

# Complaint Investigation Report

## Parent v Bangor

February 3, 2017

Complaint #1 7.034C

Complaint Investigator: Jonathan Braff, Esq.

### I. Identifying Information

Complainant: Parent

[REDACTED]

Respondent: Betsy Webb, Superintendent  
73 Harlow St.  
Bangor, ME 04401

Special Services Director: Patti Rapaport

Student: Student  
DOB: [REDACTED]

### II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on December 9, 2016. The Complaint Investigator was appointed on December 16, 2016 and issued a draft allegations report on January 3, 2017. The Complaint Investigator conducted a complaint investigation meeting on January 10, 2017, which date was extended from the original date of January 5, 2017 at the Complainant's request, resulting in a stipulation. On January 19, 2017, the Complaint Investigator received 9 pages of documents from the Complainant, and received a 12-page memorandum and 532 pages of documents from [REDACTED] School Department (the "District") on January 18, 2017. Interviews were conducted with the following: Patti Rapaport, special services director for the District; Stephanie Johnston, special education teacher for the District; Karen Perry, special education teacher for the District; Barbara Clewley, regular education teacher for the District; Laura Betters, BCBA contracted with the District; Jamie Treworgy, BCBA previously contracted with the District; and [REDACTED] the Student's mother (the "Parent").

### III. Preliminary Statement

The Student is [REDACTED] years old and is currently receiving special education under the eligibility criterion Multiple Disabilities (Autism and Hearing Impairment). This complaint was filed by the

Parent, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

#### IV. Allegations

1. Failure to provide education in the least restrictive environment by determining to place the Student in a separate special education school in violation of MUSER §X.2.B;
2. Failure to fully and adequately implement the Student's IEP with respect to provision of supports including visual supports, visual cues, FM system, iPad access, social stories and non-time-limited lessons in violation of MUSER §IX.3.B(3);
3. Failure to modify the Student's behavior plan based upon strategies that have been successful in the regular education setting to adequately address the child's behavior issues, in violation of MUSER §IX.3.C(2)(a).

#### V. Stipulations

1. Visual supports, visual cues, use of an FM system, access to an iPad, use of social stories and limiting the duration of difficult tasks had all been recommended for the Student.

#### VI. Summary of Findings

1. The Student lives in [REDACTED] with the Parent, and has been attending [REDACTED] grade at [REDACTED] School (the "School"). He has been receiving special education services since Kindergarten.
2. The Student began the 2015-16 school year in [REDACTED] grade at the School with an IEP in place dated 4/6/15. The IEP contained three academic goals, one OT goal with two objectives, two speech/language goals with six objectives, one behavior goal, one PT goal with four objectives, and three adapted PE goals. The IEP contains 27 supplementary aids, modifications and accommodations, including such things as a visual schedule, access to ed tech support, an AAC device for communication, social stories, an FM system, and sensory breaks. Services identified in the IEP include adapted PE 30 minutes per week, specially designed instruction in a self-contained classroom 270 minutes daily, specially designed instruction in literacy in the resource room 30 minutes daily, OT 60 minutes per week, PT 60 minutes per week, Speech/language therapy 90 minutes per week, Teacher of the Deaf 60 minutes per month, and psychological consult services 30 minutes per week. The IEP states that the Student would be with his non-disabled peers for 3% of the time.
3. During his [REDACTED] grade year, School staff recorded 52 major behavioral incidents for the Student, resulting in eight suspensions totaling 11 days. The incidents mainly involved physical aggression (primarily towards staff members), property destruction, and bolting on the Student's part. A Functional Behavioral Assessment ("FBA") was conducted in October 2015 by Tim Rogers, Ph.D., who found that the primary functions of the Student's behaviors were escape/avoidance of an undesired task and attempting to gain access to a preferred activity.

4. On December 23, 2015, another FBA was conducted by Jamie Treworgy, BCBA. Ms. Treworgy identified the behaviors of concern as aggression (the Student's aggressive behaviors included head-butting, pinching, slapping, kicking, stomping on feet, pushing, spitting, punching, pulling on hair, biting and scratching) and bolting (the Student ran away from the playground when outside the building and ran out of the classroom and down the hallway when inside the building). She noted that these behaviors were more likely to occur when staff asked the Student to complete a non-preferred task or when a preferred item was taken away. She further reported that the Student "struggles with social interaction and peer relationships. He can easily become frustrated with the behaviors of his peers and will aggress towards them often." Ms. Treworgy reported that the School staff had been using a visual schedule and token system to increase on-task behavior and decrease aggressive behavior. She also reported that the Student had recently been shifted to working exclusively with the lead teacher Ms. Perry for all instructional purposes, and that Ms. Perry had decreased her expectations and the Student's workload. She described Ms. Perry as "highly energetic, in tune with [the Student]'s needs, two steps ahead of his planning, and very accommodating to him. Ms. Treworgy observed that this created a problem in that Ms. Perry was not able to fully run her classroom and meet the needs of the other students. Ms. Treworgy concluded that: the Student engaged in aggression towards peers and adults when he wanted to gain or prolong access to preferred activities and rewards, and to avoid tasks, activities or persons that he is presented with; and the Student engaged in bolting to access the positive or negative attention of adults and peers, and to avoid tasks, activities or persons that he is presented with. Ms. Treworgy made a number of recommendations for behavior management and teaching strategies in an effort to strengthen desired behavior and weaken problem behavior.

5. The Student's IEP Team met on March 23, 2011 to conduct its annual review of the Student's IEP. The Team reviewed the FBA conducted by Ms. Treworgy, who attended the meeting. Ms. Treworgy told the Team that Ms. Perry was already doing many of the things she recommended when she observed in her classroom, and that she did not believe that the classroom was the problem in that she saw many positive things in place there. Dr. Rogers expressed his belief that an increase in expectations placed on the Student would lead to an increase in problem behaviors, and that the focus on managing the Student's behaviors has resulted in the Student being able to refuse to do work. Speech/language pathologist Karen Davis, SLP-CCC reported on her observations of the Student, expressing a concern that the Student's social skills deficits may be a problem for the Student in the regular education setting. Regular education teacher Barbara Clewley reported that the Student had been successful during specials (gym, art, music) in the regular education setting. The Team determined that the Student would start doing homeroom in the regular education classroom, and Ms. Rapaport stated that she wanted Ms. Treworgy to become part of the Team to help with the Student's participation in the regular education setting. The Student's IEP dated 3/30/2016 added consultation by a BCBA 1200 minutes per year.

6. The IEP Team met again on April 13, 2016, and Ms. Treworgy discussed her recent observations of the regular education classroom and of the Student in the self-contained classrooms. She stated that Ms. Clewley's classroom had clear expectations and individualized instruction and support for all students. In Ms. Perry's classroom, the Student was avoiding an

academic activity by crouching under a table and only came out to participate in a preferred motor activity. It was reported that in the past three weeks the classroom had to be cleared of all other students on four occasions due to the Student's aggression and bolting, including hitting peers, destroying the bathroom, and wielding a wooden spear as a weapon. Ms. Treworgy recommended that academic instruction in the regular education classroom not be attempted until the Student showed he could tolerate that instruction in the self-contained classroom. She also suggested certain modifications to the Student's behavior tracking system, which the Team agreed to implement.

7. During the first two weeks of the 2016-17 school year, the Student had few behavioral incidents. In the following week, however, he had two incidents lasting over two hours each and involving both aggression and bolting. Incidents of aggression towards peers increased, set off by such things as not being first in line, or a peer touching his possessions. In the regular education setting, Ms. Clewley reported that the Student was argumentative and bossy towards his peers. Ms. Treworgy became unavailable to provide consulting services, and the District arranged for Laura Betters, BCBA, to take her place.

8. An IEP Team meeting was held on November 15, 2016 in response to the Student's third incident of restraint during the school year. It was reported that, as of that date, the Student had been involved in 32 incidents of aggression towards peers, 43 incidents of aggression towards staff, three incidents of disrobing, nine incidents of elopement from the building and six incidents of elopement from the playground. Ms. Clewley expressed concern about the amount of instructional time the Student was missing due to his behaviors, and about the amount of instructional time the other students were missing when the classroom needed to be cleared as a result of those behaviors. Ms. Betters made suggestions for modifications to the Student's behavior plan, and it was agreed to implement those suggestions.

9. On November 25, 2016, Dr. Rogers issued a written recommendation that the Student be placed in a day treatment program. Dr. Rogers noted a recent significant increase in the Student's disruptive behaviors, including aggression towards staff and peers, two incidents of elopement from the building, disrobing in the classroom and urinating on the floor. There were many occasions when the other students had to be evacuated from the classroom due to the Student's behaviors, thereby disrupting their education. Dr. Rogers recounted the long history of the District's attempts to provide programming for the Student that would successfully meet his needs, including implementation of recommendations from BCBA's, one-on-one adult support, and reduced academic demands, but stated his belief that the District was nevertheless not meeting the Student's needs. Dr. Rogers stated that the Student needed the more intensive level of behavioral and emotional supports provided by a day treatment program.

10. An IEP Team meeting was held on November 30, 2016, attended by Christy Babin, director of the [REDACTED] Program. Stephanie Johnston, the teacher in the Student's self-contained classroom, reported that the Student's aggressive behavior towards peers and adults (both in her classroom and in the regular education setting), as well as his elopements from the classroom, playground and building, had continued. Dr. Rogers expressed his concern that staff could not ensure the Student's safety or the safety of others, and stated that he had consulted on the Student since [REDACTED] and had no further recommendations to offer. Ms. Babin described the

regional program, stating that the goal was to promote academics while developing very focused behavior plans, with the ultimate goal being to return students to their school as soon as possible. The District made the determination to place the Student at the regional program beginning on December 12, 2016.

11. During an interview conducted by the Complaint Investigator with Barbara Clewley, Ms. Clewley stated the following: She is currently a ■ grade teacher at the School, and has had the Student in her class for part of his day this year. The Student started attending her class last year when she taught ■ grade. The Student started by attending during specials, but not during academic periods because his skills are far below the grade level benchmarks; the Student is working on a ■ grade level. Closer to the end of the last school year, the IEP Team decided the Student should spend a little more time with his peers, and he started attending first thing in the morning when her class was doing academics-related tasks without there being too much pressure.

The Student would partner with one of the other students so he could learn the basic processes in the regular education environment as well as the social requirements there. He often would work side-by-side with the other student but not directly with him/her. The Student's ed tech, Mr. Foster, would come with the Student, though he would step outside the classroom if his presence didn't seem necessary. The Student was able to participate in the specials units without having to be removed. She noticed that the Student sometimes became impatient, and didn't want to wait for his turn. He might talk to someone a little abruptly; he didn't have much experience interacting with his peers. Usually the Student could work it out, but she would step in if the Student was having difficulty. She saw that the Student had control of himself as he was learning her classroom management style; she was able to redirect him when necessary, but she could see that he didn't like it. The Student didn't like the class math activity, so she reduced the demand for output from him.

By the end of the year, the Team decided to have the Student also attend two or three times a week during class meeting time in the morning, when she works with the class on social skills using such strategies as the zones of regulation and Superflex. This year, she met with Ms. Johnston to look at other opportunities for the Student to be in her class. They thought the Student could try science and social studies lessons, which happened twice a week. The Student was subject to the same academic demands as modified by his IEP accommodations. If there was a long writing task, the Student would dictate to her or to Mr. Foster, and they would take turns writing a word. Also, cutting with scissors was difficult for the Student, and she discussed how to approach those tasks with the OT provider.

The morning meetings went fairly well. The Student could use the zones of regulation to identify feelings and the colors associated with them, though he wasn't always able to identify his own feelings correctly; he always wanted to be in the green zone. The first few science and social studies lessons went okay, but when writing assignments or assessments were involved, if Mr. Foster gave him an academic expectation, the Student would say "no," be rude and start to cry. She would step in and do social skills with him, suggesting that he go to the classroom peaceful area (a corner of the classroom with three walls, a comfortable chair, and a timer). He would go there for her, but not when Mr. Foster suggested it. The Student didn't like being held accountable for his treatment of Mr. Foster. The Student became unhappy if he saw that other

students had completed an assignment that he had not yet completed. He wouldn't agree to go to the peaceful area, or to come back from the peaceful area when it was time. By the second quarter of this year, the Student's behavior in her classroom began to look a lot like his behavior in the special education classroom.

For example, on one occasion the class was doing a unit on mapping skills, and it was something within the Student's capabilities. The other students finished the assignment before the Student did. The Student didn't want to follow directions. He was allowed to go to the peaceful area, but then he wouldn't come back to finish the assignment. When he eventually came back, he saw that the other children were going to begin a motor activity. Rather than complete his work so he could join them, he grabbed on to a table leg and wouldn't let go; two adults had to remove him. Another time the Student called out inappropriately, and she gave him another chance to act appropriately. The Student started to cry, so she told him to go to the peaceful area. Instead, the Student went to the active area of the classroom (an area where children can go if they are feeling antsy to do motor activities like jumping jacks), where he replaced the crying with a big smile. When she again directed him to the peaceful area, he bolted from the classroom.

There were also two incidents on the playground involving the Student pushing other students. In both cases, the other students had done nothing to provoke the Student. Last week, the Student got in trouble for becoming too aggressive during recess; he was pushing, kicking and jumping on another student. Until recently, the Student had not been aggressive with her, but this quarter there was an incident when the Student was on the floor in the hallway saying he wanted to go to her room. She was called over to him, and she told the Student what he needed to do and then counted down from five. When she got to one, the Student jumped up and grabbed her ankles, nearly knocking her down. She has seen him throw something at Mr. Foster several times, and try to kick other staff members. Recently, during an indoor recess, the Student became upset because he was being held accountable for being rude to Mr. Foster. He ended up in the hallway screaming, kicking and trying to hit staff members.

The staff has changed the Student's behavior plan twice this year, and it is in the process of being changed again. She feels that she no longer has any power over the Student. Last year, the Student responded to the behavior plan; now, he so quickly gets emotional and physical. She's not sure where else she can go with him. She is the only regular education teacher at the School using the zones of regulation and Superflex, and he's no longer responding to those strategies. She has tried new things when suggested, but things aren't improving. She sees the Student trying to take more and more power away from staff members.

She was at the November 30<sup>th</sup> IEP Team meeting, and she agreed with the determination to place the Student at the regional program. She listened to the description of the program, and thought it sounded really great. The regional program has a timeout room, which is something the Student's mother has been requesting. She believes that staff there can spend more therapeutic time with the Student; she has 14 other students that she has to work with while she's trying to manage the Student's behaviors. She has had to take all the other students out of her classroom because the Student started undressing and throwing a fit. Right now, it takes three adults to manage the Student's behaviors. They don't have those kind of resources at the School, but they do at the regional program. Some of the Student's behaviors are very disturbing. He urinated on the floor in front of people who were trying to calm him down; he did it purposely. He has also

been disrobing, and putting his fingers in body cavities (especially his bottom) and then trying to smear other people. Early on, she thought that maybe, with more intensive therapy, the Student could increase his time in the regular education setting, but she is very concerned about the Student in view of these disturbing behaviors.

With regard to providing the Student with the accommodations in his IEP, the Student's FM system is always in use. The teachers use a microphone. Mr. Foster has it on when he comes in and gives it to her. When other students speak, she gives the microphone to them. The Student's iPad is built into his behavior plan. If he brings the iPad to class, he gets extra points. One thing the Student uses the iPad for is spelling words. She believes that the Student often doesn't want to use his iPad because he wants to be like everybody else. With regard to non-timed tasks, if the Student doesn't complete a task in her classroom, he takes it with him to the special education classroom and can finish it there. Cutting out a compass rose took the Student two weeks to complete with the assistance of the OT provider; there was no time limit. Last year and at the beginning of this year, the Student's mother wanted the staff to use sign language with the Student, but it's not effective because the Student doesn't look at you. With regard to use of visuals, she uses a promethean board, so there are always pictures that accompany what she writes. She uses a lot of manipulatives with her lessons; most of her students are not auditory learners. When the Student becomes upset, she talks about it with him using story format.

12. During an interview conducted by the Complaint Investigator with Stephanie Johnston, Ms. Johnston stated the following: She is a special education teacher in the School. She has a class of eight students with developmental disabilities, [REDACTED] through [REDACTED] grade. The Student is one of those students; he is the oldest and is the only [REDACTED] grader. In comparison to the other students, the Student's academic ability is significantly higher than the other students, although his levels are not as high as they might be due to his behaviors. At the same time, the Student doesn't fit well in the classroom because his behaviors are more extreme than those of the other students. They are teaching the Student at the level of his academic ability, and she believes that he is being academically challenged. Socially, the Student's skills are on a par with the other students; he fits in well in that regard and definitely benefits from the social skills work they are doing in her classroom.

At the beginning of the year, the Student was more willing to do the academic work; as the year has progressed, he more often says that he doesn't want to do the work, that it's too hard. He has completed less and less of the work, so he hasn't made much academic progress – he is at the same reading level and has only completed one math topic. She has modified the Student's work a lot, making sure that the work is at his academic level, but the Student still refuses. Saying the work is too difficult is a work avoidance technique; the Student might have done the same work yesterday that today he says is too difficult.

Behaviorally, the Student started the school year in great shape, but has increased the inappropriate and negative behaviors as the year has progressed. Both the frequency and the severity of the behaviors have increased. Over the last month, the Student has engaged in hitting, kicking, biting, head butting, climbing on furniture, disrobing, urinating on the floor after disrobing, and bolting. He has aggressed against peers, but mostly against adults. The frequency varies, but he has been averaging about three to four incidents per week. It is hard to predict

these behaviors; he can have a fabulous morning, and then go downhill in the afternoon. The Student has acted out even during preferred activities; he has so many triggers.

She has had to evacuate her classroom over 20 times, sometimes for just a half hour and sometimes the students have been dismissed from evacuation status. When the other students leave, they don't have their work materials with them and the class is short-staffed, so the children miss out on their educational programming.

The staff has tweaked the Student's behavior plan several times already this year. Now he is being rewarded every 15 minutes for safe behavior, and can earn additional break time as a reward, with many small breaks throughout the day. They try and give the Student a quiet space in which to work so he is not distracted by the other students. They introduced the zones of regulation, which the Student has been using in Ms. Clewley's classroom, into her classroom. They have changed the strategies which the Student can use to calm himself, and offer him choices of which strategies to use. The reward system in her classroom is now very similar to the system in Ms. Clewley's classroom.

With regard to the Student's IEP accommodations, she uses visual supports and visual cues throughout the day. There are many visuals on the walls of her classroom and in the Student's work space. She incorporates visuals during her work with the Student. The FM system is used daily in her classroom, and accompanies the Student when he goes to other rooms. The Student has an iPad with communication software which also goes with him throughout the day. Social stories are the basis for all of the Student's social lessons; she uses social stories at least once a day and whenever the Student is starting to look distressed. She works hard with the Student on work completion, breaking down lessons into chunks. The emphasis is on completion, not on completing within a certain amount of time.

She attended the November 30<sup>th</sup> IEP Team meeting, and agreed with the determination to place the Student in the regional program. The Student's behaviors have become so significant that staff cannot safely manage him. She wants to see the Student be successful in the School, but his continued escalation shows that their management strategies are not being effective. Staff members have been hurt, including an ed tech who received a disabling back injury due to being involved in several restraints of the Student in one day. The regional program offers a better way to manage the Student's behaviors and has a more therapeutic component. When the Student is in a good space he is a great kid, but she's concerned for him and worried about his future.

13. During an interview conducted by the Complaint Investigator with Karen Perry, Ms. Perry stated the following: She is a special education teacher with the District. The Student was in her classroom during both the 2014-15 and 2015-16 school years. In her classroom, visual supports and cues were used with the Student every day. His positive behavior plan was implemented using a visual schedule that displayed the tokens he had earned. There were visual schedules on the classroom board, and visuals for content area displayed on the walls in her room. There was a safe area that the Student could access at any time, and the Student had a card that he could use to communicate that he wanted to do that. The Student had other cards that would tell us what he wanted or needed. She also used social stories and pre-teaching with the Student all the time. For example, she would say "We're going to the gym next. What are we going to do there?"



There was an FM system in use in her classroom. At one point, she learned that the Student wasn't using hearing aids at home because the Student's mother didn't have any batteries. She asked the Student's mother if she wanted school staff to use the FM system, and the Student's mother said it was up to the staff. Also, the Student would sometimes take his ear pieces out of his ears and throw them.

The Student had access to an iPad all the time. He had his own and there were several in the classroom. His own device had a communication program, and the speech/language provider would train the Student to use it as well as adding new words.

She did not give the Student time-limited tasks. She scaled back academic expectations for the Student because he couldn't do more than a problem or two without blowing up. In a typical lesson, she would sit with the Student and show him the page he would be working on. She would circle one problem and tell the Student he could take a break when he completed it. Often he would just say "No." For a time, the Student would go to the quiet area on his own, but then he stopped. If the Student blew up, it would mean constant attack on the person who was working with him. He would stomp on feet, punch, hit and bite. Once he went into the bathroom, broke a wooden shelf and came out with a big sharp piece of wood, trying to stab staff members with it. He also would bolt out of the room and in the hallway.

The staff probably changed the Student's behavior plan five times over the course of the 2015-16 year, trying to find something that would work. Ms. Treworgy suggested not taking the Student's tokens away, so that was stopped. The IEP Team suggested putting the Student in the regular education setting more often, so the Student started attending morning meetings (he was already attending specials). She disagrees that the Student was using his behaviors to try to get out of the special education classroom and into the regular education setting. She believes the behaviors were related to task avoidance and attention getting; the Student had blow-ups in the regular education setting too. In music, there were behaviors approximately once a month, and twice a month in P.E. Art was always difficult for the Student, and approximately every other time there was at least one incident of behavior.

The Student made no academic progress during the 2015-16 year, and did very little academic work. She recommended placement in the [REDACTED] Program while the Student was in her class, but the Student's mother rejected it. The Student's outbursts were becoming more frequent, and he was lashing out at other students. When the Student escalated, he would perseverate on attacking, and there was no place at the School where he could go and staff could see that he was being safe but where he couldn't attack. The regional program had that safe space. She was also concerned about the safety of the other students, and the effect the Student's behaviors had on their learning. She had to evacuate her classroom quite often.

She met with Ms. Clewley at least once per week, and they reviewed the strategies that were being used in their classrooms. She did everything in her power to help the Student and it was never good enough. It wasn't a good situation for anyone, including the Student.

14. During an interview conducted by the Complaint Investigator with Jamie Treworgy, BCBA, Ms. Treworgy stated the following: She is a BCBA and last year was contracted in mid-autumn as a consultant with the District to act as an additional set of eyes on the Student. She first observed the Student in November 2015, and she met with the Student's teachers and providers and with Dr. Rogers. She was asked to do a full FBA. In addition to meeting with staff, she reviewed the Student's behavioral data. She categorized two major sets of behaviors: aggression towards peers and staff (mostly staff), including head-butting, pinching, punching, biting, scratching and pulling on hair; and bolting, including running away from the building. The Student's aggressions all served the same function. Staff reported that behavior happening at least every day and sometimes five times in a day. The other students often had to be evacuated from the room, and the Student often had to be sent home. Lots of the behaviors occurred around work sessions when the Student was presented with a task or something was taken away from him. The Student didn't exhibit these behaviors during free time or during specials.

She looked at the Student's visual schedule and token system; they were giving tokens to the Student but also taking them away. The Student might have earned four out of the five tokens he was working towards, have a behavioral incident and then lose them all. She didn't think that was a good system for the Student who had a hard time coming back from being escalated; he might perceive the effort required to earn more tokens as too hard to be worth it. She set up a system where the Student didn't lose tokens, but the reward might be delayed.

The Student struggled with peer interactions; the Student didn't understand the concept of friendship or compromise. He was lacking in significant social skills. Staff had tried different types of reward systems and incentives, and used different behavioral strategies. The Student had a good relationship with Ms. Perry, who mostly took over working with the Student with the result that she was pulled away from working with the rest of the class. She spoke with Ms. Perry about providing training to the other classroom staff members, so she could teach them the techniques she was using. She can't say enough good things about Ms. Perry.

She found that the Student's aggressive behavior occurred when he wanted access to a preferred activity or to avoid a non-preferred activity or person. She found that the bolting behavior was an effort to obtain attention, both negative and positive; the behavior had been successful for the Student to avoid work and to get social attention. The Student needed a short-term goal on the way to developing more long-term changes, and some pro-social behaviors to replace the problem behaviors. The Student needed to be taught to ask for breaks instead of aggressing. The Student's visual schedule needed to be consistent and staff needed to pre-teach with respect to any expected deviations from the schedule. The Student was using a visual schedule, but it didn't always go with him to other settings and was sometimes fairly generic; she wanted it to be specific to the Student's day, especially to any anticipated changes. She suggested the use of a count-down strip instead of the timers they were using. She suggested building more choice for the Student into his day; the Student has control issues, and giving him choices makes him feel like he has more control. She suggested building in more opportunity to be in the regular education setting, such as helping to bring things to the office, as well as giving him non-academic tasks to perform in the classroom. This would also help improve his reputation within the school community. She recommended finding lots of opportunities to praise the Student; Ms. Perry did this naturally, but she wanted others to build this in and over-reinforce appropriate

behaviors. She suggested changing the Student's token system -- it was too vague, and different staff members had different expectations. The Student's mother also had a reward system at home that was based on the Student's performance at school. She thought that wasn't fair to the Student, so she suggested just sending home a narrative summary of the Student's day rather than the token sheet.

Staff members were very receptive to her suggestions and were eager to implement them. After the April 13, 2015 IEP Team meeting, she went on maternity leave, so she didn't have the opportunity to observe the results of her suggested modifications. She spoke once with Ms. Perry, who told her that things were going pretty well, and that they had implemented some of her suggested changes. She knows that Ms. Perry and Dr. Rogers spent time reviewing with Mr. Foster changes to the Student's behavior plan.

She never had the opportunity to observe the Student in Ms. Clewley's classroom, but she didn't believe that the Student's problem behaviors were related to his wanting to get out of the special education classroom. They were related to work demands, and there would still be work demands in Ms. Clewley's room. Also, the students in Ms. Clewley's class were working at a higher academic level, so the Student would have to be working on alternative tasks and couldn't participate in some of the same activities. Unless the Student was making really positive gains, it didn't make sense to just change one setting for another. She thought there were times when the Student could be in Ms. Clewley's classroom when the class was not being presented with academic demands.

She doesn't recall whether or not she observed an FM system in use. She saw staff members using visual supports with the Student, but not as consistently as they could have. She saw the iPad being used as a reward for the Student, but doesn't remember seeing it used for communication. Ms. Perry would sign with the Student, but she's not sure the Student was paying attention to her when she did so. She doesn't recall seeing the staff using social stories with the Student, and she recommended that they do so. She didn't see the Student being given time-limited tasks; staff had decreased academic demands on the Student so he would be more likely to engage.

15. During an interview conducted by the Complaint Investigator with Laura Better, BCBA, Ms. Better stated the following: She is a BCBA contracted as a consultant with the District. She has been providing consult services twice per month, working with School staff to find a behavioral plan that would work to reduce the Student's problem behaviors. Her first contact with the Student was in late October or early November 2016. She began with a file review and staff interviews, as well as speaking with Dr. Rogers. She observed the Student, and continues to do observations each time she does her consulting. She has observed the Student in Ms. Johnston's room, as well as in art, PE and lunch; she has not had an opportunity to observe him in Ms. Clewley's classroom. The Student did a good job in PE; it was a more independent activity, something he enjoyed. She hasn't seen him engage in more cooperative play. In art, the Student needed a little more assistance to complete the activity. He showed a little frustration when he had to leave to go to a therapy before he had completed the task, but he was able to move on when he was told he could come back and finish the activity afterwards. The Student is

a very sweet, engaging young man when things are going well. He likes attention from staff members.

When the Student is presented with a non-preferred activity or a task he perceives as too difficult, instead of pursuing a functional way of dealing with this, he will quickly escalate to throwing things or aggressing towards staff members. It is challenging to bring the Student down to a calm level once he escalates. They are trying to reduce the Student's access to property in the classroom and limit his ability to bolt or aggress. She thinks there are times when the Student has the skills to do a task, but the task is non-preferred or is presented in such a way that the Student concludes it will be too hard. If the task is something the Student doesn't want to do, even if it is within his capabilities, he will become frustrated. Others have reported to her that if the Student is in the regular education setting and he becomes frustrated, he will hold it together until he leaves that setting and then aggress towards staff or bolt.

Staff members have been very receptive and willing to implement her suggestions. They check in with her to make sure what they are doing is in alignment with the behavior plan and with ABA. Over the time she has been working with the Student, she has seen short-term improvement, but overall there has been an increase in problem behaviors, both as to frequency and severity. Recently, School staff has created more space for the Student in Ms. Johnston's classroom and reduced the distractions, but the Student's behaviors have increased significantly since then, including disrobing in the hallway, disrobing and urinating on the floor, and aggressing. They have tweaked the behavioral strategies in the special education classroom to mimic those being used in Ms. Clewley's classroom, but the demands on the Student are greater in Ms. Johnston's classroom. They are now reinforcing every 15 minutes for safe and appropriate behaviors, rather than for task completion, and letting the Student earn break time which is very motivating. They have not been able to assess what is driving the increase in the Student's behaviors. It may be an extinction burst – things getting worse before they get better. There is also an internal piece that they don't have access to – something internal acting as reinforcement beyond what they can observe. Historically, changes have been made to the Student's programming which appear to be successful over a short time, but lose effectiveness thereafter. Many things have been tried, but the issue is longevity.

School staff members have also been spending more time with the Student on social skills instruction, on his recognizing what's going on within him and asking for sensory breaks when he needs them. They've increased the frequency of zones of regulation check-ins with the Student – what are we feeling and what do we need to do? She has also seen staff members use social stories with the Student, including an activity around making good choices. The Student has a skill deficit; his problem behaviors have worked for him in the past, and their trying to teach him replacement behaviors.

She has seen staff members use visual supports and cues with the Student. Every time she has observed the Student, visual supports have been in place and have been referenced by staff. The FM system has been used consistently; the ed tech or whomever is working with the Student has on the microphone. When she has worked directly with the Student, the microphone has been handed to her so she could wear it. She has also observed that the Student has his iPad with him at all times; he uses either his own or another to which he has access in his work space and which

he uses to engage in reinforcement activities. She has never observed staff to give a task to the Student in which he has a set amount of time in which to complete it; they tell him how many items will complete the task, but don't limit the time in which he has to do them.

The Student has many wonderful qualities. Staff really cares about him, and works really hard to support him. When the Student is in a good space, staff members want to engage with him and enjoy being with him, so he gets a lot of positive attention.

She was at the November 30<sup>th</sup> IEP Team meeting. At that point, she had only conducted two observations and was still gathering information. The Student's behaviors have increased since then, and safety is a major concern. When the Student is escalated he has no safety sense. It's very hard to maintain safety in the classroom setting due to environmental factors. At this point, given the long history of working with the Student on many different strategies without improvement, the Student may need a change in placement. If his behavior isn't changing, one has to look at the environment. Changing to an environment where he has access to a quiet space, where there is more emphasis on social skills and more staff support could be beneficial to the Student.

16. During an interview conducted by the Complaint Investigator with the Parent, the Parent stated the following: The Student's behaviors started to decrease last April when Ms. Treworgy was working with the staff, but there has been an increase in frequency and severity of behaviors this year. Ms. Treworgy found that many parts of Dr. Rogers' behavior plans were very wordy and confusing, and were not being applied consistently across settings. Ms. Treworgy was not sure that the data being collected by staff was appropriately tracking the Student's behaviors. Ms. Treworgy wanted to scrap the existing plan and replace it with a whole new plan. She assumes that staff had begun to implement Ms. Treworgy's plan because the Student's behavior improved. It is hard for her to know because one of the changes was that they stopped sending home the Student's daily behavior charts. She is not sure what happened to Ms. Treworgy's plan this year when Dr. Rogers again took over.

She is not seeking for the Student to remain at the School. She believes that school staff reinforced the Student's negative behaviors for so long that they created a cycle that they now cannot break. Staff members admit that they don't know what to do at this point. She does not believe, however, that the Student would be appropriately placed at the regional program; it's not the right place for him. The regional program relies heavily on the use of physical restraint and seclusion; the data for their use of those methods show very high numbers. The regional program staff members think that the way to address problem behaviors is to immediately remove the student and place him in seclusion. She doesn't know what she wants the District to do at this point. The Student doesn't exhibit any of these problem behaviors at home, even when she does home schooling with him. The Student's babysitter doesn't see any of these behaviors either.

She is in the process of moving the family to [REDACTED]. She asked for a superintendents' agreement so that the Student could begin attending school in [REDACTED] where she believes special education staff are better able to work with students such as the Student, but the superintendents denied her request.

School staff members say they don't know why the Student engages in the problem behaviors, but she has seen them working to deescalate the Student, and their techniques are lacking. She once came to the special education room and there were seven adults in the room around the Student while he was eating lunch. That's too many. Two of them were discussing the Student being sent to the regional program right in front of him. Another time she was called in because the Student was having a behavior, and there were four adults around him in the quiet area. She was able to deescalate the Student and then he was ready to return to the classroom. When he did, he was immediately given a non-preferred, difficult academic task. That is not a proper re-entry task in that situation. She once saw on a behavior sheet that the Student had pulled on a staff member's tie. Staff should know that when you are following Safety Care to manage an escalating student that you do not wear loose clothing. She said this to the staff member and he stopped wearing ties.

With regard to the FM system not being used, this was something noted by Ms. Morneault, an inclusion specialist recommended by Disability Rights of Maine who observed the Student in November 2015, but she found out later that there had been a technical problem with the Student's hearing aids so they had been taken out. The problem was corrected and the FM system has been in use since then.

With regard to visual supports and cues, she hasn't seen them in use in the classroom. The Student should have a visual schedule with icons that are Velcro-ed onto a board. As he completes each activity, the icon is removed so the Student can see his progress towards the end of the day. He had one at the beginning, but staff said that the Student kept playing with the icons so they took it away. They say the Student has a different visual schedule now, but she has never seen it out and near to the Student when she was in the classroom. Also, it has been many months since they reported that the Student was playing with the velcro icons, and they haven't tried to use them recently.

Ms. Morneault also reported that the Student wasn't bringing his iPad to all his classes. Ms. Clewley then started rewarding the Student for remembering to bring the iPad to her class. She's not in the School so she doesn't know if the Student is using the iPad in the special education classroom. She knows he uses it in speech/language sessions, because there is a history function on the iPad that reflects that it is being used there. At home, there are times when she doesn't understand something the Student is saying and the Student uses the iPad to help with communication. When they go to a restaurant, the Student sometimes uses the iPad to tell the server what he wants to eat.

Staff was sending home social stories with the Student a few years ago, but that stopped. She saw one from his speech/language provider late last year or early this year, but she doesn't see them in the Student's classroom. Neither has she seen a chart with the zones of regulation on display when she has visited the classroom.

The Student has told her that he has been given timed tests, and staff members have reported that they have timed the Student and he only completed a certain number of tasks. There are also supposed to be time limits on how long staff spends on academic tasks, but they have told her that they worked for 45 minutes on academics without a break.

She believes that the Student has been more successful in the regular education setting. There are five [REDACTED]-age students in the Student's self-contained classroom, and no same-age peers. He enjoys being with his peers. In the regular education classroom there isn't an adult on top of him all the time telling him what he's doing wrong. This leads to power struggles. It's possible that the greater demands of academic activities in the special education classroom explains some of the difference in behavior between the two settings, but the Student is bored in the special education classroom because the other students are at such a lower academic level. She sees the Student bringing home worksheets that he had already completed another time.

The Student generally does very well in the regular education setting, and he won't have that opportunity in the regional program. In the regional program, the Student will be more likely to learn negative behaviors than if he is in a regular education setting with his non-disabled peers.

## **VII. Conclusions**

**Allegation #1:** Failure to provide education in the least restrictive environment by determining to place the Student in a separate special education school in violation of MUSER §X.2.B  
**NO VIOLATION FOUND**

MUSER §X.2.B provides that, "[t]o the maximum extent appropriate, children with disabilities, ... shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." In considering whether a proposed placement in a special education setting was the student's least restrictive environment [LRE], courts have held that the issue was "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child." *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 120 (2d Cir. 2008). In considering this, several factors must be considered, including: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class." *Id.* As to that third factor, the Court in *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1217 (3d Cir. 1993) stated that if the disabled child's inclusion in a regular class excessively disrupts the class or requires so much of the teacher's attention that other students are ignored, a general education placement may be inappropriate. .

Looking at those three factors in this case, it seems clear that the District made reasonable efforts to accommodate the child, both in the regular education setting and in the self-contained classroom. The District employed the consulting services of not one, but three different behavior specialists to inform them as to possible behavior management strategies and techniques. The Student had a complex behavior plan, which the District continued to modify based on the advice of the behavioral consultants. The Student's IEP contained numerous accommodations, as well as several related services. Through all these efforts at arriving at a plan that would enable the

Student to be successful in the School, the Student's behaviors over the last year continued to increase, in both frequency and severity. This increase extended also to behaviors in the regular education setting and behaviors directed at peers.

In addition to the lack of improvement in the Student's behaviors, the educational programs developed and implemented by the District also did not result in the Student making academic gains. Based on two separate FBAs conducted for the Student which concluded that the principal function of the Student's behaviors was avoidance of non-preferred academic tasks, the District greatly reduced the academic demands being placed on the Student. This had the dual result of not leading to a decrease in the behaviors, and not leading to the Student's making academic progress. The central question in a LRE case has been described as whether the educational program proposed to be provided to the Student is reasonably calculated to enable him to receive some educational benefit in the least restrictive environment. *Ciresoli v. M.S.A.D. #22*, 901 F. Supp. 378 (D. Me. 1995). A program which would have continued the Student in his placement at the School could not have been said to be reasonably calculated to enable him to receive some educational benefit.

Lastly, there is the matter of the negative effects of the Student's placement on the other students. It is clear that the Student's negative behaviors, which often resulted in the need to clear the other students from the classroom, have been greatly disruptive to the learning of those other students. Furthermore, Ms. Treworgy described how Ms. Perry's need to focus her attention on the Student took her away from her availability for instruction to the other students in her classroom. In *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5<sup>th</sup> Cir. 1989), the Court held that a student's placement in a classroom was not required to be continued if the student "would require so much of the teacher... 's time that the rest of the class suffers."

In consideration of these factors, the District's decision to place the Student in the more restrictive setting of the regional program was reasonable and appropriate. The goal of such placement, of course, is to enable the Student to learn more successful coping strategies and social skills so as to enable him to thereafter return to a less restrictive environment.

**Allegation #2:** Failure to fully and adequately implement the Student's IEP with respect to provision of supports including visual supports, visual cues, FM system, iPad access, social stories and non-time-limited lessons in violation of MUSER §IX.3.B(3)

#### **NO VIOLATION FOUND**

The Parent's allegation in this regard appears to be based on the observations of Ms. Morneault, who observed the special education classroom and regular education classroom for one hour each more than one year before the filing of this complaint, and on her own observations on those occasions when she visited the classroom or based on what the Student told her or brought home from school. The Parent acknowledged that the issue with the FM system was a misunderstanding, and that it is now being used. As to the other accommodations in question, the Student's teachers were quite specific in their reporting of the use of them with the Student. Although Ms. Treworgy also identified some accommodations that she did not see being used or used consistently when she observed last year, the more recent observations of Ms. Betters



indicated that these accommodations were being provided, and corroborated the accounts of Ms. Johnston and Ms. Clewley.

**Allegation #3:** Failure to modify the Student's behavior plan based upon strategies that have been successful in the regular education setting to adequately address the child's behavior issues, in violation of MUSER §IX.3.C(2)(a)

**NO VIOLATION FOUND**

There were several reported instances of strategies that were in use in the regular education setting being brought into the special education classroom, such as the zones of regulation and the structure of the rewards system. Ms. Johnston reported frequent meetings with Ms. Clewley to discuss the Student's performance in the regular education classroom.

At the same time, it is not at all obvious that the Student would have greater success in the special education classroom if only it was organized exactly like the regular education classroom. For one thing, the Student exhibits problem behaviors in the regular education setting as well. For another, to the extent that those behaviors are fewer in number in that setting, that appears to have more to do with the lesser demands being placed on the Student when he is there. Both FBAs of the Student arrived at the conclusion that the Student engages in behaviors as a means to avoid doing academic tasks that are difficult and/or non-preferred. Those are the tasks that are presented to him in the special education setting in an effort to allow the Student to make academic progress.

**VIII. Corrective Action Plan**

As no violations were found, none is required.