

Complaint Investigation Report
Parents v. SAD #72

September 8, 2009

Complaint #09.100C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Mother
Address
City, Zip

Respondent: Gary MacDonald, Superintendent
124 Portland St.
Fryeburg, ME 04037

Special Services Director: Nancy Hall

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on June 26, 2009. The Complaint Investigator was appointed on June 30, 2009 and issued a draft allegations report on July 1, 2009. The Complaint Investigator conducted a complaint investigation meeting on August 4, 2009 (rescheduled from the original date of July 16, 2009 at the Complainant's request), resulting in a set of stipulations. On August 10, 2009, the Complaint Investigator received 7 pages of comments and 63 pages of documents from the Complainant, and received an 8-page memorandum and 85 pages of documents from MSAD #72 ("the District") on August 6, 2009. Interviews were conducted with the following: Nancy Hall, director of student support services; Jennifer Day, special education teacher; Carol Mallett-Tonken, special education teacher; Wilbert Libby, O.D.; the Student's mother (the "Parent"); and the Student.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Specific Learning Disability. This complaint was filed by the Student's mother and

the Student's father, the Student's parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide vision therapy as a related service necessary for the child to benefit from special education in violation of MUSER §§ IX.3.A(1)(d) and XI.

V. Stipulations

1. The Student began the 2008-2009 school year at high xx to low xx grade levels in word recognition and reading fluency. By the end of the school year, his scores in these areas had improved to high xx to low xx grade levels.
2. The Student improved in his word recognition and reading fluency by 3 grade levels during the 2008-2009 school year.
3. The Student began vision therapy with Bridgton Eye Care on February 4, 2009, and has received 6 sessions of vision therapy since then.

VI. Summary of Findings

1. The Student lives primarily in Fryeburg with his mother, and will be attending 9^{xx} grade at Fryeburg Academy. The remainder of the time, the Student lives with his father, in Brownfield, Maine. The Student began receiving special education services under the category Specific Learning Disability in xx grade.

2. On February 4, 2009, the Student underwent an eye examination, vision analysis, visual skills profile and sensory-motor evaluation performed by Wilbert Libbey, O.D. Dr. Libbey diagnosed the Student as suffering from General Binocular Vision Dysfunction, and stated in his report that the result of this condition "can be visual fatigue, which leads to short attention span, and inconsistent levels of visual performance. This can cause him to lose his place while reading and lead to poor comprehension." Dr. Libbey prescribed and administered a program of vision therapy and instructed the Student in performing visual exercises.

3. At the Parent's request, an IEP team meeting was scheduled for March 18, 2009 to discuss the Student's vision therapy. Prior to the meeting, on March 11, 2009, Ronda Searles, an occupational therapist employed by the District, spoke with Dr. Libbey about the Student. Dr. Libbey told Ms. Searles that the Student's visual problem was "not massive," although it did affect his visual processing of information, and estimated that the problem would require 6 to 9 weeks to remediate.

4. At the March 18, 2009 meeting, the District agreed to facilitate the Student's performing his visual exercises during his study period, but declined the Parent's request to pay for Dr. Libbey to provide the vision therapy.

5. From the date of his visual examination (February 4, 2009) until the end of the school year, the Student had 6 sessions of vision therapy with Dr. Libbey, at a cost to the Parent of \$930.

6. According to the Student's May 15, 2009 IEP, as of December 2008, the Student was still reading on a xx grade level. Between December and May 14, 2009, the Student improved his reading ability by 2 grade levels and then an additional grade level between May 15, 2009 and the end of the school year.

7. Beginning in December, the Student began receiving his 45-minute daily reading instruction in a one-on-one setting, rather than in a class with several other students, with an emphasis on word recognition, phonics and reading fluency.

8. In a reading progress report submitted to the IEP team at the May 2009 meeting, Carol Mallett-Tonken stated that the Student "is now able to read a whole page without stopping at every word and getting extremely frustrated....Now he reads with confidence and interest, for his ability has improved, along with the strengthening of his eye muscles which is being worked on by Dr. Libbey with eye therapy and eye exercises at home." In Ms. Mallett-Tonken's writing progress report submitted at that same time, she wrote that, in spelling, she had "witnessed a vast improvement. Going from most a word [sic] being unreadable and 95% misspelled to only being off by one or two letters, since September shows great progress. Now, you can understand what [the Student] is writing and the spell check is now a tool he can access, since his version of the word is close to the correct spelling."

9. During an interview conducted by the Complaint Investigator with Nancy Hall, Ms. Hall stated the following: She is the director of student support services for the District. She doesn't know specifically whether or to what degree the Student's visual therapy resulted in improvement in the Student's ability to read. She believes that for some students visual therapy can help with visual fatigue, but she is not sure this is a problem for the Student. She considers the Student's primary problem in reading to be a processing disorder, rather than a vision disorder. She has observed that the Student does not have difficulty manipulating numbers on paper, and that he also participates in sports. She would expect that a student with a vision disorder would have difficulty with both of these activities.

10. During an interview conducted by the Complaint Investigator with Jennifer Day, Ms. Day stated the following: She is a special education teacher, and was the Student's reading teacher when he was in xx grade and for the first two months during his xx grade year. She believes the Student's difficulty with reading is the result primarily of a processing disorder, and perhaps secondarily a tracking disorder. She also believes that the Student meets the criteria of a "reluctant reader," in that he becomes frustrated and gives up easily, and is somewhat resistant to instruction. She further believes the Student never internalized basic phonics principles, and now is resistant to learning them.

In March 2007, she began using the Dynamic Indicators of Basic Early Literacy Skills ("DIBELS") tool to assess the reading ability of her students. Using this measure the Student's score at that time was 36 words per minute at the xx grade level, where reading fluency would be achieved by a score of 104 or more, indicating he was then a xx grade reader. In May 2007, the Student's score had increased to 41 words per minute, which left him still at the xx grade level. She reviewed the Student's records from xx grade, and found he progressed from 37 words per minute in September to 75 words per minute in May (still

not fluent at the xx grade level). At the start of xx grade, she decided to use the xx grade benchmark because she felt it would be bad for the Student's morale to still be tested using xx grade material. Using the xx grade standards, the Student scored 47 words per minute, where fluency required 128 or more words per minute. This was approximately where he tested at the end of xx grade. When she tested the Student again in May 2009, his score was 66 words per minute, indicating he was now reading at a xx grade level.

As an experiment, and partly in an effort to boost the Student's morale, she allowed the Student in May 2009 to re-read certain of the passages in the DIBELS. His scores went up from 8 to 27 words per minute when he re-read the passages. She believes this improvement was due in large part to the fact that he didn't have to work as hard to decode and process the words the second time. She thinks that if the Student's reading problem were really based on a visual disorder, then he wouldn't have shown so much improvement upon re-reading the passages.

11. During an interview conducted by the Complaint Investigator with Carol Mallett-Tonken, Ms. Mallett-Tonken stated the following: She is a special education teacher, and was the Student's case manager during his xx grade year. At the start of the year, the Student was in a reading class taught by Ms. Day along with several xxd xx graders. When she realized how low the Student's reading scores were, and that the Student was the only xx grader in Ms. Day's class, she suggested to Ms. Hall that she start working one-on-one with the Student on a daily basis instead. Ms. Hall agreed, and she began spending 45 minutes each day one-on-one with the Student in December 2008.

She worked primarily on word recognition and fluency, as the Student was very deficient in those skill areas. Comprehension was never a problem for the Student. She started with a book at the xx grade level, even though it was a little challenging for the Student, because it was written about an area of interest for the Student. She continued to try and give the Student material written on subjects of interest for him. The Student worked very hard and, after he started to make some real progress, he decided that learning to read was important to him. By the end of xx grade, the Student was reading on a xx grade level. She thinks the relatively lower DIBELS scores the Student received at that time could be the result of the material presented by that test being about subjects in which the Student just wasn't interested. It was her experience that when the Student was given such materials, he would refuse to read them or be unable to stay focused on them.

She believes the Student's improvement in reading during xx grade to be the result of a number of factors. One is that the Student does have problems with tracking. She was successful in getting the Student to use a ruler or a pen to help him stay on the line he was reading and not lose his place. She believes that the vision therapy also helped the Student with this – that it was definitely important and definitely needed. She further believes that the diagnosis of a vision disorder was also important to the Student psychologically – he was able to feel that his difficulty with reading wasn't because he was unintelligent. She thinks that getting the Student out of the class with xx and xx graders helped in this regard too. The change in how he felt about himself enabled the Student to really apply himself to the task of learning to read. Another major factor was the intensive instruction she provided to the

Student on a daily basis, both the fact that it was one-on-one and the emphasis on phonics. All these factors operating concurrently led to the substantial progress the Student made during the period from December 2008 to June 2009.

12. During an interview conducted by the Complaint Investigator with Wilbert Libby, O.D., Dr. Libby stated the following: He is a licensed optometrist, and began providing vision therapy to the Student on February 4, 2009. He provided 6 sessions through June 3, 2009, when the Student suddenly stopped coming for treatment. At that point, he was expecting that there would be two more therapy sessions, followed by a final progress exam.

When he first examined the Student, the Student had over-convergence of his eyes, causing his eyes to be stressed, which in turn interfered with processing of written material. There are three levels to the therapy program. The Student started at level one, and had just begun level three when he discontinued treatment. This indicates that the Student made substantial progress and that his eyes were functioning better. He believes that the Student's progress in his vision therapy was directly and substantially related to his progress in reading. By remediating the over-convergence, he made the Student's vision more efficient, thus enabling the Student to take full advantage of the instruction the school was offering.

13. During an interview conducted by the Complaint Investigator with the Parent, the Parent stated the following: In xx grade, when the Student was attending school in North Conway, NH, his teacher told her that the Student would never learn to read. In xx grade, after the Student transferred to the District, various school staff told her that the Student didn't really have a learning disability, but rather a behavior disorder. Since then, other District staff members have said he was just lazy. When the Student was in grades xx through xx, he had Susan Hill as his teacher. She worked with him one-on-one, with the same kind of care and effort that he now gets from Ms. Mallet-Tonken. Ms. Hill did the Wilson reading program with the Student and stressed phonics with him, but he just couldn't get it.

At the May 2008 IEP team meeting, she expressed her frustration that the school kept using the same methods and the Student wasn't making progress. She asked whether there wasn't something else that could be tried. After the meeting, one of the team members, Ms. Monahan, sent her a brochure from Bridgton Eye Care. When the Student saw Dr. Libbey for the initial examination, he told her the Student was a classic case of a child who had a vision problem that was interfering with his learning to read. She started the Student on the vision therapy immediately. She stopped the therapy after six sessions because she couldn't afford to continue, but she plans to resume when she has the money. Dr. Libbey wants to do two more sessions with the Student.

Before the vision therapy, the Student used to not see the letters in a word, and the words in a line, in proper left to right sequence; his eyes would jump around. Now, one can see his eyes tracking across the page as he reads. On one occasion when she was driving back from Dr. Libbey's office with the Student, the Student pointed out to her that the street had two yellow lines down the middle, as if that was unusual. She understood this to mean that he had not been seeing them as two lines before. She believes that the Student is currently reading at an even higher grade level than when school ended. He has been reading with genuine interest

the required summer reading books for next year at Fryeburg Academy, and she thinks they are written on a xx grade level. He also regularly reads the newspaper to get sports news, something he never used to do.

13. During an interview conducted by the Complaint Investigator with the Student, the Student stated the following: Since the vision therapy, he sees everything better. He noticed a change beginning after the second therapy session. He told his mother about the two yellow lines on the road because before, he only saw them as one thick line. In sports, he believes he is seeing a baseball better, and his hitting has improved. He went roller blading, and he noticed that he could see shadows and changes in the road surface that he didn't notice before. In addition, his eyes used to itch, and now they don't. He also doesn't blink as often as he used to, and he has stopped having headaches.

Since receiving vision therapy, his reading has gotten much better. Before, he couldn't read fine print on a package because it was blurry, but now he can read it perfectly. It used to take him a whole month to finish one book. The words were jumbled, and after reading for a while he would get headaches. Presently, he is reading a book assigned for xx grade and he has been able to read it much more quickly without getting any headaches.

VII. Conclusions

Allegation #1: Failure to provide vision therapy as a related service necessary for the child to benefit from special education in violation of MUSER §§ IX.3.A(1)(d) and XI
VIOLATION FOUND

The Individuals with Disabilities Act (IDEA) states that one of its purposes is to ensure that all children with disabilities have available to them a free appropriate public education. 20 USC §1400(d)(1)(A). The Maine Uniform Special Education Regulations (MUSER) defines "free appropriate public education" to mean "special education and related services" provided in conformity with the student's IEP. MUSER §II.11. A student's IEP, in turn, must contain a statement of the special education and related services, "based on peer-reviewed research to the extent practicable," to be provided so as to enable the student to advance appropriately toward attaining his annual goals and to make progress in the general education curriculum. MUSER § IX.3.A(1)(d). As used in the foregoing provisions, "related services" are "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 CFR §300.34. See Also MUSER §XI. Although the federal regulatory definition identifies a number of specified services, that list has been deemed non-exhaustive. *See J.T. v. Missouri State Board of Education*, 51 IDELR 270 (E.D. Mo. 2009), *citing Cedar Rapids Community School District v. Garrett*, 526 U.S. 66 (1999); *see also Letter to Anonymous*, 213:198 (OSERS 1989).

The facts uncovered in this investigation lead compellingly to the conclusion that the vision therapy received by the Student was required to enable him to benefit from his special education. The special education provided during the Student's xx grade – one-on-one reading instruction with an emphasis on word recognition and phonics – was not essentially

different than what the Student had received through xx grade, and differed from his special education in the xx, xx and 1st quarter of xx grade mostly in that it was one-on-one rather than small group instruction. During that time period, from xx grade through the 1st quarter of xx grade, the Student made only slight progress in his ability to read, and entered the 2nd quarter of xx grade reading on a high xx/low xx grade level. It strains credulity to suggest that it was mere coincidence that the Student improved his reading scores by 3 grade levels during the period (December 2008 through June 2009) in which he received 6 sessions of vision therapy. This is not to say that the instruction provided to the Student by Ms. Mallett-Tonken was not largely responsible for those gains, but rather that vision therapy enabled the Student to benefit from that instruction. Ms. Mallett-Tonken herself agrees that the Student's vision therapy was "definitely important and definitely needed" for the Student to have made the gains he demonstrated.

The Maine Department of Education has previously concluded that developmental vision services are available as a related service where necessary for a child to benefit from special education. *Emerson v. CDS Cumberland*, Case No. 00.233 (2000). Two other jurisdictions have also concluded that vision therapy could constitute a related service under IDEA and their state's laws. See *Board of Education of Springville-Griffith Institute Central School District*, 37 IDELR 175 (NY 2002); *In re: Student with a Disability*, 24 IDELR 612 (VT 1996).

The District makes three arguments in opposition to this conclusion. The first is that vision therapy is being offered as a method for addressing the Student's reading needs, and a student's parent does not have a right under law to compel the District to employ a specific methodology in providing for the Student's education. As described by Dr. Libbey himself, however, the therapy he provided was not reading instruction, but was intended to enable the Student to take full advantage of the instruction provided by his reading teacher by allowing the Student to "have more comfortable and sustained attention on visual tasks." In this way, the Student's vision therapy was more akin to occupational therapy being used to assist a student with writing. In that context, the occupational therapy is not a method of teaching writing, but enables the student to access the writing instruction provided by a language arts instructor.

The next argument is that the Student did not require the vision therapy in order to benefit from his special education. The District notes that the Student's IEP already addresses his disability, and that he has been receiving educational benefits over the years without receiving vision therapy. Remarkably, the District offers the fact that the Student is now reading at a xx grade level as evidence that the Student has made progress with the services already being provided, ignoring that it was only during the period that he was receiving vision therapy that the Student finally progressed past the xx grade level. Indeed, it was in the context of the Student's continued failure to make adequate progress that someone from the District offered to the Parent the suggestion of a consultation with Dr. Libbey.

Finally, the District claims that vision therapy is not a scientifically based intervention for addressing reading deficits, and thus should be rejected as not based upon "peer-reviewed research." The source for this assertion is a "Joint Policy Statement on Learning Disabilities

Dyslexia and Vision” issued by the American Academy of Pediatrics, the American Association for Pediatric Ophthalmology and Strabismus, and the American Academy of Ophthalmology (the “Statement”). The Statement includes the comments that “[v]isual problems are rarely responsible for learning difficulties. No scientific evidence exists for the efficacy of eye exercises (“vision therapy”)...in the remediation of these complex pediatric neurological conditions....[T]hese methods...cannot be substituted for appropriate educational measures. Claims of improved reading and learning after visual training...are almost always based on poorly controlled studies that typically rely on anecdotal information. These methods are without scientific validation. Their reported benefits can be explained by the traditional educational remedial techniques with which they are usually combined.”

Initially, it is noted that the Statement ascribes to the developmental optometrists practicing visual therapy the belief that vision problems are responsible for learning disabilities and that vision therapy alone can cure them. Review of the literature from the field of developmental optometry belies this contention. A Joint Organizational Policy Statement of the American Academy of Optometry and the American Optometric Association, titled “Vision, Learning and Dyslexia,” contains the following language: “Vision therapy does not directly treat learning disabilities or dyslexia. Vision therapy is a treatment to improve visual efficiency and visual processing, thereby allowing the person to be more responsive to educational instruction. It does not preclude any other form of treatment and should be a part of a multidisciplinary approach to learning disabilities.”

As to the claim that the relationship between vision therapy and learning has not been scientifically studied, a relatively modest search of the literature casts doubt on the validity of this conclusion. In an article titled “Binocular Anomalies and Reading Problems” (Simons & Grisham, *Journal of the American Optometric Assoc.*, July 1987), the authors review and evaluate the research literature on the relationship of binocular anomalies to reading problems, and conclude that the evidence supports a positive relationship between certain anomalies, convergence insufficiency among them, and reading problems. In another, peer reviewed article, *Learning-Related Vision Problems: How Visual Processing Affects Reading Efficiency* (Solan, *Learning Disabilities: a Multidisciplinary Journal*, v.13 n.1, 2004), the author reviews research published during the preceding decade and similarly concludes that the evidence supports a significant correlation between certain visual deficits and reading and learning disorders. The study goes on to conclude that many of these visual deficits were amenable to vision therapy. Still other studies, such as “Eye Exercises and Reading Efficiency” (Heath, EJ et al., *Academic Therapy* 11:435, 1976), a controlled study of 60 xx and xx grade readers, document improvement in both ocular-motor proficiency and reading scores following vision therapy.

It is not the point of the foregoing review of literature to make a definitive assessment of the literature published in this field. Rather, the highlighted studies and articles merely suggest that vision therapy is sufficiently research-based to be ordered, in an appropriate case, as a related service for a child with a disability.

VIII. Corrective Action Plan

The District shall reimburse to the Parent the sum of \$930. In addition, the Student's current IEP shall be amended to include vision therapy as a related service, consisting of two further sessions with an optometrist followed by post-testing with an optometrist. The District will submit a copy of the amended IEP to the Due Process Office and the Parents.