determination that there was no less restrictive environment that was presently appropriate for the implementation of the Student's transfer IEP.

¹⁵ Counsel for the Foster Parents argues that *MSAD No. 37*, 43 IDELR 133 (SEA Me. 2004) is distinguishable from the present complaint because the *MSAD 37* operated three self-contained classrooms in the child's neighborhood public school. See Student's Reply to #21.030C, dated December 23, 2020. However, the parties involved in *MSAD No. 37* agreed that none of those classrooms was appropriate to meet the child's needs. Even if the School operated three self-contained classes, none of which was appropriate to meet the Student's specific needs, the Student's educational options would not improve. Additionally, the Foster Parents argue that the child's situation in *MSAD 37* is dissimilar from the present facts because "the student's behaviors deteriorated more rapidly and with more intensity in most recent public school placement." *Id.* However, the five-day period where the Student was successful at School does not provide sufficient enough time period to indicate the Student's potential success or the Student's potential setbacks in a public school self-contained behavior program. Comparing the Student's first five days at School with first two months in a self-contained elementary school behavior classroom in 2019-2020, and considering the Student's struggles at the program in mid-November suggest that the evidence is, at best, mixed about whether the student's behaviors would deteriorate more rapidly and with more intensity in a public school placement.

Children with disabilities are entitled to access a continuum of alternate placements that are available to meet a child’s special education needs. MUSER X(2)(B); 34 CFR 300.115. (“Each public agency must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. The continuum...must include...instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions...”). However, individual schools are not required to duplicate highly specialized programming, and therefore, the full continuum of alternate placements need not be presented under the single roof of a neighborhood school. See MSAD No. 37, 43 IDELR 133 (SEA Me. 2004).

School is small, with only about 150 students from kindergarten to 8th grade. Nonetheless, all districts – large or small – must provide a continuum of alternate placements for children with disabilities. The District has joined the () to ensure access to a larger continuum, including but not limited to the Program’s day treatment program.

Counsel for the Foster Parents argues that the District fails to provide placements for students who need to access specially designed instruction for more than 60% of their school day. However, the facts presented suggest that the District conducts an individualized case-by-case approach about providing special education services to each student with special needs. Currently, the District only provides school students with a resource room model at School. There is presently one part-time Special Education Teacher and one Educational Technician to assist with IEP implementation. However, the program is currently structured as such because the special education services meet the needs of the current student population. In interviews with the complaint investigator, the Director of Special Education, the Superintendent/Principal, and the Special Education teacher all explained that needs of the individual students drive the school’s determinations about how special education resources are allocated (not the other way around).

When the Student transferred to the District on October 20, 2020, the Director of Special Services immediately began searching for outside programs to meet the Student's needs. The Director did this because the initial (outdated) IEP as provided to the District from RSU 73 called for the Student's placement in a special purpose private school. Therefore, that is exactly what the Director sought initially – placement at a special purpose private school. When the Director soon learned about changes to the Student's IEP, included the incorporation of the Student's detailed PBSP, Re-Entry Plan, and Individual Crisis Response Plan, and she received a request from the Foster Parent to consider the [redacted] School self-contained behavior program, the Director began making further inquiries to both public school programs with self-contained behavior programs and special purpose private schools.

Additionally, after the IEP Team held a Transfer Meeting on November 6, 2020, the District was in agreement with the rest of the IEP Team that the Student's BCBA from RSU 73 and the District's BCBA should work together to determine whether a program could be initiated for the Student at the [redacted] School which would also meet the Student's needs with respect to all the provisions of [redacted] IEP (and the PBSP, the Re-Entry Plan, and the Crisis Response Plan). The two BCBA's considered numerous options at the [redacted] School, including creating a completely individualized educational program for the Student in a small staff room, utilizing other open spaces such as a gymnasium or library, or mainstreaming the Student in the [redacted] grade classroom with specially designed instruction, as needed.

All of these potential program options would have required the District to hire and train additional staff members, to rearrange space in the school building, and to execute a new educational program for the Student, but those obstacles were not the reasons why the BCBA's (and ultimately, the IEP Team) recommended an out-of-district placement for the Student. Instead, none of the options presented along the proposed continuum of alternate placements was found to be more beneficial to the Student than a potential placement in an out-of-district therapeutic day treatment program.

A significant concern that the BCBA's raised for all [redacted]-based options was the current hybrid learning model for [redacted] school students that is necessitated by the COVID-19 pandemic, which would have allowed the Student to only attend school two

days per week. The BCBA's concluded that the best programming fit for the Student was an out-of-district placement, and the IEP Team agreed with their recommendation. In other words, the IEP Team considered possible alternative placements along the continuum of services, but the IEP Team felt that the Student's needs as expressed by IEP and detailed PBSP, Re-Entry Plan, and Crisis Response Plan were best met by an out-of-district placement, such as _____.

As such, there is no evidence to suggest that the District is unable or unwilling to provide special education services for students who require access to special education for more than 60% of their school day. Instead, there is only evidence that, considering this particular Student's current individual behavioral needs, as well as this particular Student's current LRE percentage of 0% of educational time spent with non-disabled peers, the Student's IEP Team concluded that _____ in _____, Maine was the Student's most appropriate and least restrictive educational placement.

- C. To the extent that the District proposes the _____ Program as a placement, the _____ Program would not provide the Student with a free and appropriate public education in the least restrictive environment (LRE). MUSER X(2)(B). **NO FINDING.**

The Student is currently placed at _____ in _____ Maine. Although the District originally offered the _____ as a potential placement when the Student transferred to the District, the Foster Parent expressed strong objections upon learning new information about the Student's trauma history and prior educational experience at the _____. As a result of the Foster Parents concerns, as well as concerns raised by the Student's BCBA from RSU 73 and the School's BCBA, the Student's IEP Team has never determined that the _____ is the most appropriate, least restrictive placement for the Student.

In interviews with District and school staff, there was no indication that the District intends to propose the _____ Program as a placement in the future. To the contrary, District and school staff expressed the hope that the Student would continue to progress towards _____ IEP goals, would successfully enter Phase 3 of _____ Re-Entry plan, and would then be able to access a less restrictive environment at the _____ School.

Since the District is not currently proposing the _____ as a placement for the Student, and because the IEP Team has never determined that the _____ would be the most appropriate, least restrictive learning environment for the Student, no determination will be made with respect to this allegation.

VII. Corrective Action Plan

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

Dated: January 26, 2021

Julia N. Pothen, Esq.
Complaint Investigator