

Complaint Investigation Report

v. York CDS

March 19, 2021

Complaint # 21.043C

Complaint Investigator: Julia N. Pothen, Esq.

Date of Appointment: January 29, 2021

I. Identifying Information

Complainant: _____, Parent

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 – York County

Student:

II. Summary of Complaint Investigation Activities

On January 25, 2021, the Maine Department of Education received and opened this complaint. Therefore, the current investigation covers the period of January 25, 2020 to present. See MUSER XVI(4)(B)(3). The complaint investigator was appointed on January 29, 2021.

The complaint investigator received 141 pages of documents from Child Development Services in York County (“CDS-York”). The investigator also received 138 additional pages of documents from the Complainant. On February 18, 2021, the Student’s Case Manager at CDS-York, the Director of CDS-York, and the Student’s former Speech and Language pathologist were interviewed. A formal phone interview was conducted with the Student’s parent (“Parent”) on February 19, 2021.¹ The Student’s community caseworker from _____ was also interviewed

¹ Beyond the scheduled phone interview on February 18, 2021, the Parent and the complaint investigator communicated by phone on multiple additional occasions between February 8, 2021 and March 11, 2021 to discuss supplemental information.

on February 19, 2021. On February 22, 2021, the Student’s Occupational Therapist, the CDS-York Program Manager, a CDS-York IEP Administrator, and the Student’s Physical Therapist were interviewed. On February 25, 2021, the Director of the Morrison Center and the CDS State Director were interviewed.² 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.³

III. Preliminary Statement

The Student is _____ years old, and _____ resides with _____ parents (“Parents”) in _____, Maine. The Student has been diagnosed with Autism Spectrum Disorder (“ASD”), Level 2, requiring substantial support – with language and intellectual impairment. _____ 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 November 2019, shortly after birthday.

The present complaint was filed by the Student’s parent (“Parent”) on January 25, 2021, alleging that CDS-York 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 February 2, 2021, alleging one violation of the MUSER. A telephonic Complaint Investigation Meeting was held on February 5, 2021. A Revised Allegations Letter was sent to the parties by the complaint investigator on February 8, 2021, also setting forth one (revised) allegation made by the Parent.

IV. Allegation

The Parent alleged:

- A. CDS-York did not provide the Student with a free and appropriate public education (“FAPE”) because CDS-York did not fully implement the Student’s IEP. MUSER II(13); MUSER IX(3)(B).

²As 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. Additionally, not all of the witnesses suggested by the parties agreed to speak with the complaint investigator.

³ The Student was also a named student in the systemic complaint investigation #21.037CS filed against CDS-York. As such, the complaint investigator obtained some initial information about the Student through the process of reviewing documents and conducting interviews during the complaint investigation #21.037CS.

V. Factual Findings

1. The Student is _____ years old, and _____ resides at home with _____ Parents in _____, Maine.
2. The Student qualifies for special education services based on _____ diagnosis with Autism Spectrum Disorder (“ASD”), Level 2, requiring substantial support – with language and intellectual impairment. See Student’s Individualized Education Plan (“IEP”), dated October 2, 2020; Student’s Developmental Evaluation, dated October 24, 2019, conducted by Donald Burgess, MD.
3. The Student has also been diagnosed with spastic diplegic cerebral palsy, a global developmental delay, a developmental language disorder, and a sensory integration disorder. See Student’s Developmental Evaluation, dated October 24, 2019, conducted by Donald Burgess, MD. The Student experiences significant delays in both receptive and expressive language, as well as delays in both fine and gross motor skills. See Student’s IEP, dated October 2, 2020.
4. In Maine, Child Development Services (“CDS”) is responsible for delivering special education services under Part B of the IDEA for children aged 3 to 5 years. CDS-York is the regional site responsible for _____, where the Student lives. As such, CDS-York maintains educational responsibility for the Student.
5. The Student’s most recent IEP, dated October 2, 2020, provides for 5 x 6 hours per week of Specially Designed Instruction (“SDI”). The Student also requires 4 x 30 minutes per week of Speech and Language Services, 3 x 30 minutes per week of Occupational Therapy, 3 x 30 minutes per week of Physical Therapy, and 2 x 30 minutes per week of Counseling services, as well as 12 x 1 hour annually of Board Certified Behavioral Analyst (“BCBA”) consultation and transportation services. The Student’s IEP requires 1:1 adult support for all services. See Student’s IEP, dated October 2, 2020; Written Notice for IEP Team Meeting on January 14, 2021.
6. The Student’s most recent psychological evaluation was conducted in October 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 into the “severe” range of concern. The Student’s diagnosis was ASD requiring substantial support (level 2), with accompanying developmental

- language disorder, global developmental delay, and spastic diplegic cerebral palsy. See Student's Developmental Evaluation, dated October 24, 2019, conducted by Donald Burgess, MD. ⁴
7. The Student also participated in a Speech and Language evaluation, dated October 19, 2019. The Preschool Language Scale – 5th edition (“PLS-5”) was administered to assess the Student’s auditory comprehension and expressive communication skills. standard score placed in the 1st percentile when compared to same age peers. Due to the Student’s limited expressive language skills, the Goldman Fristoe Test of Articulation-3 (“GFTA-3”) could not be administered. The Student was diagnosed with a developmental disorder of speech and language, unspecified, and Speech and Language services were recommended for the Student. See Student’s “Specialty Evaluation,” dated October 10, 2019, conducted by Jennifer P. Russo, M.A. CCC-SLP.
 8. The Student also has been diagnosed with childhood apraxia of speech (“CAS”) and oral dysphasia (feeding). See Progress and Discharge Notes, issued by Elizabeth Straka, Ph.D, CCC-SLP.
 9. On September 10, 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. The Team ordered a speech and language evaluation, as well as observations of the Student in childcare setting. See Written Notice for IEP Team Meeting on September 10, 2019.
 10. On October 21, 2019, the Student’s IEP Team met again to determine eligibility for special education services and develop the Student’s IEP, which would become effective shortly after the Student’s third birthday. The Team found the Student eligible for services and made plans to reconvene following a full developmental evaluation. See Written Notice from IEP Team Meeting on October 21, 2019.
 11. On November 15, 2019, the Student’s IEP Team met again to review the Student’s new evaluations regarding current and functional academic levels. See Written Notice from IEP Team Meeting on November 15, 2019. At this time, the IEP Team agreed that the Student should be placed in a Behavioral Health Day Treatment program with 1:1 adult support and five full days of services.

⁴The Student’s developmental evaluation notes, “There is also associated anxiety issues and some hyperactivity present. At this time, I cannot fully determine whether has a diagnosis of ADHD based on age.” See Student's Developmental Evaluation, dated October 24, 2019, conducted by Donald Burgess, MD.

According to Written Notice, the IEP Team considered fewer hours of SDI per week, but ultimately determined that 5 days x 6 hours of SDI was necessary because the Student required considerable treatment/services and because the Student “does well with consistency and routine.” Id.

12. On November 15, 2019, the IEP Team agreed to amend the Student’s IEP to provide for 5 x 6 hours per week of Specially Designed Instruction at a behavioral health day treatment program, 4 x 30 minutes per week of Speech and Language Services, 2 x 30 minutes per week of Occupational Therapy, 1 x 60 minutes per week of Physical Therapy, and transportation services. See Student’s IEP, dated October 21, 2019, as amended on November 15, 2019.

13. At the end of 2020 or the beginning of 2021,⁵ CDS-York secured a placement for the Student at a _____ program located in _____, Maine. The Student began receiving _____ OT, PT, and Speech and Language services around this time as well. See Interviews with Parent between February 8, 2021 and March 11, 2021; Response to Complaint from Child Development Services, dated February 12, 2021.

14. During interviews with the complaint investigator, the Parent explained that the Student initially only attended the _____ for three days per week, on Mondays, Tuesdays, and Wednesdays, due to unavailability of a full-time spot in the _____, Maine _____ program. See Interviews with Parent between February 8, 2021 and March 11, 2021.

15. At some point, the Parent recalls that the Student transitioned to five days per week at the _____, but the Parent is unsure about the exact date when a full-time program slot became available for the Student.⁶ Id.

⁵ The Student’s precise start date at the _____ in _____, Maine remains unknown, despite a review of all documents provided by CDS-York. The complaint investigator made multiple requests for additional information and documentation, and the complaint investigator inquired about the Student’s start date at the _____ program during multiple interviews with CDS-York staff members and during an interview with the Director of the _____. Nevertheless, the present complaint covers the period of January 25, 2020 to present, and all parties agree that the Student was enrolled in the _____ program in _____, Maine prior to January 25, 2020.

⁶ Again, the scope of services that the Student received at the _____ in _____, Maine between January 25, 2020 (the start of the complaint investigation period) and March 17, 2020 (when the classroom closed for in-person instruction due to COVID-19) remains unknown, despite a review of all documents provided by CDS-York. The complaint investigator made multiple requests for additional information and documentation, and the complaint investigator inquired about the extent of services received during multiple interviews with CDS-York staff members and during an interview with the Director of the _____. No specific information was provided to dispute the Parent’s contention that the Student initially only attended _____ for three days per week.

16. During the time-period when the Student was not receiving the full extent of the SDI listed on IEP, the Parent was not offered additional services for the Student, even though the Parent continued to send the Student to a private daycare on Thursdays and Fridays when [redacted] was not attending the program. Id.

17. 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 the evening of March 17, 2020, the Parents learned that the [redacted] program would no longer be operating an in-person [redacted] program due to the COVID-19 pandemic.

18. 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.”).

19. 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.

Based on a review of CINC service logs (which were not provided to the complaint investigator or verified for accuracy), an advocate for CDS-York determined that the Student received services of some kind (whether it be SDI, OT, PT, or Speech and Language services) at the [redacted] on the following dates: Monday, 1/13/20, Tuesday, 1/14/20, Wednesday, 1/15/20, Tuesday, 1/21/20, Wednesday, 1/22/20, Thursday, 1/23/20, Friday, 1/24/20, Monday, 1/27/20, Tuesday, 1/28/20, Wednesday, 1/29/20, Friday, 1/31/20, Monday, 2/3/20, Tuesday, 2/4/20, Wednesday, 2/5/20, Monday, 2/10/20, Tuesday, 2/11/20, Wednesday, 2/12/20, Monday, 2/24/20, Tuesday, 2/25/20, Wednesday, 2/26/20, Monday, 3/2/20, Tuesday, 3/3/20, Wednesday, 3/4/20, Monday, 3/9/20, Tuesday, 3/10/20, Wednesday, 3/11/20, Monday, 3/16/20, and Tuesday, 3/17/20. With the exception of the last two weeks in January 2020, where data indicates the Student received four days of services per week, the service dates provided by CINC reflect the fact that the Student only attended the [redacted] in [redacted], Maine on Mondays, Tuesdays, and Wednesdays until the [redacted] program closed for in-person instruction on March 17, 2020.

The complaint investigator expressed concern that clear, accurate data about the Student’s educational services is not readily available within the Student’s special education file. Without this data, CDS-York would have been unable to answer necessary questions during the IEP process about “Services Previously Unmet,” as well as participate in meaningful discussions about the Student’s unique needs going forward.

20. The Student received no services between March 18, 2020 and mid-April 2020.
21. At some point in April 2020,⁷ the _____ began offering the Student synchronous remote 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 10 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. The Student was eventually offered remote “large group meetings” on Tuesdays and Thursdays, daily remote music class, and daily remote gym class. See Interviews with the Parent between February 8, 2021 and March 11, 2021; Interview with the Director of the _____ on February 25, 2021; Email from _____ Special Education Teacher to Parent on July 31, 2020.
22. The Student received no individualized remote instruction – synchronous or asynchronous – nor any specially designed instruction towards _____ IEP goals during circle time or large group meetings. 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 ZOOM sessions after May 2020 because the services offered were not meeting the Student’s needs. Id.
23. The Student’s CDS-York Case Manager and the Director of the _____ confirmed that the Parent’s description of the remote services offered to the Student was likely accurate, but neither individual could offer details to confirm or dispute the Parent’s description about the specific nature of the services provided.⁸ See Interview with CDS-York Case Manager on February 18, 2021; Interview with Director of the _____ on February 25, 2021.
24. Despite the extensive challenges with effectively implementing the Student’s IEP services remotely, _____ IEP Team was not reconvened to develop an alternative plan between March 17, 2020 and _____ previously scheduled annual meeting on October 2, 2020. See Written Notice for the IEP Team meeting on October 2, 2020.

⁷ The precise start date of remote services is unknown, although it appears from the communication log provided by CDS-York that services may have started sometime after April 13, 2020. See Student’s Communication Log.

⁸ The current Director of the _____ only began working as the Director after in-person services had resumed in the fall of 2020. See Interview with Director of _____ on February 25, 2021. According to the communication log provided by CDS-York there was no communication between the CDS-York Case Manager and the _____ regarding the Student’s remote services between April 21, 2020 and September 10, 2020. See Student’s Communication Log.

25. While the _____ in _____, Maine was closed for in-person learning, the Student did not receive any related services remotely or in-person, such as Physical, Occupational Therapy, or Speech and Language services. See Interviews with the Parent between February 8, 2021 and March 11, 2021; Interview with the CDS-York Case Manager on February 18, 2021.
26. In June 2020, the Parent brought the Student to see _____ developmental pediatrician due to a number of concerning and escalating behaviors. The Parent reported that the Student was throwing prolonged tantrums, biting, banging head, and other issues related to reduced self-regulation. See Developmental Follow Up Note, dated June 1, 2020, conducted by Dr. Donald Burgess. The Student was prescribed guanfacine for self-regulation. Id.
27. The Parent was extremely concerned about the Student's apparent regression and ongoing behavioral challenges, so she eventually enrolled her daughter in _____ former private daycare setting, _____, for several months during the summer of 2020. No services were offered or provided to the Student in _____ private educational setting. See Interviews with Parent between February 8, 2021 and March 11, 2021. The Student also continued to work with a private Speech and Language pathologist in _____ home. Id.
28. The Student began attending the _____ in _____ Maine in-person again on August 31, 2020. See Interviews with Parent between February 8, 2021 and March 11, 2021; Response to Complaint from Child Development Services, dated February 12, 2021; Email from _____ Special Education Teacher to Parent on August 8, 2020.
29. Between August 31, 2020 and January 15, 2021, the Student's IEP services were implemented mostly in accordance with _____ IEP. See Interviews with Parent between February 8, 2021 and March 11, 2021; Response to Complaint from Child Development Services, dated February 12, 2021.
30. However, the Student did not receive any Speech and Language services between August 31, 2020 and mid-December 2020. The _____ did not have a speech pathologist on staff, and CDS-York did not step in to provide the Student with _____ necessary speech and language therapy. See Interview with the Director of the _____ on February 25, 2021; Email from Student's CDS-York Case Manager to CDS-York Staff regarding the lack of a speech therapist at _____, dated September 28, 2020; Written Notice from the IEP Team meeting on October 2, 2020.

31. On October 2, 2020, the IEP Team convened for an Annual Review. The IEP Team decided to add counseling to the Student's IEP "to support the following behaviors attributed to anxiousness during the school day: will cover ears, cry, tremble, bolt, or some combination of these." See Written Notice for IEP Team Meeting on October 2, 2020. The Parent emphasized the Student's needs for trust and consistency in order for the Student to continue making educational and socioemotional progress. Id.
32. The IEP Team remained concerned about the Student's expressive and receptive language delays, noting that the Student had increased babbling and uses sign in the classroom for eat and more, but "verbal speech is more scripting than anything else. is beginning to say hi to peers. [Parent] is concerned that [the Student] may never talk in functional sentences to be able to communicate wants, needs, and ideas." Id.
33. However, the Student continued to receive no Speech and Language services at the for an additional two and a half months following the Annual IEP Meeting until was ultimately able to hire a new speech and language pathologist in December 2020. There appeared to be no follow-up from CDS-York regarding the lack of Speech and Language therapy during this period of time. See Interview with the Director of the on February 25, 2021; Interview with the Student's CDS-York Case Manager; Student's Communication Log.
34. On December 18, 2020, the Parents and staff members at CDS-York were informed that the would be closing its program in , Maine, effective on January 15, 2021. See Email from Director of to CDS Staff on December 18, 2020; Interview with Parent on February 19, 2021.
35. The Parent and the Student's community caseworker immediately sent multiple email communications to CDS-York staff, inquiring about the Student's options for special education services after January 15, 2021, requesting an IEP meeting, and seeking assistance with the Student's referrals to other programs. See Emails from Parent and Student's community caseworker between December 21, 2020 and January 14, 2021.
36. On December 22, 2020, the Student's community caseworker contacted the Student's CDS-York Case Manager, asking "I'm also wondering if we could begin looking at contracting with outside providers for OT/PT services for [the

- Student].” The Student’s Case Manager responded, “We legally are not allowed to contract with outside providers, I can check to see if we could make an exception though...can [the Student] get more OT and PT through Mainecare?” See Emails between Student’s community caseworker and Student’s CDS-York Case Manager, dated December 22, 2020.
37. During interviews, multiple CDS and CDS-York staff members confirmed that CDS-York is responsible for providing the Student with all services on IEP, regardless of the provider. Multiple staff members also insisted that there is no need for a case manager to seek approval to put services into place when a child’s IEP is not being fully implemented. See Interviews with CDS & CDS-York Staff between February 18, 2021 and February 25, 2021.
38. On December 29, 2020, CDS-York staff referred the Student to three different programs, _____, “in hopes someone can pick up this child.” See Email from CDS-York Case Manager/Referral Coordinator, dated December 29, 2020.
39. On December 30, 2020, the Parent emailed the Student’s CDS-York Case Manager asking, “Nothing on trying to get _____ into another school? And if I have to send _____ to daycare, I heard CDS would help with that?” The Student’s CDS-York Manager responded, “Who did you talk to about CDS providing funding for _____ to go to daycare? We typically would only provide funding for services that are on IEP.” See Emails between Parent and CDS-York Case Manager on December 30, 2020.
40. On January 14, 2021, the Student’s IEP Team met, and the Parent discussed concerns about the Student’s potential for regression during a critical time of development, specifically when the Student was just learning to speak. See Written Notice for the IEP Team Meeting on January 14, 2021.
41. The IEP Team considered the fact that all special purpose programs appropriate for the Student were currently full. The CDS-York Director, who attended the Student’s IEP Team meeting on January 14, 2021, explained to the IEP Team that CDS was hoping to open a program at the beginning or middle of February 2021, stating that the Student “would be number 1 on the list for enrollment.” Id. Additionally, the IEP Team discussed the possibility of hiring an Ed Tech for the Student, if the Parent were able to enroll _____ in a private preschool program, and the possibility of an Early Childhood Tuition Agreement with the Parent’s chosen private preschool. Id.

42. On January 14, 2021, the CDS- York Program Manager confirmed that “our referral coordinator is making referrals for the speech, OT, and PT services today, and you should be hearing from those clinicians soon.” See Email from CDS- York Program Manager to Parent on January 14, 2021.
43. On January 15, 2021, the _____ program in _____ Maine closed.
44. The Student has not received further specially designed instruction since January 15, 2021.
45. On January 25, 2021, the Parent filed this complaint with the Department of Education.
46. The Student began receiving Occupational Therapy services on January 27, 2021. _____ began Physical Therapy services on February 3, 2021, and _____ started Speech and Language services on February 1, 2021. The Student receives these services at CDS offices.
47. On January 29, 2021, the Parent emailed the CDS-York Program Manager, expressing concerns about the Student’s new Speech and Language services for two reasons. First, the Parent was worried the chosen provider did not have sufficient experience working with children who are diagnosed with childhood speech apraxia. Additionally, the Parent was concerned about the timing of the Student’s speech sessions, stating that the Student was too tired by the late afternoon to benefit from Speech and Language therapy at 3:15pm. See Email from Parent to CDS-York Program Manager on January 29, 2021.
48. The Student’s Speech and Language provider was unable to offer an earlier time slot for the Student’s therapy due to _____ overbooked schedule, and the Parent decided to discontinue Speech and Language therapy through CDS. The Parent enrolled the Student in private Speech and Language therapy at York Hospital. See Interviews with Parent between February 8, 2021 and March 11, 2021; Interview with Student’s former Speech and Language pathologist on February 18, 2021.
49. At present, the Student has not been placed into a day treatment program, and is not receiving Specially Designed Instruction in any form. The Student

continues to receive PT and OT services through CDS-York, as well as Speech and Language services from a private provider.⁹

Other relevant facts are included in the determinations below.

VI. Determinations

- A. CDS-York did not provide the Student with a free and appropriate public education (“FAPE”) because CDS-York did not fully implement the Student’s IEP. MUSER II(13); MUSER IX(3)(B). **VIOLATION FOUND.**

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 5 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 appropriate progress in light of the child’s unique circumstances. See *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988, 999 (2017).

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.*

⁹ CDS has continued to communicate with the Parent about their imminent plans to open a program to meet the Student’s needs. However, at the time of publication, no program has been opened for the Student.

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 (10th 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 (4th 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).

With respect to the time-period between January 25, 2020 and March 17, 2020, the Student’s parent reports that the Student was not receiving the full services required by IEP because was only in attendance at the in , Maine for three days per week, 6 hours per day, rather than five days per week, 6 hours per day. While the Parent is unable to state specifically when the Student was transitioned into a five day per week schedule, CDS-York and the were unable to provide any reliable data for this complaint investigation to suggest that the Student consistently attended the for more than three day per week prior to the closure of in-person learning on March 17, 2020. In fact, the very limited data shared by CDS-York and the suggests that the Student attended the on Mondays, Tuesdays, and Wednesdays only for the entire months of February 2020 and March 2020 (until the cessation of in-person learning on March 17, 2020).

A three-day school week runs counter to the Student’s IEP Team decision on November 15, 2019, which determined that any less than 5 days per week, 6 hours per

day of SDI would be insufficient to meet the needs of the Student because of the extent of related service needs and because of the Student's needs for a consistent, reliable schedule. Therefore, between January 25, 2020 and March 17, 2020, there was a material failure to fully implement the Student's IEP, resulting in a denial of FAPE.

Looking next at the time period between March 17, 2020 and August 31, 2020, the circumstances of the COVID-19 pandemic must be closely considered. 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,¹⁰ the IEU "must 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>.

In other words, the circumstances surrounding the COVID-19 pandemic do not create 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.

¹⁰ 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 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> (emphasis added).

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 & Office 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 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, once CDS-York began providing remote services to Students in April 2020, CDS-York was required to provide FAPE to the Student. The [redacted] 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 the Student's IEP Team because the services provided to the Student dramatically changed the substance of [redacted] special education instruction outside of the IEP process. The Student, who was [redacted] years old at the time, and who has been diagnosed with a severe intellectual and language delay, was invited to participate in a virtual, group circle time through the [redacted] for 30 minutes each day, as well as "large group" virtual meetings on Tuesdays and Thursdays. The instruction was not specially designed to meet the Student's IEP goals or needs. The instruction did not satisfy the 1:1 adult support ratio required by the Student's IEP. Furthermore, despite best efforts from the Parent to engage the Student in remote learning, the services provided were simply inaccessible to the Student. Due to [redacted] age, maturity, and disabilities, the Student could not engage in a group setting with 10 or more peers on a computer screen.

Additionally, the Student was provided with no Occupational Therapy, Physical Therapy, or Speech and Language services, either remotely or in-person between March 17, 2020 and August 31, 2020.

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 SDI, SDI packets prepared specifically for the Student, or remote coaching services provided to the parents. An IEP Team meeting was never held, no additional conversations or communications with the Parent were documented after April 21, 2020, and none of these options were considered. The Parent eventually sought medical help for the Student's self-regulation struggles. When the Student began attending private daycare due to the Parent's fear that the Student was regressing significantly without a structured learning

environment, CDS-York took no steps to implement any part of the Student's IEP in daycare setting.

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 investigation finds that CDS-York violated MUSER by neglecting to hold an IEP Meeting prior to the Student's annual meeting on October 2, 2020, by effectively changing the Student's IEP outside the IEP process, without input from the Parents, and by not providing FAPE when the Student's IEP was not implemented in any form between March 17, 2020 and August 31, 2020. The Student was never offered specially designed instruction or given a generalized form of remote instruction that was accessible to [redacted]. The remote instruction offered by [redacted], as discussed above, did not address the Student's IEP goals and did not provide opportunities for the Student to progress in light of [redacted] unique circumstances. CDS-York did not offer or provide OT, PT, or Speech and Language services, and all of those gaps amount to a material failure to implement the Student's IEP.

Additionally, when the Student's in-person placement at the _____ in _____, Maine became available again on August 31, 2020, _____ IEP Team should have met to consider what compensatory services would be offered to the Student following the lengthy period of inadequate delivery of services. CDS-York violated the Student's rights by neglecting to make a determination about COVID-19 recovery services.

Furthermore, CDS-York had a responsibility to ensure that the Student was receiving Speech and Language Services at the _____ between August 31, 2020 and mid-December 2020. CDS-York staff members were aware of this lapse in crucial services, as evidenced by emails between CDS-staff members in September 2020, as well as the conversation at the Student's IEP Team meeting on October 2, 2020. Yet no action was taken by CDS-York to ensure the delivery of services (or to compensate the Student for the absence of services once services were eventually restored in December 2020).

Finally, CDS-York has not provided the Student with FAPE during the time-period since the _____ has closed. Although CDS-York has made sufficient efforts to replace the Student's OT, PT, and Speech and Language services after the _____ closed on January 15, 2021, it remains unclear why the Student's referrals were held until after the IEP Team meeting on January 14, 2021. Additionally, CDS-York has not provided the Student with specially designed instruction necessary to meet the Student's unique and extensive needs. While CDS-York undoubtedly had insufficient notice of the _____ closing of the _____, Maine _____ program, CDS-York maintains an obligation to address the dire lack of availability of special purpose private schools in York County in order to ensure that all students' IEPs are fully implemented, including the IEP of the Student.

CDS-York did not provide the Student with a free and appropriate public education ("FAPE") because CDS-York did not fully implement the Student's IEP between January 25, 2020 and the present. See MUSER II(13); MUSER IX(3)(B).

VII. Corrective Action Plan

1. CDS-York must provide:

156 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.

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

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

12 hours of compensatory Physical Therapy. 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 August 31, 2022.**

2. **Within one week of the Student's placement in a new program, CDS-York shall schedule an IEP Team Meeting for the Student.** The Student's IEP Team must convene to determine a plan for providing the compensatory education services above before August 31, 2022. The Team should discuss an appropriate timeframe and location for service 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 **within 7 days of the IEP Team Meeting.**

3. CDS-York must continue to diligently seek an educational placement for the Student. **Starting on April 1, 2021, and every 30 days thereafter,** CDS-York must provide the Department of Education with a summary of its efforts to provide the Student with an educational placement and/or alternative options for SDI. Once the Student's IEP is being fully implemented, CDS-York may discontinue these monthly summaries.