

SYSTEMIC COMPLAINT INVESTIGATION REPORT

Disability Rights Maine v. Portland Public Schools

Complaint 21.040CS

Complaint Investigator: Rebekah J. Smith, Esq.

April 26, 2021

I. INVESTIGATION PROCEDURE

Complainant: Disability Rights Maine (“DRM”)

24 Stone Street, Suite 204

Augusta, Maine 04330

Respondent: Portland Public Schools (“School District”)

Xavier Botana, Superintendent

Jesse Applegate, Director of Student Support Services

353 Cumberland Avenue

Portland, Maine 04101

The Department of Education received this complaint on January 6, 2021. A telephonic conference was held on January 14, 2021. A Draft Allegations Report was issued on January 15, 2021. On January 22, 2021, Disability Rights Maine filed a response to the Draft Allegations Report. On February 8, 2021, the School District filed two responses, one response that did not include personally identifying student information and which was provided to Disability Rights Maine and a second student-specific response that did include personally identifying student information and which was not provided to Disability Rights Maine. The general response included School District Exhibits A to X. The student-specific response included School District Exhibits 1 to 18. On February 15, 2021, Disability Right Maine filed a reply to the School District’s general response. Disability Rights Maine submitted Exhibits 1 to 6.

On February 24, 2021, the School District submitted a proposed resolution. On March 1, 2021, Disability Rights Maine responded to the School District’s proposed resolution. The Department directed the Complaint Investigator to complete the investigation. On March 10, 2021, the School District filed a supplemental response at the request of the Investigator to provide updated information regarding the changes to ██████████ programming that were being made. It contained documentation marked by the Investigator as Appendix 1. On April 14, 2021, at the request of the Investigator, the School District filed an affidavit executed by Jesse Applegate, Director of Student Support Services, affirming the factual information provided in the School District’s responses. ██████████ the mother of Student ██████████, and the School District Advocate provided responses to follow-up questions after the interviews were completed.

The Complaint Investigator reviewed all documents, information, and responses from the parties. Both parties identified witnesses that they requested be interviewed. The following individuals were interviewed by videoconference:

Jesse Applegate, Director of Student Support Services, Portland Public Schools

Kirk Davis, Special Education Teacher, ██████████ Program Grades 3 to 5
Dr. Victoria Dalzell, ██████. Pediatric Pediatrician, Maine Medical Partners Pediatric
Specialty Care
Laura Hesselink, Nurse, ██████████ Elementary School, Portland Public Schools
Julie Kirby, Assistant Director of Student Support Services for Elementary Schools,
Portland Public Schools
Roby Moulton, Ed Tech III in the ██████████ Program, Portland Public Schools
██████ Parent of Student ██████, Student in ██████████ Program Grades 3 to 5
Beverly Stevens, Principal, ██████████ Elementary School, Portland Public Schools
Christa Yates, Behavior Home Health Coordinator with Woodfords

Although the School District identified three additional ██████████ program staff members to be interviewed, the Complaint Investigator concluded that their interviews would be redundant and informed the School District that she would not need to interview the three additional staff members.

II. PRELIMINARY STATEMENT

This systemic complaint was filed by Disability Right Maine on behalf of students in the ██████████ Program at ██████████ Elementary School within Portland Public Schools. Although the complaint focused on the ██████████ Program, Disability Rights Maine alleged that students throughout the District were being impacted. At the conference held on January 14, the parties agreed that the first stage of the analysis would be focused on the ██████████ Program grades 3 to 5 from June 2020 to the present. The parties agreed that the Department has the authority to expand the investigation into other programs after the initial report. This report addresses programming generally for the students in the ██████████ program grades 3 to 5 and because the programming for students in the ██████████ program grades K to 2 was similar, addresses that program as well.

There is agreement to many of the essential facts in this case. In its response, the School District acknowledges the following:

- IEP Teams did not make determinations about how many days a week each student would attend school.
- The School District did not amend IEPs to reflect the spring closures or the reduced instructional time of the fall's hybrid schedule.
- The School District developed annual IEPs based on the assumption that schools would be able to return to in-person learning in the fall of 2020.
- The School District worked out with families informally the levels of services that would be delivered during the hybrid period.
- The School District did not amend IEPs but instead developed Individualized Remote Learning Plans with input from parents to describe the services that would be provided during the hybrid period.
- The School District always planned to address the students' needs for compensatory education when the pandemic ended, which would be the time when the actual educational impact could best be quantified.

- The School District's intention is to make individualized assessments of all the children in the [REDACTED] program to determine whether they have regressed during the current school year and then in each case make a reasonable calculation of how to address that regression, in addition to the normal delivery of FAPE in the upcoming school year.

III. ALLEGATIONS

1. Whether, from the start of Extended School Year services in 2020 to the present, the School District has had a policy and/or practice of failing to provide IEP services to students in the grades 3 to 5 [REDACTED] program for reasons unrelated to the individual needs of students, resulting in the School District's failure to provide services determined necessary to provide a free and appropriate public education in violation of MUSER I (stating that each school district must provide special education students with a free appropriate public education); MUSER IX.3(A)(1)(d) (stating that the elements of a student's IEP should include a statement of the special education and related services and supplementary aids and services to be provided to the student or on behalf of the student).

2. Whether, from the start of Extended School Year services to the present, the School District has failed to develop and implement a plan to meet the needs of students in the grades 3 to 5 [REDACTED] program who cannot receive a free and appropriate public education through remote instruction and who need in-person services even during periods where in-person instruction may be limited for many students in the District in violation of MUSER I (stating that each school district must provide students with a free appropriate public education).

IV. FACTUAL FINDINGS

COVID-19 District-Wide Determinations

1. Beginning March 16, 2020, the School District closed all its schools to in-person learning due to COVID-19 after Governor Mills declared a public health emergency on March 15, 2020. (School District Exh. A.)
2. On March 20, 2020, the School District made the decision to remain closed to in-person learning until April 27. (School District Exh. A.)
3. On April 7, 2020, the Commissioner of the Maine Department of Education recommended that all schools plan for remote learning for the remainder of the 2019-2020 school year. (School District Exh. B.)
4. From March through the end of the 2019-2020 school year, the School District provided a totally remote system of learning that included a combination of synchronous and asynchronous technology-based learning activities in addition to paper packets that were made available. (School District February 8, 2021, Response; Affidavit of Applegate.)

5. From March through the end of the 2019-2020 school year, the School District began to hold remote annual IEP Team meetings if a student's annual review was due. (School District February 8, 2021, Response; Affidavit of Applegate.) The School District developed annual IEPs on the assumption that schools would be able to return to in-person learning in the fall. (School District February 8, 2021, Response; Affidavit of Applegate.)
6. By May 2020, the School District had begun planning for ESY services. (School District February 8, 2021, Response; Affidavit of Applegate.) Although the School District initially hoped to provide ESY services in-person, the School District determined that all summer programs would be provided remotely due to the continuing prevalence of COVID in the community. (School District February 8, 2021, Response; Affidavit of Applegate.) The School District was acting upon guidance from the Department of Education that no ESY should be held in-person due to health and safety concerns. (Interview with Kirby.)
7. The School District began to plan for a return to school in the fall based on the Maine DOE guidance issued in the beginning of June. (School District Exh. K.)
8. Beginning in May, the classroom teacher/case manager began to work with each family in the [REDACTED] 3 to 5 program to develop the summer plan. (School District February 8, 2021, Response; Affidavit of Applegate.) Six of the nine students then in the program participated in remote ESY services. (School District February 8, 2021, Response; Affidavit of Applegate.)
9. Throughout the spring and summer of 2020, School District administrators outlined various scenarios to explore for the upcoming school year which were shared with the school community. (School District Exh. A.)

The [REDACTED] Program

10. The [REDACTED] Program for grades 3 to 5 is housed in one classroom in [REDACTED] Elementary School, which houses students in grades K to 5. (Interview with Stevens.) Kirk Davis, the special education teacher for the [REDACTED] 3 to 5 classroom, develops individualized academic lessons for each student that he delivers or that are delivered by an educational technician. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.)

Extended School Year Services in Summer 2020

11. The School District's ESY program ran from July 6 through August 13, Monday through Thursday for four hours a day. (School District Exh. 1; Interview with Moulton.) There were ten [REDACTED] students who took part in ESY although four received only paper packets and did not participate in the remote programming. (Interview with Moulton.)

12. Roby Moulton, Educational Technician III with the District, ran the program. (Interview with Moulton.) He led groups with the program's occupational therapist. (Interview with Moulton.) Although four hours of programming were offered, most students attended approximately one to two hours per day. (Interview with Moulton.) Once a week they offered a lunchtime session during which students and parents were invited to eat in front of the camera together. (Interview with Moulton.) A music group was offered once a year. (Interview with Moulton.) Each student was offered one on one academic sessions with a teacher assigned to every two students. (Interview with Moulton.) Each student's attendance was based on the ability of their family to attend. (Interview with Moulton.) Mr. Moulton also sent home paper packets each week that would take approximately one to three hours per day if fully completed by a student. (Interview with Moulton.)
13. Weekly communications to families provided a variety of resources that may have been of interest or assistance given the unique circumstances posed by continued remote learning. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.)
14. Most students had difficulty communicating and maintaining attention in the remote format. (Interview with Moulton.)
15. In mid-August 2020, the School District decided that the school year would begin on a hybrid schedule after it concluded that a full-time return for all students was not feasible. (School District Exh. L.)
16. As the return to school approached, special education staff had many meetings with special education administrators during which staff voiced that they were not comfortable coming back in the fall and the group worked together to obtain PPE and other protective tools. (Interview with Davis.) The [REDACTED] program also uses plexiglass barriers to separate student areas. (Interview with Davis.) It is very difficult for the [REDACTED] program staff to avoid coming within three feet of students, although staff does step back three feet if a student is eating or doing independent work. (Interview with Davis.) Often staff need to be in direct contact with [REDACTED] students. (Interview with Davis.) The [REDACTED] program required more PPE than other classrooms. (Interview with Hesselink.) Some ordered equipment did not arrive when anticipated although the staff had what they needed to start school in the fall safely. (Interview with Hesselink.) N95 masks which had to be fitted to staff individually did not come in until late October. (Interview with Hesselink.) [REDACTED] program staff felt safer once the N95 masks had arrived. (Interview with Hesselink.)
17. The School District believed that the [REDACTED] Elementary School did not have enough physical space to return all students to fully in-person learning while maintaining physical distancing requirements. (School District February 8, 2021, Response; Affidavit of Applegate.)

Return to School Fall 2020

18. On August 20, 2020, the School District announced that it would return to school using a hybrid approach beginning on September 14. (School District Exh. M.) The [REDACTED] program staff members were told that the [REDACTED] program would offer programming consistent with the schedule within [REDACTED] Elementary School, where it is housed. (Interview with Davis.)
19. For the students at [REDACTED] Elementary School, the hybrid program translated into attendance at school two days a week (Monday/Thursday or Tuesday/Friday) from 7:45 to 12:30 and would learn remotely the other days. (School District February 8, 2021, Response; Affidavit of Applegate.) Wednesday was a planning and collaboration day for staff with some additional time for student check ins. (School District February 8, 2021, Response; Affidavit of Applegate.) This schedule was developed in negotiation with the teachers' union and determinations of how the School District could ensure the safety of all involved. (School District February 8, 2021, Response; Affidavit of Applegate.) The School District had entered into a Memorandum of Agreement with the Portland Education Association regarding health and safety considerations. (School District Exh. O.)
20. The [REDACTED] 3 to 5 program began the 2020-2021 school year with 9 students enrolled in the program. (Interview with Davis.) One student chose to access the fully remote "Remote Academy" and continues to do so. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) Due to a variety of circumstances, there are now 6 students in the program. (Interview with Davis.)
21. Parents were told that the reason the school day ended early, at 12:30 p.m., was to allow the School District to conduct health and safety measures required by the U.S. Centers for Disease Control and the State of Maine. [REDACTED]. Email of April 15, 2021.)
22. Although it would have been theoretically possible to delineate six individual spaces for students within the [REDACTED] 3 to 5 classroom that comport with the physical spacing requirements, each of the students requires an adult within close proximity to facilitate their learning. (School District February 8, 2021, Response; Affidavit of Applegate.)
23. Special education staff were also concerned about students' abilities to tolerate masks or shields. (Interview with Davis.)
24. On their two in-person days each week, the students arrive between 7:15 a.m. and 7:45 a.m. and complete school at 12:30 p.m. (School District Exh. 4.) Three periods, ranging from 40 to 55 minutes, are designed as "Academic/Therapies." (School District Exh. 4.)
25. During school days in which students are not in school, they generally work asynchronously on materials that have been developed for them at the beginning of the week, which are designed to reinforce previously taught concepts. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) Some students

access this programming through an on-line platform such as See Saw or Google Classroom, which allows staff to record audio and visual instructions or messages and links to on-line resources. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) Other students access this programming with paper packets. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) On remote days, each student has a regularly scheduled 30-minute session with one or two educational technicians. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) A second 30-minute session is held as a back-up time slot in case the student is not available to access the work in the first session. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) On Wednesday mornings, a remote meeting was open to all [REDACTED] students. (Interview with Davis.)

26. The School District provided a one-to-one adult support to promote health and safety in the [REDACTED] program even though students did not always have a one-to-one support prior to the pandemic. (Interview with Kirby.)
27. Special education staff understood that the School District intended to return kids to school three or four days a week a few weeks into the school year. (Interview with Davis.) Within a few days of school starting, however, [REDACTED] program staff realized that it would not be feasible to increase students' time in school because not all students were able to mask consistently nor were, they consistently able to maintain appropriate social distancing. (Interview with Davis.) During the first few weeks of school in September, [REDACTED] program staff were focused on setting expectations while the month of October was focused on trying to keep students and staff safe. (Interview with Davis.) Mr. Davis began to focus on making sure the staff and students were mentally healthy and that parents were up to date on programming. (Interview with Davis.) Mr. Davis also was informed that he should begin generating IRLPs as a way to asterisk a student's IEP to indicate that because of the emergency circumstances, only a certain percentage of the services identified in the IEP would actually be offered. (Interview with Davis.) The first IRLP for a [REDACTED] student was created by Julie Kirby, Assistant Director of Student Support Services; Mr. Davis then began creating IRLPs at IEPs as they were held. (Interview with Davis.) Parents were routinely in agreement with the IRLPs they were offered at that time. (Interview with Kirby.)
28. Special education administrators were keeping the provision of IEP services at the forefront and were asking the Department of Education for guidance on their obligations during the pandemic. (Interview with Applegate.) The School District felt that the guidance regarding creation of IRLPs was their primary direction for how to move forward. (Interview with Applegate; School District Exh. S.) Special education administrators did not feel it would be appropriate to change IEPs without guidance from the Department of Education that it should do so. (Interview with Applegate.) The IRLPs were a way to address changes that were not student driven. (Interview with Applegate.) When the IRLP was developed as part of an IEP, the family would receive procedural safeguards, but the families likely did not receive procedural safeguards upon development of an IRLP that was not part of an IEP process. (Interview with Applegate.)

29. On September 30, Superintendent Xavier Botana announced to the School District community that the increase in time would not happen on October 13 as planned due to the ongoing need to maintain social distancing standards, which made it impracticable for the elementary schools to bring that number of students back into the buildings and still be able to meet distance requirements. (School District February 8, 2021, Response; Affidavit of Applegate.)
30. On October 5, Superintendent Botana announced that the hybrid model would continue through at least the beginning of December. (School District Exh. A.)
31. The School District prioritized the delivery of related services during the students' in-person learning days. (Interview with Davis.) After that, anything else that needed to happen during in-person days was factored in. (Interview with Davis.) Specially designed instruction filled in the remainder of the students' time at school. (Interview with Davis.) The focus was making sure students got as much life experience as possible. (Interview with Davis.)
32. Consultation services among providers continued as outlined in students' original IEPs and were conducted either in-person or through video conferencing depending on the schedules and availability of staff. (School District February 8, 2021, Response; Affidavit of Applegate.)
33. Mr. Davis regularly fielded questions from [REDACTED] program parents requesting that students be in school more often. (Interview with Davis.) Parents were initially understanding of the program's limitations. (Interview with Davis.) Over time, as plans were developed to increase in-person time for students and then those plans were not brought to fruition, parents became frustrated and wanted more time in the classroom for students. (Interview with Kirby.) When parents of [REDACTED] students advocated for more in-person school time, they were told that it was not possible due to health and safety guidelines. (Interview with Kirby.)
34. Most students were allocated iPads to take home in approximately February. (Interview with Davis.)
35. Since the beginning of the school year, the program has used a protocol for teaching mask tolerance that was developed by the BCBA who works with the program and has maintained mask tolerance data for students. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate; Appendix 1 to School District Supplemental Response.)
36. The School District did not leave it up to each individual IEP Team to make determinations about how many days a week students could safely attend in-person. (School District February 8, 2021, Response; Affidavit of Applegate.) Broader determinations about classroom structure were reached by the School District generally, based on conversations with involved staff and a judgement about circumstances unique

to each program and across the School District. (School District February 8, 2021, Response; Affidavit of Applegate.) The School District does not believe that individual IEP Teams have authority to make these district-, building-, or classroom-wide decisions. (School District February 8, 2021, Response; Affidavit of Applegate.)

Prioritization of Related Services

37. The provision of related services was prioritized for the days that students were in school. (Interview with Davis.) Under the hybrid model, related service providers continued to work on the goals and objectives outlined on a student's IEP and continue to report progress towards those goals through regular trimester progress reports. (School District February 8, 2021, Response; Affidavit of Applegate.) The actual service delivery times in the hybrid model was less than provided during a typical school learning model with full time in-person learning. (Interview with Davis.)
38. Megan Langenella is the Speech Language Clinician for the [REDACTED] program. (School District Exh. 5.) Ms. Langenella saw most students at least once for 30 minutes the week of September 14, 2020. (School District Exh. 5.) Beginning September 21, 2020, Ms. Langenella provided students with the amount of speech language in their IRLPs if they had an IRLP. (School District Exh. 5.) For the eight students in the [REDACTED] 3 to 5 program, all except two received less speech therapy per week compared to the level of service identified in their IEP. (School District Exh. 5.) For example, Student [REDACTED]'s IEP called for 120 minutes per week of speech services; he has received 90 minutes per week since September 14, 2020. (School District Exh. 5.)¹ Student E.R.'s IEP called for 120 minutes per week of speech services; he has received 60 minutes per week since September 14, 2020. (School District Exh. 5.) The School District provided this data for each student in the [REDACTED] 3 to 5 program. (School District Exh. 5.)
39. Tracey Falla is the Occupational Therapist for the [REDACTED] program. (School District Exh. 6.) Four of the eight [REDACTED] students in the 3 to 5 program have been receiving the 30 minutes per week in their IEP since the fall of 2020. (School District Exh. 6.) IEPs for the remaining four students call for 60 or 90 minutes per week but they generally received 30 minutes per week. (School District Exh. 6.) Student [REDACTED] has been receiving 30 minutes per week plus an additional 30 minutes every other week when he attends school on alternate Wednesdays. (School District Exh. 6.)
40. Three students in the [REDACTED] 3 to 5 program have IEPs that call for physical therapy services. (School District Exh. 7.) Two of the three students, including G.S., have been receiving the full allotment of services identified in their IEP. (School District Exh. 7.) The third student's IEP calls for 60 minutes of physical therapy a week; he has been receiving 30 minutes. (School District Exh. 7.)
41. Two students in the [REDACTED] 3 to 5 program have IEPs that call for social work services. (School District Exh. 8.) E.J.'s IEP calls for 30 minutes per week of social work

¹ The amount of service may have increased for all students since they were offered the opportunity to attend school four days a week in March 2021, which occurred during the pendency of this investigation.

services; he has been receiving 15 minutes of service per week. (School District Exh. 8.) S.P.'s IEP calls for 30 minutes per week of social work services; he has been receiving 30 minutes per week in a group with peers. (School District Exh. 8.)

42. Finally, four students in the [REDACTED] 3 to 5 program have IEPs that call for BCBA services. (School District Exh. 9.) Jess Jandrea, the BCBA for the [REDACTED] program, has been providing services to each of the four students at the level identified in each student's IEP. (School District Exh. 9.) She attends speech therapy sessions to co-treat and observe. (School District Exh. 9.)

Increase in In-person Time at School Late January 2020

43. As of the holiday break, [REDACTED] program staff continued to feel unsafe increasing the students' time in class to a large degree. (Interview with Davis.)
44. In January, Mr. Davis completed IRLPs for any [REDACTED] student who did not yet have one. (Interview with Davis.)
45. Towards the end of January 2021, [REDACTED] students were offered the option to begin attending school every other Wednesday. (School District Exh. Q; Interview with Davis.) At this point, the [REDACTED] program veered from the [REDACTED] Elementary School schedule in order to offer [REDACTED] students more time in school. (Interview with Davis.)
46. Six of the seven students then attending the [REDACTED] program opted to attend the every other Wednesday session. (School District February 8, 2021, Student-Specific Response; Affidavit of Applegate.) The every other Wednesday option ended at 12:30 as other in-person school days did. ([REDACTED] Email of April 15, 2021.)
47. Upon the addition of every other Wednesday to students' in-person time, Ms. Kirby estimated that [REDACTED] students were receiving 60% of the SDI and a high percentage of their related services. (Interview with Kirby.)
48. In late January, the entire [REDACTED] K to 2 program was required to quarantine due to a student being positive for COVID. (Interview with Davis.)
49. During the last weeks of January and the beginning of February, construction and expansion activities at Lyseth Elementary School neared completion and administrative discussions revealed that there would be space within the school that could potentially be used for the [REDACTED] program. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.) On February 11, the day after the School District received an occupancy permit for that space, special education administrators met with [REDACTED] program staff to discuss a potential move to Lyseth for some of the students and staff in order to facilitate increased in-person learning time for the [REDACTED] students, with either the K to 2 or 3 to 5 [REDACTED] program moving to the new space. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate; Interview with Applegate.) On February 22, upon returning from break, administrators received an

email from ██████ program staff with a proposal to retain both ██████ programs at ██████ Elementary School, which would be possible by implementing some changes in space utilization and the adoption of some additional spaces for programming. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate; Interview with Applegate.) To make this proposal work, the School District added additional plexiglass partitions the spaces, removed some bolted cabinetry, and moved a K-2 student into space shared by both programs. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.) Special education staff adopted space concepts that they have previously rejected in order to maintain the program in one location. (Interview with Applegate.) The School District felt this change was also supported by the decreasing COVID cases in the community, the increasing number of vaccinations, and the student's general increase in mask tolerance. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.)

50. The ██████ program is now using the two original classrooms, a shared kitchen space, and an occupational therapy space. (Interview with Davis.) Students with the most difficulty wearing masks are placed in the most distanced areas of the four rooms. (Interview with Davis.) In addition, several pieces of equipment that were not in use were removed from the rooms and additional plexiglass was purchased to create additional student spaces. (Interview with Kirby.) Increasing the students' in-person time resulted in changes in working conditions for ██████ program staff which caused the Association to raise concerns. (Interview with Kirby.)
51. Portland has identified a qualified special education professional to oversee the process of review each ██████ student's programming and progress for the year and administer some criterion referenced assessment for each student, to be compared to March 2020 student data to determine if the student has demonstrated regression. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.) If regression is identified, the School District will make a proposal to each family about how to address the regression. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.)

Additional Increase in In-Person Time Offered in March 2021

52. Beginning March 15, ██████ began offering in-person learning four days a week, although the District as a whole has continued with the hybrid model. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.) In the email alerting families to the change, Ms. Kirby informed families that the change would require cohorts to be mixed throughout the week, which could increase students' exposure to COVID-19. (Appendix I to School District Supplemental Response.) Ms. Kirby also noted that this was particularly true in the ██████ classrooms, where some students continued to work on consistently wearing masks and social distancing. (Appendix I.) She also observed that staff were also typically unable to social distance from students due to their needs. (Appendix I.) The Education Association has expressed concern that the School District is not meeting health and safety guidelines in the ██████ classroom because staff cannot maintain three feet distance from students and masking is not being complied with 100% of the time. (Interview with Kirby.) It is also of concern that

students in the [REDACTED] program might not be able to voice symptoms of COVID. (Interview with Kirby.)

53. Not all students attend the same four days. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate; Appendix 1 to School District Supplemental Response.) The schedule was developed considering student needs and services, their mainstreaming schedules if any, parent schedules/input, and staff assignments. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.)
54. The School District plans to reach out to families to discuss proposed changes to each student's IRLP and plans to subsequently issue Written Notices regarding any agreed-upon changes to IRLPs. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.)
55. Special education staff feel that bringing the [REDACTED] students to school four days a week in September would not have been possible because of higher COVID case numbers, which created stress for school staff concerned about their well-being and the well-being of their family members. (Interview with Moulton.) Further, at the start of the year, staff did not have all the PPE that was needed and were concerned about keeping the students safe. (Interview with Davis.) [REDACTED] program staff felt pressure from special education administrators to increase student time in the classroom as the months passed. (Interview with Davis.) In turn, special education administrators felt push-back from staff to bring the students into the classroom more due to staff's health and safety concerns. (Interview with Kirby; Interview with Applegate.) Anxiety remained high among staff throughout the year although by March the staff was in a better position than in the fall. (Interview with Davis.)
56. Mr. Davis feels that bringing the students to school four days a week is the best solution to a still unsolvable program. (Interview with Davis.) He feels that it is best for the students but he harbors concerns about whether the program will lose staff as a result, noting that he lost one teacher and two educational technicians in the K to 2 program this year due to their not feeling safe, worrying about bringing the students back too quickly, and not having enough safety protocols or equipment. (Interview with Davis.) He notes that the [REDACTED] program staff members have been working very hard and yet many feel like they are still failing students given the circumstances. (Interview with Davis.)
57. Mr. Davis observed that the [REDACTED] students experienced notable regressions over the summer and fall but were largely back to baseline with skills in the spring of 2021. (Interview with Davis.)
58. Several students had triennial evaluations conducted in the spring of 2021 and others underwent assessments as part of their annual IEP. (Interview with Davis.)
59. At some point in the year, students at [REDACTED] Elementary School who were in the English intensive program were allowed to come to school four days a week, spending

two days with English intensive teachers and two days in regular education programming. (Interview with Stevens.) Those students, however, are able to socially distance and are mainly compliant with mask wearing. (Interview with Stevens.)

█ **Program Mask Protocol**

60. Some students had begun to practice mask wearing prior to the return to school; two students in the █ 3 to 5 program came to school in the fall in with effective mask wearing skills. (Interview with Davis.) Other students required significant trial and error with using different masks to try to teach the skill. (Interview with Davis.) One of the program educational technicians made masks for the students with different fabrics and designs. (Interview with Davis.)
61. Mask tolerance was built into the students' work; students would be rewarded for appropriate mask wearing at various intervals. (Interview with Davis.)
62. The School District has created a mask behavior protocol, which governed what staff could do when a student was wearing a mask and when a student was not wearing a mask. (Appendix 1 to School District Supplemental Submission.) If a student was unable to tolerate a mask or shield, they would be placed in a room with no other students present and an IEP would be scheduled to determine next steps. (Appendix 1 to School District Supplemental Submission.)
63. The School District has maintained mask tolerance data for students in the █ program. (Excel Spreadsheet on Mask Tolerance Appendix to School District Supplemental Submission.) The data shows some improvement among some students in mask tolerance over time. (Excel Spreadsheet.) For example, on October 26, 2020, the first date in the spreadsheet, student █ wore his mask incorrectly for 128 to 228 minutes, refusing to wear it at all for somewhere between 11 and 17 incidences. (Excel Spreadsheet.) On March 8, 2021, the most recent date in the spreadsheet, █ wore his mask incorrectly for 20 minutes and refused to wear a mask at all on 2 occasions. (Excel Spreadsheet.) On October 27, 2020, student A.N. wore his mask incorrectly for 25 minutes but did not refuse a mask at any time. (Excel Spreadsheet.) On March 5, 2021, A.N. did not wear his mask incorrectly at all but did refuse his mask on 4 occasions. (Excel Spreadsheet.)
64. By March, Mr. Davis felt that most students had progressed significantly with mask wearing. (Interview with Davis.) One student, however, had regressed with mask wearing and another could not consistently keep the mask above his nostrils. (Interview with Davis.) Another student, █ wore his mask incorrectly for 10 minutes and refused it completely between 185 and 230 times on October 26, 2020. (Excel Spreadsheet.) On March 4, 2021, the last date on which data was included and while a new mask protocol was being tried, █ wore his mask incorrectly for 42 minutes and refused a mask 293 times. (Excel Spreadsheet.)

Plans to Evaluate Regression and for ESY Services Summer 2021

65. The School District plans to review each BEACH student's regression at the end of the year and amend IEPs to reflect any regression. (Interview with Applegate.) The School District is hoping to offer more ESY than it would in a traditional year, which is dependent on the School District's budget. (Interview with Applegate.)
66. Options for providing these additional services include additional hours in the day beyond regular extended school year programming, additional days a week, additional weeks, or some combination thereof. (School District March 10, 2021, Response; Affidavit of Applegate.) Additional summer programming is dependent on health and safety conditions, staffing availability, and budgetary restraints. (School District March 10, 2021, Supplemental Response; Affidavit of Applegate.)

3 to 5 Student

67. Student's mother was interviewed for this investigation. (Interview with)
68. took part in some online learning from March to June 2020 and was receiving paper packets as well. (Interview with) requires help with every step in the process from turning on his computer through facilitation of the lesson or learning. (Interview with) requires constant one-on-one supervision due to his disabilities of autism, ADD, and an intellectual disability. (Interview with)
- 69.'s IEP Team met on April 30, 2020, for the Student's annual review. (School District Exh. 14.) The IEP generated by the Team called for the following services on a weekly basis: 25 hours of specially designed instruction, 120 minutes of speech/language services, 90 minutes of occupational therapy, and 60 minutes of physical therapy. (School District Exh. 14.) It also called for 2 hours per month of BCBA consultation. (School District Exh. 14.)
70. received occupational therapy, physical therapy, and speech therapy remotely from March through June 2020. (J.S. Email of April 14, 2021.)
71. On July 6, 2020, School District staff reached out to's parent to check in regarding his ESY services. (School District Exh. 14.)'s parent requested one on one remote sessions for (School District Exh. 14.) was not offered any speech therapy as part of ESY although he did receive occupational and physical therapy remotely during ESY. (Email of April 14, 2021.)
72. A Student Progress Report was issued by ESY Teacher Roby Moulton at the end of ESY services in 2020. (School District Exh. 14.) had accessed learning materials through Zoom in group settings and instructional lessons with staff. (School District Exh. 14.) was present and engaged for the majority of the classroom morning meetings. (School District Exh. 14.) Although his attention to the content varied from

session to session, in about half of opportunities, [REDACTED] successfully answered questions about the weather, calendar, or daily theme with visual or verbal support. (School District Exh. 14.)

73. [REDACTED]'s family reported that the large portion of his learning during the summer session took place during his direct instruction Zoom lessons with classroom staff and his occupational therapist. (School District Exh. 14.) His family reported great difficulty completing paper packets when at home with [REDACTED] displaying significant refusal when academic work was presented. (School District Exh. 14.) [REDACTED] therefore accessed most content during ESY through direct video lessons, which he attended regularly. (School District Exh. 14.)
74. Mr. Moulton noted that when presented with certain demands or non-preferred expectations, [REDACTED] exhibited interfering behaviors during his remote learning period. (School District Exh. 14.) The Student's exhibition of aggression, throwing, and swiping, disrobing, and eloping, were especially concerning to the family and [REDACTED] staff. (School District Exh. 14.) [REDACTED]'s mother reported some very concerning instances of elopement, one of which resulted in an injury to [REDACTED] on a neighbor's lawn. (School District Exh. 14.) [REDACTED] was often in the care of an older family member at home and his behaviors during ESY resulted in multiple injuries to family members and himself. (School District Exh. 14.)
75. Mr. Moulton noted that [REDACTED] needed support in his attention to academics, noting that [REDACTED]'s mother reported great difficulty transitioning him from leisure time to academic work tasks. (School District Exh. 14.) In addition to augmented work tasks and supportive tools, Mr. Moulton noted that safety devices and safety awareness skills could be implemented to assist [REDACTED] and his family to be successful and safe in the home environment. (School District Exh. 14.)
76. On August 24, 2020, [REDACTED] mother requested that [REDACTED] be physically in his [REDACTED] classroom as much as possible during the school year. (School District Exh. 14.) She noted that the proposal for students to be half in school and half at home would not work well for [REDACTED] (School District Exh. 14.)
77. [REDACTED] received all of his related services in person, and none remotely, during the two half-days he was at school beginning in the fall of 2020. (Interview with [REDACTED])
78. On September 29, 2020, [REDACTED] saw Dr. Victoria Dalzell of Maine Medical Partners Pediatric Specialty Care for a visit. (DRM Exh. #5.) Dr. Dalzell noted that she felt strongly that [REDACTED]'s ability to participate in remote learning was very limited and that he should be in a program in school at least four days per week. (DRM Exh. #6.)
79. On December 15, 2020, Christa Yates, LSW, [REDACTED]'s Case Manager at [REDACTED], emailed Mr. Davis to relay [REDACTED]'s concern that the Student's limited access to school for two half-days per week was having a significant impact on his learning. (DRM Exh. #6.) She asked what opportunities there were for more in-person days for

██████████ (DRM Exh. #6.) Ms. Yates indicated that it might be a good time to bring the Student's Team together to discuss his programming. (DRM Exh. #6.)

80. On December 16, 2020, Mr. Davis responded to Ms. Yates that the ██████████ Program had been talking with School District administrators for the past couple of weeks about ways that ██████████ Program students could access more in-person services and school days moving forward. (DRM Exh. #6.) Mr. Davis noted that their next meeting would review those options and make a decision about how to move forward after the holiday break. (DRM Exh. #6.) He reported that having students come in more often and/or for more time required ensuring the safety of students and staff while teaching in an ever-worsening pandemic and following COVID decisions. (DRM Exh. #6.) He concluded that it was a program decision and that when they had decided on how to move forward in introducing more time into the students' days, the announcement would come through the administration at the central office. (DRM Exh. #6.)
81. On December 17, 2020, ██████████ requested an IEP meeting for ██████████ (DRM Exh. #6.) The same day, Ms. Kirby responded by email, indicating that they could schedule a meeting for after the winter break. (DRM Exh. #6.) She indicated that the School District had been actively trying to find ways to increase days for students and continue to meet health and safety requirements to keep all students and staff safe during the pandemic. (DRM Exh. #6.)
82. On January 20, 2021, ██████████ IEP Team met at the request of ██████████'s parent. (School District Exh. 14.) ██████████'s parent requested that the Student receive more in-person school time. (School District Exh. 14.) ██████████'s mother raised IEP goals as a concern since their time requirements were not being met. (School District Exh. 14.) ██████████'s mother also expressed concern about skill regression, noting that problems at home had increased. (School District Exh. 14.) ██████████'s mother reiterated her prior explanation that on-line/homework was not working for ██████████. (School District Exh. 14.) She noted that ██████████ initially was happy and engaged when seeing peers online but wound himself up which has resulted in biting and scratching her. (School District Exh. 14.)
83. ██████████'s mother stated that she wanted to support his learning at home but felt she did not have the ability. (School District Exh. 14.) She expressed a desire for a higher level of support at home. (School District Exh. 14.) School District staff suggested a BHP to support the Student at home on his remote days when School District staff members were working with the Student on a remote platform. (School District Exh. 14.) ██████████'s mother agreed to try an at-home BHP to assist in synchronous remote sessions and individual schoolwork that was sent home. (School District Exh. 14.) ██████████'s mother also sought assistance with using a tracking device the IEP Team had obtained and asked for assistance learning how to use it. (School District Exh. 14.)
84. On January 20, 2021, an Individualized Remote Learning Plan was developed for ██████████ (School District Exh. 14.) The services to be provided to the student were broken into hybrid and remote only. (School District Exh. 14.) ██████████ was to receive 47 hours of in-person specially designed instruction per month and 20 hours of remote specially

designed instruction per month. (School District Exh. 14.) [REDACTED] was to receive 7 hours of speech language services per month in-person and 4 hours per month remotely. (School District Exh. 14.) [REDACTED] was to receive 3 hours per month of occupational therapy in-person and 2 hours per month remotely. (School District Exh. 14.) [REDACTED] was to receive 2 hours per month of physical therapy in-person. (School District Exh. 14.) The IEP called for [REDACTED] to receive one hour a month of behavior services in-person and one hour remotely. (School District Exh. 14.) [REDACTED] has not received any related services remotely since 2020 ESY programming. [REDACTED] Email of April 14, 2021.)

85. The Student's IEP was amended to include the IRLP under supplemental aids and modifications. (School District Exh. 14.)
86. [REDACTED]'s mother's request for more in-person time for the Student in school was rejected due to COVID 19, including the need to meet health and safety guidelines through appropriate social distancing and significantly less people in a classroom. (School District Exh. 14.) The Student's IEP was amended to include the IRLP under supplemental aids and modifications. (School District Exh. 14.)
87. The Written Notice stated that all IEP Team members were in agreement with the IRLP monthly times for services where they were reduced from the services identified in the IEP. (School District Exh. 14.) Specifically, the IRLP reduced the Student's specially designed instruction from 25 hours per week in his IEP to 67 hours per month; his speech/language services from 120 minutes of speech/language services per week in his IEP to 11 hours per month; and his occupational therapy from 90 minutes per week in his IEP to 5 hours per month. (School District Exh. 14.)
88. The Written Notice from the meeting indicated that the Amended IEP would be implemented between January 27, 2021, and April 29, 2021, at which time [REDACTED] was due for an annual review. (School District Exh. 14.)
89. [REDACTED]'s mother indicated that although they got through the work that they could during [REDACTED]'s school time at home, it was very difficult to replicate school at home. (Interview with [REDACTED].) She noted that when [REDACTED] is asked to participate in something he did not want to do, he could become aggressive. (Interview with [REDACTED].) [REDACTED] stated that she felt she was not able to meet [REDACTED]'s educational needs at home. (Interview with [REDACTED].) [REDACTED] reported that she observed area special education programs were able to get students who had levels of need similar to [REDACTED]'s into school full time or four days per week. (Interview with [REDACTED].) [REDACTED] felt that the School District was dismissive of her requests that [REDACTED] be placed in school for more time each week. (Interview with [REDACTED].) She felt she received boiler plate answers to her requests. (Interview with [REDACTED].) She is confused about why the days that [REDACTED] was in school were only half days. (Interview with [REDACTED].) [REDACTED]'s questions why the School District is now able to have the [REDACTED] students in school four days a week but wasn't able to do so earlier in the school year. (Interview with [REDACTED].)

90. [REDACTED]. received specially designed instruction in an amount significantly lower than his IEP. (Interview with [REDACTED] [REDACTED] thrives on routine and structure, which has been lacking for him for the last year. (Interview with [REDACTED]
91. Dr. Victoria Dalzell, developmental pediatrician for [REDACTED] is concerned that [REDACTED] was experiencing increased behavioral difficulties as a result of his inability to access in-person school for more time each week. (Interview with Dalzell.) Dr. Dalzell stated that it was hard to fully gauge [REDACTED].’s additional behavioral difficulties because his baseline behavior was concerning in and of itself. (Interview with Dalzell.) She reported that [REDACTED] could not pay attention to Zoom meetings and was not able to sit long enough at home to do work sent home from school. (Interview with Dalzell.) Dr. Dalzell felt that [REDACTED] would be capable of participating in additional time during ESY services to begin to make up for some of the time lost, opining that he was capable of participating in full-time ESY. (Interview with Dalzell.) Dr. Dalzell noted that her other patients in the greater Portland area, who attended school districts other than Portland, had been able to return to school for more time each week than [REDACTED] (Interview with Dalzell.)
92. Christa Yates, [REDACTED]’s behavioral home health coordinator with [REDACTED] [REDACTED] who was formerly [REDACTED]’s case manager, reported that she had been working with [REDACTED] for several years. (Interview with Yates.) Ms. Yates indicated that based on [REDACTED]’s mother’s report [REDACTED] was having significant difficulty accessing any on-line education and [REDACTED]’s mother had requested additional in-person time from the School District. (Interview with Yates.) Ms. Yates reported that she had seen significant regression and increased safety concerns for [REDACTED] over the course of the last year, including increased dysregulation. (Interview with Yates.) She noted that [REDACTED] had tried to escape and had eloped at times, even going missing on one occasion during which he was found by the police in the bay fully disrobed. (Interview with Yates.)
93. Ms. Yates reported that [REDACTED] stabilized a bit when school restarted in the fall but continued to have a lot of difficulty accessing on-line education and his educational needs were not being met. (Interview with Yates.) [REDACTED] was also having difficulty taking his medicine which potentially contributed to his increased aggression and unwillingness to work on daily life skills. (Interview with Yates.) [REDACTED] continues to have difficulty taking his medications consistently and riding safely in a car. (Interview with Yates.) Ms. Yates opined that [REDACTED]’s challenges began to improve at the start of 2021. (Interview with Yates.) The School District implemented the use of a BCBA for the student at home while he was trying to access remote school which helped greatly. (Interview with Yates.) Ms. Yates was aware that [REDACTED]’s family had been advocating throughout the schoolyear for him to receive more in-person time at school. (Interview with Yates.) Ms. Yates believes that the structure of being in school is very beneficial to [REDACTED] (Interview with Yates.)
94. Mr. Davis is aware that spring and summer 2020 were exceptionally rough for [REDACTED]. and his family. (Interview with Davis.) He was aware of [REDACTED]’s mother’s concerns of regression and his attempts to elope. (Interview with Davis.) Mr. Davis understood that it was especially challenging for [REDACTED]’s mother, who had two special needs children at

home. (Interview with Davis.) Mr. Davis assisted [REDACTED]'s mother to obtain a tracking device for [REDACTED] (Interview with Davis.)

95. [REDACTED] is doing much better now that he has resumed four half-days of school per week. [REDACTED]. Email of April 14.)

[REDACTED] K-2 Program

96. The [REDACTED] K-2 program has followed the same schedule as the BEACH 3-5 program during the 2020-2021 school year and related services have been similarly prioritized during in-person school days. (Affidavit of Applegate.)

V. DETERMINATIONS

1. From the start of Extended School Year services in 2020 to the present, the School District has had a policy and/or practice of failing to provide IEP services to students in the [REDACTED] 3 to 5 program for reasons unrelated to the individual needs of students, resulting in the School District's failure to provide services determined necessary to provide a free and appropriate public education in violation of MUSER I and MUSER IX.3(A)(1)(d).
2. From the start of Extended School Year services to the present, the School District has failed to develop and implement a plan to meet the needs of students in the [REDACTED] 3 to 5 program who cannot receive a free and appropriate public education through remote instruction and who need in-person services even during periods where in-person instruction may be limited for many students in the District in violation of MUSER I.

VI. ANALYSIS

A. Governing Statutes and Rules

In September 2020, the United States Department of Education Office of Special Education Programs ("OSEP") issued guidance stating that "no matter what primary instructional delivery approach is chosen," School Districts "and [IEP] Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities. If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, SEAs, LEAs, and IEP Teams are not relieved of their obligation to provide FAPE to each child with a disability under IDEA." USDOE, OSEP, Implementation of IDEA Provision of Services in the Current COVID-19

Environment Q & A Document (September 2020). The guidance notes that although the special education and related services in a student’s IEP may need to be provided in a different manner, all students with disabilities must continue to receive FAPE and must ““have the chance to meet challenging objectives.”” Id. (quoting Endrew F. v. Douglas County School District Re-1, 137 S.Ct. 988, 1000 (2017)).

On August 28, 2020, the Maine Department of Education issued an Update on Individualized Remote Learning Plans (“IRLPs”). August 28, 2020, Maine Dept. of Educ. FAQ Update. The guidance described an IRLP as a “temporary plan describing changes to a student’s IEP that are necessary to protect health and safety during the pandemic and provide a free appropriate public education (FAPE). Although IRLPs are not contemplated or required by the IDEA, the Maine DOE recommends that IEP teams consider such a plan to navigate the uncertainties related to COVID-19.” Id. The guidance suggested that an IRLP could be developed with input from the student’s IEP team, must include parent input, and should be added to the student’s IEP as an accommodation. Id. The guidance specified that there were two uses for an IRLP:

1. The IEP team may, but is not required to, create an IRLP plan for a student that could be implemented during disruptions to in-person instruction due to the pandemic. . . .
2. Additionally, the IEP team may, but is not required to, create [an] IRLP plan for a student [who] is being offered in-person services, but parents or guardian elect to access services remotely. If a parent chooses an online program, due to potential health and safety concerns, and the exact type and amount of services identified in the IEP cannot reasonably be provided in that program and/or the IEP team believes that in-person instruction is necessary to provide FAPE, the IEP team should develop an IRLP to describe the services that will be delivered in the online program.

Id. The guidance also indicated that whether a Written Notice was required depended on the particular facts and circumstances and OSEP encouraged schools to ensure that parents were

fully informed of how their child's special education and related needs would be addressed during remote learning. Id.

Additional guidance from the DOE indicated that an IRLP must be developed with input during an IEP team meeting or could be discussed as an amendment to the IEP without a meeting. DOE Power Point Slides regarding IRLPs, date unknown. If the IRLP is done as an amendment, the Written Notice must document parent input. Id. The DOE noted that it was important that the IRLP include parent input. Id.

B. Parties' Arguments

DRM argues that the Department has a duty to ensure that the School District is complying with the IDEA. It maintains that the School District, as one of the largest LEAs in the State, is required to provide the Department with assurances that it has in effect policies and procedures to ensure compliance with the IDEA. DRM maintains that the School District is essentially requesting to waive the operation of the IDEA for the 2020-2021 school year. DRM contends that the School District's response indicates that even in cases of students for whom it was clear that two shortened days of school attendance each week would fall well short of providing a FAPE, IEP Teams were powerless to address the concerns of IDEA violations. DRM contends that the significant needs of the [REDACTED] Program students render it impossible for them to be expected to work asynchronously on materials prepared for them to reinforce concepts introduced during 10 hours per week of in-person learning, noting that this was simply not possible for students without direct and consistent adult support, such as that received at school.

Although the School District maintains that its provision of services during the pandemic has not resulted in a denial of FAPE, it recognizes that the model for service delivery could necessitate the delivery of compensatory education at the end of the hybrid period.

The School District argues that since the Department clearly wrestled with the correct approach to this particular issue, the School District should not be faulted for taking the approach that it did, leaving IEPs to reflect the level of services to be provided when schools are fully in-person. The School District also points out that at the federal level Department of Education Office for Civil Rights and OSEP continued to suggest into the fall that IEPs did not need to be amended to reflect a temporary change in service delivery.

Nevertheless, the School District states that it has always recognized that the model for service delivery imposed upon the school by a worldwide pandemic may necessitate the delivery of compensatory education for some students and the likelihood of such a requirement is particularly notable for those who are most seriously disabled. The School District prefers to assess the compensatory education needs at the end of the hybrid period when it can more accurately review educational impact with this high-needs population. The School District proposes to undertake an individualized review of each child in the [REDACTED] program before the beginning of the 2021-2022 school year and make a reasonable calculation about the educational impact of the hybrid schedule on the child's performance. The School District contends that such evaluation should be done when it returns to a full-time schedule, when it will be best able to look back at the entire time period and assess educational impact, especially for the most disabled children such as those in the [REDACTED] program. The School District proposes that there should be input from each student's parents about how they see the educational needs of the child and what might work best for their family as a means to remedy regression, which it argues

it a sufficient yardstick for assessing pandemic-caused deprivations, citing United States DOE language that appears to permit this standard.

The School District notes the no-win position it was in of not amending IEPs during a period when it recognized it could not fully provide the services identified within IEPs or amending IEPs to reflect the amount of service actually being provided during a hybrid or fully remote school, arguing that it would be facing the same systemic complaint regardless of its actions. In conclusion, the School District recognizes the adoption of a hybrid model as required to ensure student and staff safety due to the global pandemic may have resulted in the denial of FAPE for individual students and in particular more vulnerable, seriously disabled children such as those in the [REDACTED] program.

C. Analysis

There is no dispute that the students in the [REDACTED] 3 to 5 program have not been provided the full range of services and specially designed instruction designated in their IEPs. The students were provided the opportunity to be in school for shortened-length days for the first half of the school year, at which time an additional shortened day was offered once every two weeks. Most recently, in March, students were offered the opportunity to attend school for four shortened days each week.

Parents of some students in the [REDACTED] 3 to 5 program, including [REDACTED]'s mother, repeatedly requested that students be allowed to access more time in school due to regression they were observing, the extreme difficulty or inability of the students to access remote instruction or work on paper packets at home, and the students' need for a regular and predictable schedule and routine. [REDACTED]'s care providers, including his developmental pediatrician and his behavioral home health coordinator, advocated with the School District to allow [REDACTED]

additional time in school. ■■■■■'s mother reported that she felt that she received boiler-plate responses to her requests.

On the other side of the equation, special education administrators, who were strongly encouraging staff to try to open up opportunities for the students to spend more time in school, were meeting significant resistance from the special education staff working in the classroom. Those staff members were legitimately concerned about the health and safety of the students and themselves. The students in the ■■■■■ program in particular face challenges to maintaining social distance and wearing face masks appropriately and consistently. Nevertheless, by the spring, special education staff and administrators were able to move forward with space changes that have allowed the students to access four days of in-person education each week. Lengthening the school days to return to normal length could also have been a possibility.

Special education administrators utilized IRLPs to document the changes they were making to the services being provided to students because they did not feel it was appropriate to modify the services identified in the IEP, even though the IEPs had been created at a time when full-time school was envisioned. The IRLPs were created in consultation with parents and parents were told they could be changed at any time. The IRLPs included access to procedural rights when the IRLP was created in conjunction with an IEP but not necessarily when the IRLPs were created as stand-alone documents. The IRLP process did not afford parents the opportunity to request more time in school for their students.

The School District's blanket use of IRLPs to alter the services provided to students over much of the school year is inconsistent with the Department's expectation that IRLPs that will be used exclusively for short-term disruptions to services rather than for long-term changes to services. As OSEP's March 2020 guidance indicates, an IEP Team could consider creation of a

distance learning plan to be implemented in the event of a COVID-19 outbreak that requires the school's closure. USDOE Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020). OSEP stated that IEP Teams could, but were not required to, "include distance learning plans in a child's IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak." Id. Such a plan could include instruction at an alternative location, remote programming, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services could be provided in a student's home. Id. The OSEP guidance concluded that such a contingency plan should be created before an outbreak occurred to give the student's service providers and parents an opportunity to reach agreement as to what circumstances would trigger the use of the student's distance learning plan and the services that would be provided during the closure. Id. Here, the School District utilized IRLPs as a standardized document to alter the provision of services over the long-term rather than over a short-term disruption of services due to a COVID-19 outbreak that required the specific school's closure. Moreover, the use of IRLPs in the present case functioned as a reduction in services called for in each student's IEP.

Further, the students in the [REDACTED] 3 to 5 program were denied a FAPE due to the reductions in related services and specially designed instruction that were provided. In addition, the decision that each student would be limited to a certain amount of in-person school time was not made by each student's IEP Team but instead was made as an administrative decision across the board for all [REDACTED] students. Parents who advocated for more in-person time were met with a blanket denial regardless of the fact that School District staff recognized that particular students were especially challenged in accessing on-line or asynchronous learning at home.

Understanding the space constraints within the building and the initial decision to begin with only two shortened days per week, the changes that have been made to implement a four-day per week program for each [REDACTED] student could potentially have been made earlier in the year. Special education administrators reported that [REDACTED] program staff adopted changes in this reorganization that had previously been rejected. It is also notable that some English intensive students, although not in a parallel situation to [REDACTED] students, were allowed to attend school in-person four days a week much sooner than the students in the [REDACTED] program were able to do so.

The result of the IRLPs was that [REDACTED] students received significantly reduced amounts of specially designed instruction each week and somewhat reduced amounts of speech and occupational therapy. The prioritization of related services meant that students generally received most or all of their physical therapy, social work, and BCBA services called for in their IEPs.

As the September 2020 OSEP guidance related, if a school district continued to provide educational opportunities to the general student population during a school closure, the school was required to ensure that students with disabilities also have equal access to the same opportunities. The particular difficulty with the [REDACTED] students was their challenges accessing remote as well as at home programming such that they were somewhat uniquely situated to be unable to be provided meaningful at home programming, rendering in-person programming of paramount importance. Even if regular education students or students with less significant needs who received special education programming were able to access remote or at home programming, the students within the [REDACTED] program were largely not able to do so, rendering

them without the same functional opportunity to access the equivalent of full-time education during the pandemic.

Because the students in the [REDACTED] 3 to 5 program, who did not receive all of the services in their IEPs from June 2020 to the present were denied a FAPE, they are entitled to compensatory education.

The purpose of compensatory education in these instances is to remedy the knowledge and skill deficits that have resulted from missed services. Each student's IEP Team must make an individualized determination. Neither the IDEA nor MUSER require an hour for hour correspondence when calculating the amount of compensatory education to be awarded. The IEP Team must determine the need, type, amount, frequency, duration, and location of compensatory education necessary to address the lack of progress toward IEP goals and objectives resulting from missed services. The IEP team should discuss services that have not been provided during remote or hybrid instruction, consider the impact of missed services on student progress toward meeting IEP goals and objectives, and determine the need for compensatory services. The Team may agree to develop a written document to amend or modify a student's IEP to include the compensatory services. This IEP Team process, whether held in-person or remotely, must include proper written notice to each student's parents if the IEP Team proposes or refuses changes to the student's IEP, including the type, frequency, and location of compensatory services to be provided to the student. Proper written notice must also include the right of parents to request a special education mediation conference or due process hearing.

To determine the compensatory services required, the IEP Team must review formative and summative formal and informal assessment data to determine progress toward each student's

IEP goals and objectives during the period of remote and hybrid instruction. The IEP Team should then determine what services were missed and what goals and objectives the student was expected to achieve but did not due to the absence of services. The IEP Team should next determine the nature, frequency, and duration of compensatory services and document them in the student's IEP. A student's placement in general education programming should not be altered due to the need for compensatory services. If a student's parent disagrees with the IEP Team's proposed type, frequency, or location of compensatory education services, the parent may pursue dispute resolution options.

In the present case, due to the length of time that service reductions occurred for all [REDACTED] 3 to 5 students, the significant reduction in the amount of specially designed instruction and related services that occurred, and the general inability of [REDACTED] students to meaningfully access remote instruction, each student is entitled to the above-described process regarding the determination of compensatory education.

In addition to compensatory services, IEP Teams of [REDACTED] 3 to 5 students are encouraged to consider additional learning loss and recovery services, such as accelerated learning programs, tutoring programs outside normal school hours, summer enrichment programs, and other opportunities designed to address learning loss that are available to all students. General education learning opportunities may be considered as a tool to provide compensatory services. Additional weeks or lengthened days of ESY services may also be appropriate. The Department notes that the determination of ESY services cannot be dependent on the School District's budget and that the School District may use funds awarded under the CARES Act Elementary and Secondary School Emergency Relief Fund to provide compensatory and recovery services to students.

VII. CORRECTIVE ACTION TO BE COMPLETED BY THE DISTRICT

The School District must deliver the IEP services identified in the IEP of each [REDACTED] student, including both the K-2 and 3-5 classrooms. The School District must also undertake the above analysis regarding the compensatory and recovery services required for each student in the [REDACTED] program. The School District must report to the Department at 30-day intervals the progress in the compensatory education determination process for each student in the [REDACTED] program as well as the final outcome regarding the determinations of compensatory and recovery services and documentation of parental notice and input into those determinations.

The Department will communicate with Disability Right Maine and the School District regarding the application of this decision to other students in the School District who receive special education services and the potential course of any further investigation.