

# Complaint Investigation Report

v. York CDS

February 12, 2021

Complaint # 21.036C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: December 16, 2020

## I. Identifying Information

Complainants: \_\_\_\_\_, Parents

Respondent: Child Development Services (“CDS”) – York County  
Roberta Lucas, Acting Director of CDS  
Maine Department of Education  
23 State House Station  
Augusta, ME 04333

Lisa-Kay Folk, CDS Site Director

Student:

DOB

## II. Summary of Complaint Investigation Activities

On December 14, 2020, the Maine Department of Education received this complaint. Therefore, the current investigation covers the period of December 14, 2019 to present. See MUSER XVI(4)(B)(3). The complaint investigator was appointed on December 16, 2020.

The complaint investigator received 333 pages of documents from Child Development Services in York County (“CDS-York”). The investigator also received 28 additional pages of documents from the complainants. Interviews were conducted with the Student’s parents (“Parents”) on January 29, 2021 and February 5, 2021. On February 1, 2021, the Student’s Occupational Therapist was interviewed. On February 3, 2021, the Student’s Behavioral Health Home Care Coordinator from \_\_\_\_\_ was interviewed. On February 3, 2021 and February 5, 2021, the following staff members from CDS-York were interviewed: Two CDS-York Case Managers, CDS-York Program Manager, the Student’s CDS-York Case Manager, the CDS-York Director, a CDS-York

IEP Administrator, and the CDS State Director.<sup>1</sup> 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 \_\_\_\_\_ resides with \_\_\_\_\_ parents (“Parents”) in \_\_\_\_\_, Maine. The Student was diagnosed with Autism, and \_\_\_\_\_ qualifies for special education and related services under the Individuals with Disabilities Education Act (“IDEA”). The Student has had an Individualized Education Plan (“IEP”) since \_\_\_\_\_ turned \_\_\_\_\_ years old in January 2020.

The present complaint was filed by the Parents’ counsel, alleging that CDS-York 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 30, 2020, alleging five violations of the MUSER. A telephonic Complaint Investigation Meeting was held on December 30, 2020. A Revised Allegations Letter was sent to the parties by the complaint investigator on January 2, 2021, also setting forth five allegations made by the Parents.

### **IV. Allegations**

The Parents have alleged the following five violations:

- A. CDS changed the Student’s services and placement in March 2020 without an IEP meeting. MUSER VI(2)(I); MUSER VI(2)(J).
- B. CDS did not provide for parental participation when they changed the Student’s services and placement in March 2020 without an IEP meeting. MUSER VI(2)(H).
- C. CDS did not provide the Student with a free and appropriate public education (“FAPE”). MUSER II(13); MUSER IX(3)(B). Specifically, CDS did not provide FAPE during the following time periods:
  - 1. During the 2019-2020 school year, from 3/15/2020 to 6/17/2020.
  - 2. During Summer 2020, from 6/18/2020 to 8/21/2020.
  - 3. During the 2020-2021 school year.
- D. The Student is not being educated in the least restrictive environment (“LRE”). MUSER X(2)(B).

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<sup>1</sup>As per the standards of practice for conducting complaint investigations, the complaint investigator used her discretion with regards to which witnesses were interviewed; therefore, not all of the witnesses identified by the parties were interviewed as part of this investigation.

- E. CDS has not made available a continuum of alternative placements to meet the needs of the Student, including Head Start, Kindergarten, Reverse Mainstream, public preschool, and group childcare. Specifically, CDS has artificially limited the Student's placement options and has caused the Student to be without a program. MUSER X(2)(B); MUSER X(2)(C).

## V. Factual Findings

1. The Student is \_\_\_\_\_ years old (DOB \_\_\_\_\_). The Student resides with parents ("Parents") in \_\_\_\_\_, Maine.
2. In Maine, Child Development Services ("CDS") is responsible for delivering special education services under Part B of the IDEA for children aged 3 to 6 years. CDS-York is the regional site responsible for \_\_\_\_\_, where the Student lives. As such, CDS-York maintains educational responsibility for the Student.
3. The Student qualifies for special education and related services based on diagnoses of Autism Spectrum Disorder ("ASD"). See Student's IEP, dated October 29, 2020.
4. The Student's most recent psychological evaluations were conducted in May and June of 2019. The Autism Diagnostic Observation Schedule ("ADOS-2") was administered, and the examiner rated the Student's behaviors as consistent with the diagnostic criteria of Autism Spectrum Disorder ("ASD"), with \_\_\_\_\_ score falling in the "moderate-to-severe" range of concern. The Student's diagnosis was ASD, with accompanying language impairment. See Student's Psychological Evaluation by Dr. Ellen Popenoe, dated June 17, 2019.
5. The Student also had a Speech and Language Evaluation in April 2019. As determined by the Preschool Language Scales-Fifth Edition ("PLS-5") and the Receptive-Expressive Emergent Language Test-Third Edition ("REEL-3"), the Student showed below average language skills. The Student's fluency, voice, oral-motor, and articulation skills could not be formally assessed due to limited language development. Speech & Language services were recommended for the Student. See Speech-Language Pathology Communication Evaluation, dated April 17, 2019.
6. The Student's Occupational Therapy Evaluation was privately obtained by Parents in November 2019. The evaluator concluded that the Student "scored in the typical performance range for sensory sensitivity, sensation avoidance, and low threshold. \_\_\_\_\_ score[d] with a definite difference (more than others) in the low

- registration domain and with a probable difference (more than others) in the sensation avoiding domain.” Occupational Therapy services for 90 minutes per week were recommended. See Occupational Therapy Evaluation, dated November 25, 2019.
7. The Student’s most recent Individualized Education Program (“IEP”), dated October 29, 2020, provides for 5 x 3 hours per week of Specially Designed Instruction. The Student also requires 3 x 30 minutes per week of Speech & Language services, 6 x 30 minutes per quarter of Assistive Technology Services, 2 x 45 minutes per week of Occupational Therapy, and 1 x 30 minutes per month of Occupational Therapy consultation. The Student also receives transportation services. See Student’s IEP, dated October 29, 2020.
  8. The Student was referred to CDS in July 2018, and was identified as eligible for early education services under Part C of the IDEA. Individualized Family Service Plan (“IFSP”) was developed in July 2018, and received one hour per week of Speech & Language therapy via the coaching model. See Psychological Evaluation by Dr. Ellen Popenoe, dated June 17, 2019. The Student’s psychological evaluation in June 2019 recommended an increase in “the intensity of intervention services,” due to “significant impairments in functional communication and social interaction and delays in adaptive behavior.” Id.
  9. On November 6, 2019, the Student’s IEP Team convened to plan for the Student’s transition from Part C early intervention services to Part B special education services and to develop the Student’s IEP, which would become effective on the Student’s birthday, January 5, 2020. See Written Notice from IEP Team Meeting on November 6, 2019.
  10. The initial IEP provided for 3 x 30 minutes per week of Speech and Language Services, 5 x 3 hours per week of Behavioral Health Day Treatment, assistive technology, and transportation. See Student’s IEP, dated November 6, 2019.
  11. On January 31, 2020, the IEP Team met to consider the Student’s recent Occupational Therapy Evaluation.<sup>2</sup> At that time, the Team added 2 x 45 minutes

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<sup>2</sup> Notably, the Parents obtained a private occupational therapy evaluation, dated November 25, 2019, and during their interview with the complaint investigator, they expressed frustration with the process of ensuring that CDS would agree to include OT services in the Student’s IEP as soon as possible. See Interviews with the Parents on January 29, 2021 & February 5, 2021. The issue of an OT evaluation was discussed at the IEP Team Meeting on November 6, 2019, but Written Notice states, “[The Student] has good fine motor skills at this time. Primary concern is with sensory processing. It was discussed that CDS does not do sensory, only OT evaluations. The family is going to get a referral from their Dr. to pursue a private OT evaluation.” See Written Notice from the IEP Team Meeting on November 6, 2019. However,

per week of OT services, and 1 x 30 minutes per month of OT consultation to the Student's IEP.

12. On or around January 8, 2020, CDS began implementing the Student's IEP as written at a \_\_\_\_\_ program located within MSAD 6's \_\_\_\_\_ School. The Student began receiving \_\_\_\_\_ OT and Speech and Language services around this time as well. See Student's Service Log, provided by CDS-York.
13. During their interview with the complaint investigator, the Parents explained that they felt extremely fortunate to find a program for the Student so quickly upon \_\_\_\_\_ birthday because they were previously warned by CDS-York staff members that most children with January birthdays were required to join a waitlist initially before a program became available. The Parents were very satisfied with the services the Student received between January 8, 2020 and March 13, 2020.<sup>3</sup> See Interviews with the Parents on January 29, 2021 & February 5, 2021.
14. On March 15, 2020, Governor Mills proclaimed a state of civil emergency in Maine to protect public health in the face of the COVID-19 pandemic. Most schools immediately suspended in-person instruction at that time. On March 16, 2020, the Parents learned that the \_\_\_\_\_ program would no longer be operating at \_\_\_\_\_ School due to the COVID-19 pandemic.
15. On March 31, 2020, the Governor issued a "stay at home order," prohibiting K-12 schools from conducting in-person, classroom instruction through May 1, 2020. See "An Order Regarding Further Restrictions on Public Contact and Movement, Schools, Vehicle Travel, and retail Business Operations," ("Public and private k-12 schools statewide have terminated in-classroom instruction in accordance with my recommendation of March 15, 2020. It is hereby Ordered that all such schools shall remain closed for classroom or other in-person instruction until at least May 1, 2020 unless otherwise ordered.").
16. On March 31, 2020, the Student's Case Manager from CDS-York send a group email to the Parents, stating "Some of you may have already been offered distance

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this issue is not addressed further in this complaint because there was no allegation related to the content, development, or implementation of the Student's IEP prior to March 16, 2020.

<sup>3</sup> The Parents did note that, based on the number of students and adults in the classroom, they suspected that the Student was not consistently receiving 1:1 adult support at the \_\_\_\_\_. Their suspicion was later confirmed by the Student's special education teacher. See Email from Student's former Special Education teacher, as copied by Student's Case Manager, dated November 16, 2020. Still, the Parents were very satisfied with the Student's progress in \_\_\_\_\_ new program. See Interviews with the Parents on January 29, 2021 & February 5, 2021.

- learning or teletherapy options. If you have, please reply to your child's teacher or therapists to get that started. If you have not heard from teachers or therapists, either they are not ready to offer distance services, or they will not be offering that service...If your child had not yet been referred for or picked up for services and you would like to try teletherapy we can see if any therapists are available for new referrals. New preschool services are unlikely to be accepted at this time as many teachers have been furloughed." See Email from Student's Case Manager, "Dear Parents," on March 31, 2020.
17. On April 7, 2020, the Commissioner of Education in Maine recommended that schools extend their remote learning plans through the end of the 2019-2020 school year. See "Statement Regarding Recommendations for Extended Remote Learning," issued by Commissioner of Education Pender Makin on April 7, 2020.
  18. The Student received no services between March 12, 2020 and April 15, 2020. See Student's Service Log, provided by CDS-York.
  19. On or around April 14, 2020, the Student began to engage in Speech & Language teletherapy sessions with provider from the . Id. The Student continued to receive no OT services and no SDI.
  20. On or around May 11, 2020, the began offering the Student live, remote "telehealth" instruction. During an interview with the Parent, she described these sessions as 30 minutes per day of "group circle time." The Parent estimated that there were usually more than 20 other children present on ZOOM for these calls, and the teacher would attempt to read a book or lead an activity for the whole group. See Parents' Interviews on January 29, 2021 and February 5, 2020; Student's Service Log, provided by CDS-York.
  21. The Parent explained that the Student's teacher from the had been furloughed at the start of the pandemic, so these live group circle sessions were taught by a teacher who the Student had never worked with. The Student's former teacher never prepared any materials for the Student or engaged with remotely. The Student received no individualized instruction, nor any specially designed instruction towards IEP goals during circle time. Additionally, the Student was unable to maintain focus virtually, despite various efforts by the Parent to create a successful learning environment at home. As such, the Parent chose not to attend circle time ZOOM sessions after May 19, 2020. Id.

22. The Student's Case Manager at CDS-York confirmed that the Parents' description of the remote services offered to the Student was accurate. See Interview with CDS-York Case Manager on February 5, 2021.
23. The Student's Service Log indicates on May 26, 2020, June 15, 2020, and July 8, 2020, "family support and learning strategies, activities, and materials provided via email exchange."<sup>4</sup> This note simply refers to the generic emails sent out to all parents of students who participated in the circle time ZOOM calls; the teacher would often send a coloring page, a letter tracing worksheet, and other activities to go along with circle time. At no point, did the Student receive educational packets with SDI. At no point, did the Student engage in SDI 1:1 (or anything close to it) with a teacher or ed tech. See Student's Service Log, provided by CDS-York.; See Parents' Interviews on January 29, 2021 and February 5, 2020
24. Despite the challenges with effectively delivering the Student's remote services, the IEP Team was not reconvened to develop an alternative plan.
25. At some point in May 2020, the Student received some OT teletherapy sessions. See Student's Service Log. During an interview with the complaint investigator, the Student's Occupational Therapist explained that the remote sessions were largely ineffective due to the Student's difficulty maintaining attention on a screen for any length of time. Instead, the provider often attempted to work with the Parent in a coaching fashion to provide support and guidance. See Occupational Therapist's Interview on February 1, 2021.
26. In June 2020, the Parents privately paid the Student's OT provider to begin face-to-face sessions, and in July 2020, CDS began to deliver in-person OT services for the Student again. Id.
27. On June 18, 2020, the Student's IEP was amended by agreement, and without an IEP Team meeting, to include Extended School Year ("ESY") services. Specifically, the Team agreed that the Student required Specially Designed Instruction 12 x 3 hours per quarter, Speech and Language Services 10 x 30 minutes per quarter, and Occupational Therapy 12 x 45 minutes per quarter. See Student's IEP, dated November 6, 2019, as amended on January 31, 2020 and

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<sup>4</sup> The Parents explained during their interview with the complaint investigator that the Student's teacher at never had further contact with the student after the March 16, 2020 closure of the School building due to COVID-19. The Parents understand that the Student's teacher was furloughed, yet the Student's service grid indicates that the Student's teacher delivered 1:1 live instruction at the between May 11, 2020 and May 19, 2020, as well as remote learning packets on May 26, 2020, June 15, 2020, and July 8, 2020. The Parents insist this is inaccurate.

June 18, 2020; Written Notice of Agreement for Amendment without an IEP Meeting, dated June 18, 2020.

28. Written Notice for the ESY amendment, dated June 18, 2020, states, “[The Student] tried to access some SDI remotely during the March-June COVID-19 shutdown.<sup>5</sup> had difficulty participating in the SDI through remote learning. [The Parent] does not feel would be able to access SDI over the summer either but wanted it on the IEP should a change be made for school to re-open over the summer and face to face SDI services be available. If not, the family would be open to receiving information from a teacher over the summer as opposed to telepractice over the computer.” Id. There is no discussion in the Written Notice regarding an alternative plan to implement the Student’s IEP and provide FAPE. Id. Additionally, despite the note about the family receiving information from a teacher over the summer, no materials were ever provided. See Interviews with the Parents on January 29, 2020 and February 5, 2020.
29. The Student’s Case Manager and IEP Administrator noted during their interview with the complaint investigator that there was never a specific discussion with the Parents about what remote SDI might look like for the Student. The only experience the Parents had with remote instruction was the circle time ZOOM sessions provided by the during May 2020. See Interviews with the Student’s Case Manager or IEP Administrator on February 5, 2021. The Parents confirmed that they were never offered remote services beyond ZOOM circle time meets. See Interviews with the Parents on January 29, 2020 and February 5, 2020.
30. In July 2020, the Parents were informed that the Student’s prior program at School was unlikely to open during the 2020-2021 school year. However, the Acting Director of the informed the Parents that the Student would have a spot in the program in , Maine in the fall. However, the start date for the in kept getting pushed farther and farther back. Id.
31. Abruptly, in September 2020, the Parents were informed that there was no longer space for the Student in the program. Id.
32. On October 29, 2020, the Student’s IEP Team met for an Annual Review. The Written Notice states, “[The Student has not been in specially designed instruction

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<sup>5</sup> Although the Written Notice, dated June 18, 2020, refers to the remote instruction offered to the Student in May as “SDI” there is no finding in this complaint that SDI was offered to the Student. The nature of the remote services offered to the Student did not meet the standard for SDI.



since March 2020 due to COVID-19...[The Student] has been out of speech therapy since COVID-19 shutdown in March and just recently resumed some private, office-based therapy through parent referral.” Despite this recognition that the Student’s IEP was not being implemented for the past seven months, the Written Notice again makes no attempt to address the lack of services being provided to the Student, other than noting that all programs are currently full. There is also a note that the Parent requested the Student be added to waitlists for both \_\_\_\_\_ and other programs. See Written Notice for IEP Team Annual Meeting on October 29, 2020.

33. During the October 29, 2020 IEP Team Meeting, the Team also considered whether the Student still required 1:1 support. The Parents raised this concern, and the Student’s Occupational Therapist also shared information about the Student’s significant progress towards \_\_\_\_\_ goals, suggesting that the Student may be ready for a less restrictive environment. The Written Notice states, “Parents and [Case manager] questioned if [the Student] would get back into a program sooner if \_\_\_\_\_ was listed under a 2:1 or 3:1 ratio. It was discussed that, without current information available as to how [the Student] is functioning in a classroom setting, and \_\_\_\_\_ was still requiring full adult support for many goals, that change in ratio to a less restrictive environment should be determined once [the Student] has had the benefit of attending a program again and the school recommend[s] that [the Student] does no longer require 1:1 support.” Id.
34. During an interview with the complaint investigator, the Parents shared their opinion that the IEP Team was unable to have a meaningful conversation about the Student’s least restrictive environment because CDS quickly concluded that data was necessary from a classroom setting and there could be no further discussion until the Student was engaged in programming. The Student’s Community Case Manager also felt that the conversation was not allowed to proceed. See Interviews with the Parents on January 29, 2020 and February 5, 2020; Interview with the Student’s Community Case Manager on February 3, 2020.
35. The Written Notice seems to suggest that unanimous agreement was reached. See Written Notice for IEP Team Meeting on October 29, 2020 (“Parents in agreement with the determinations of the meeting.”).
36. However, on November 3, 2020, emails were exchanged between the Parent and the Student’s CDS-York Case Manager, indicating that the conversation/debate was ongoing. The Parent stated, “I would really like for [the Student] to be changed into a 2:1 ratio. \_\_\_\_\_ does not exhibit any aggressive behavior and both

speech and occupational therapist think that [redacted] is ready for it. Even back in March, before the shutdown, [redacted] classroom had 4 kids and 2 aids – I am pretty sure [redacted] was not a 1:1 at that point anyways, although I don't think the school would ever admit that...I'm willing to re-evaluate [redacted], but as you said, it would take too long for it to make a difference.<sup>6</sup> Is there any way the therapists' recommendations can be enough under the crazy circumstances.” See Email from Parent to CDS-York Case manager, dated November 3, 2020. The CDS-York case manager stated, “I will have to discuss with my admin and team leader about how we might look at [redacted] moving to a 2:1 ratio.” See Email from CDS-York Case manager to Parent, dated November 3, 2020.

37. The Student's CDS-York Case manager continued to exchange emails with the Parent, and on November 10, 2020, the Case manager wrote, “The written notice will explain what you need to know about the decision. [redacted] current ‘educational’ setting is nothing like a classroom, and the expectations and supports are far different, so [redacted] progress can't really be measured the same. Changing [redacted] ratio may or may not be an advantage, but the reality is no programs have openings...Everyone I speak to has nothing but waitlists. CDS York county alone has 70 children waiting for a program. The need seems to have exploded just as the availability has shrunk.” See Email from CDS-York Case manager to Parent, dated November 10, 2020.
38. On November 12, 2020, the Student's CDS-York case manager wrote an email to the Student's former teacher at the [redacted] program, stating, “I appreciate you being available to answer some questions about [the Student's] ratio issue. It continues. Would you agree with mom's suggestion that [the Student] was not always getting a 1:1 ratio in [redacted] because of staffing and you being shared with [redacted]? Can you estimate how much of [redacted] week [redacted] may not have been getting 1:1 support?” See Email from CDS-York Case Manager, dated November 12, 2020.
39. On November 16, 2020, the CDS-York Case Manager wrote another email to the CDS-York Program Manager, stating, “Here is what former teacher said about [redacted]. ‘I was in [redacted] for literally half my time, and we had a couple of pretty heavy hitters, so I would say [redacted] was 2:1 on more than 5 occasions. Just how many times I'm not sure. I know I had a lot of meetings that had me continuously

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<sup>6</sup> On November 9, 2020, the Parent also notified the CDS-York Case Manager that she spoke to Dr. Popenoe, the doctor who conducted the Student's psychological evaluation in June 2019. The Parent reported that Dr. Popenoe felt the IEP Team and whomever sees the Student in an academic setting should make the decision about the Student's ratio, rather than basing that decision on possible changes in evaluation scores. See Email from Parent to Case Manager, dated November 9, 2020.

changing my schedule, which makes it difficult to determine which days and times I was there. But I know Mary and Toni were both comfortable doubling up with [redacted] and another child when need be. When we had to double up, [redacted] was always one that would be 2:1.” See Email from CDS-York Case manager to CDS-York Program Manager, dated November 16, 2020.

40. On December 1, 2020, the Student’s Occupational Therapist wrote a letter regarding the Student’s least restrictive environment, stating, “In the last Individualized Educational Plan meeting with Child Development Services, it was discussed by the team to change [the Student] to a 3 to 1 ratio due to progression in skills and attention. CDS used the 3/20 progress note to remain at 1:1 ratio which has limited [redacted] choices of preschool options. CDS educational plan supports the least restrictive environment and the team was disregarded with their expertise in [the Student’s] abilities since 3/20 to state their recommendations.” See Letter from Student’s Occupational Therapist, dated December 1, 2020.
41. Following this ongoing email conversation and the letter from the Student’s Occupational Therapist, no amendments were made to the Written Notice, and no further IEP Team Meetings were scheduled. There is no indication that the Case Manager or the Program Manager spoke to the Parents further about their concerns.
42. On December 14, 2020, the Parents, through Counsel, filed this complaint with the Department of Education.
43. At present, the Student has not been placed into a programming, and [redacted] is not receiving Specially Designed Instruction in any form. The Student is receiving home-based Occupational Therapy services and Speech & Language services.

Other relevant facts are included in the determinations below.

## **VI. Determinations**

- A. CDS changed the Student’s services and placement in March 2020 without an IEP meeting. MUSER VI(2)(I); MUSER VI(2)(J). **VIOLATION FOUND.**
- B. CDS did not provide for parental participation when they changed the Student’s services and placement in March 2020 without an IEP meeting. MUSER VI(2)(H). **VIOLATION FOUND.**

The first two allegations are closely related because they both revolve around the question of whether CDS-York should have convened the IEP Team prior to the

Student's Annual IEP Meeting in October 2020. Therefore, these two allegations are best addressed together.

Children in Maine, ages birth to twenty-two 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 ("MDOE") shall ensure the provision of appropriate services, regardless of the nature and severity of a child's disability or developmental delay. MUSER I(2). In Maine, special education services under Part B of the IDEA are provided by Child Development Services ("CDS") for children aged 3 to 6 years. CDS was established by the Maine Legislature as the State Intermediate Education Unit ("IEU"), under the supervision of the Commissioner of Education. 20-A M.R.S. 7208. CDS-York is the regional site responsible for York County, where the Student resides.

Federal and State law entitle all children with disabilities to 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. FAPE requires special education and related services that are reasonably calculated to enable the child to make progress appropriate in light of the child's unique circumstances. See *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017).

Neither the IDEA nor the 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, once the IEU begins providing educational services to the general student population,<sup>7</sup> the IEU "must

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<sup>7</sup> By contrast, OSEP provided that if the IEU "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 students with disabilities during that same period of time." See *Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019*

make every effort to 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 CDS-York’s responsibility to provide children with a free, appropriate public education (“FAPE”), unless schools are unable to provide educational services in any form to the entire student population. Id.

OSEP and the 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 the [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, “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 Services

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*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>.

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 experience. 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, CDS-York was not initially required to hold an IEP Team Meeting when the Student’s program at the \_\_\_\_\_ first closed due to the COVID-19 pandemic. Because COVID-19 changed the nature of instructional delivery for all students, and there was no legal requirement for CDS-York to hold an immediate IEP meeting to make changes to the Student’s special education services.

However, once CDS-York began providing remote services to students, CDS-York was required to provide FAPE to the Student. The \_\_\_\_\_ began offering limited remote services to the Student that did not satisfy the requirements of the Student’s IEP; therefore, CDS-York was required to reconvene an IEP Team Meeting because the services provided to the Student dramatically changed the substance of special education instruction outside of the IEP process. The Student, who was \_\_\_\_\_ years old at the time, was invited to participate in a virtual, large group, circle time through the \_\_\_\_\_ for 30 minutes each day. This instruction was not specially designed to meet \_\_\_\_\_ IEP goals or needs. Furthermore, despite best efforts from the Parents to engage the Student in remote circle time, the services provided were simply

inaccessible to the Student. Due to age, maturity, and disabilities, the Student could not engage in a large group setting with more than 20 peers and an unfamiliar teacher on a computer screen.

When an IEP is unable to be implemented, the IEU has a responsibility to reconvene the IEP Team to identify alternative service options. See MUSER IX(3)(B)(3). At this point, CDS-York had an obligation to reconvene the Student's IEP Team and determine what alternative services could meet the Student's needs during the COVID-19 pandemic. The Team could have considered other options, such as remote 1:1 specially designed instruction, specially designed instructional packets prepared specifically for the Student, or remote coaching services provided to the parents. The IEP Team Meeting was never held, and none of these options were considered.

Because no IEP Meeting was held, despite a fundamental change in the Student's services, there was no opportunity for parental input or objection. MUSER VI(2)(I) outlines the IEP decision making process:

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. Id.

Of course, it is the IEP team that is best situated to consider the child's unique needs, including academic growth, the child's progress towards grade-level proficiencies, the child's behaviors that may interfere with their growth, and additional information and input provided by the child's parents. See MUSER V(2)(B); MUSER VI(2)(J).

Considering all of the above, this complaint finds that CDS-York violated MUSER by neglecting to hold an IEP Meeting prior to October 29, 2020 and for

effectively changing the Student's IEP outside the IEP process, without input from the Parents.

- C. CDS did not provide the Student with a free and appropriate public education ("FAPE"). MUSER II(13); MUSER IX(3)(B). Specifically, CDS did not provide FAPE during the following time periods:
1. During the 2019-2020 school year, after 3/15/2020. **VIOLATION FOUND.**
  2. During Summer 2020, from 6/18/2020 to 8/21/2020. **VIOLATION FOUND.**
  3. During the 2020-2021 school year. **VIOLATION FOUND.**

A child's Individualized Education Plan ("IEP") details all necessary special education and related services, and the IEP must be implemented as written, including all required components. 34 C.F.R. 300.323(c); MUSER IX(3)(B)(3). The failure to implement a student's IEP can result in a denial of FAPE. See *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017). However, not every deviation from an IEP constitutes a denial of FAPE. See *L.C. and K.C. v. Utah State Bd. Of Ed. et al.*, 43 IDELR 29 (10<sup>th</sup> Cir. 2005).

Material failures to implement an IEP will result in a denial of FAPE. See *Sumter Cty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4<sup>th</sup> Cir. 2011); *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir.2007) ("a material failure to implement an IEP violates IDEA."); *S.D. v. Portland Public Sch.*, 2014 WL 4681036, 6 (D. Me. 2014) ("In addition to developing an IEP that is reasonably calculated to provide meaningful educational benefits, a school district is required to implement the IEP in accordance with its requirements. Although perfect implementation is not necessarily required, courts have found that the failure to implement a material or significant portion of the IEP can amount to a denial of [a free appropriate public education]" (internal citations omitted)).

*Van Duyn* details, "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. And the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (citations omitted). 502 F.3d 811, 822 (9th Cir.2007).

At all times since March 30, 2020, there has been a material failure to implement the Student's IEP and provide FAPE. FAPE was not provided during the end of the 2019-2020 school year because the Student was never offered specially designed



instruction or given a generalized form of remote instruction that was accessible to . The remote instruction offered by , as discussed above, did not address the Student’s IEP goals and did not provide opportunities for the Student to progress in light of unique circumstances. CDS-York did not develop a plan that was appropriately designed to support the Student’s learning in an alternative context.

The Student received no services during ESY 2020, despite a recognition that required ESY services. The Parents did not decline an offer of FAPE, remote or otherwise, because nothing more than large group circle time via ZOOM was offered. When the Parents inquired about receiving remote written materials, nothing was provided. Finally, during the current 2020-2021 school year, CDS-York acknowledges that the Student was not provided with a program for SDI at all, though is now receiving related services of Occupational Therapy and Speech & Language services.

CDS-York did not provide the Student with FAPE during the time periods cited by the Complaint.

D. The Student is not being educated in the least restrictive environment (“LRE”).  
MUSER X(2)(B). **VIOLATION FOUND.**

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).

Currently, the Student is not being educated in accordance with IEP, and has gone nearly a full year without receiving FAPE. Nonetheless, according to the Student's related service providers, the Student has also changed and developed immensely during the last eleven months, both as a result of engagement with related services providers and as a result of developmental transition from 3-year-old to 4-year-old. Additionally, other members of the IEP Team, including the Parents, the Student's Community Case Manager, and the Student's former teacher have all submitted perspectives indicating that the Student's LRE likely requires reexamination. CDS-York is not currently providing the Student with an educational environment, while simultaneously insisting that the Student needs to be engaged in an educational environment before LRE can be discussed and reconsidered by the IEP Team. This is an untenable position, and the IEP Team must be permitted to collect data, perhaps through a re-evaluation, and consider the question of whether the Student's IEP reflects least restrictive environment. The failure to fully discuss and resolve this issue as an IEP Team constitutes a violation of MUSER X(2)(B) ("In determining the educational placement of a child with a disability including a preschool child with a disability, each SAU must ensure that...the child's placement is determined at least annually...").

- E. CDS-York has not made available a continuum of alternative placements to meet the needs of the Student, including Head start, Kindergarten, Reverse Mainstream, public preschool, and group childcare. Specifically, CDS has artificially limited the Student's placement options and has caused the Student to be without a program. MUSER X(2)(B); MUSER X(2)(C). **NO VIOLATION FOUND.**

Children with disabilities are entitled to access a continuum of alternative 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 alternative placements is available to meet the needs of children with disabilities for special education and related services.").

Although the Student has still not been placed in a special purpose private school, there is no evidence to suggest that CDS-York has artificially limited the Student's placement options, causing the Student to be without a program. When the 2020-2021 school year began, the Parents and the Student's CDS-York Case Manager fully expected the Student to be placed at the . In fact, the Parents and CDS-York were reassured multiple times by the Acting Director of the that the Student had secured a spot in the program. When the finally announced that it would remain closed in October 2020, regardless of the Student's adult-support ratio, no self-contained programs would have been identified with possible openings to provide the Student with SDI at a 1:1, 2:1, 3:1 or 4:1 adult-support ratio. All parties agreed that CDS-York has a practice of offering Head Start, Kindergarten, Reverse Mainstream, public preschool, and group childcare placements – the full range of alternative placements. However, the Student's parents and the full IEP Team determined that the was an appropriate special purpose private school for the Student. Everyone was caught completely off guard when the Student's spot disappeared without any prior notice or opportunity to secure another program placement.

CDS-York certainly has an obligation to address the dire lack of availability of special purpose private schools in York County in order to fully implement the IEPs of all the students it, including the Student (as addressed by allegation C above), but there is no indication that CDS-York did not make available a full continuum of alternative placements, including Head start, Kindergarten, Reverse Mainstream, public preschool, and group childcare to the Student.

## VII. Corrective Action Plan

1. **Within one week of receipt of this Report, CDS-York shall schedule an IEP Team Meeting for the Student.** The Student's IEP team must convene to determine a plan for delivering Specially Designed Instruction (SDI) while the Student remains on the waitlist at various special purpose private schools. The plan for SDI must be in keeping with the Student's current needs and must consider all options for the possible delivery of services, including, but not limited to, receiving 1:1 instruction at a non-educational site such as CDS offices, receiving 1:1 synchronous remote instruction, and receiving 1:1 asynchronous remote instruction. The Team must consider the Student's learning needs when adopting this alternative plan for delivering SDI to the Student. If the Team anticipates any further delay in initiating these long overdue SDI services, the IEP Team must determine what additional compensatory services are owed to the Student (above and beyond what is ordered below).

Additionally, the IEP Team must engage in a meaningful discussion about the Student's least restrictive environment and, if the Parents consent, take steps to re-evaluate the Student to determine whether needs have changed significantly between November 2019 (when original LRE was determined) and the present.

Finally, the IEP Team must discuss a plan for providing the compensatory education services below. The Team should discuss an appropriate timeframe and location for delivery. The certified and licensed providers will be chosen by CDS-York.

**Advanced Written Notice & Written Notice** from this IEP Team Meeting must be provided to the Department of Education **no later than March 1, 2020.**

2. CDS-York must provide:  
**270 hours of compensatory SDI to the Student.** The compensatory education must provide services that address the Student's IEP goals. The compensatory services must be provided in addition to the Student's existing educational program. Services must be provided by a certified special educator or an educational technician with oversight by a certified special educator specifically for these services.

**10 hours of compensatory Occupational Therapy.** The compensatory services must be provided in addition to the Student's existing IEP services.

**10 hours of compensatory Speech & Language services.** The compensatory services must be provided in addition to the Student's existing IEP services.

CDS-York will choose the licensed and certified providers for these compensatory services, and CDS-York must provide **documentation of the complete provision of these services** to the Department of Education **no later than June 1, 2022.**