

Complaint Investigation Report
Parent v. Portland

February 10, 2010

Complaint #10.048C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parent
Address
City, Zup

Respondent: James Morse, Superintendent
196 Allen Ave.
Portland, ME 04103

Director of Special Services: Barbara Dee

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on December 17, 2009. The Complaint Investigator was appointed on December 18, 2009 and issued a draft allegations report on December 21, 2009. The Complaint Investigator conducted a complaint investigation meeting on January 19, 2010 (rescheduled from the original date of January 6, 2010 at the Respondent's request), resulting in a set of stipulations. On January 19, 2010, the Complaint Investigator received 7 pages of documents from the Complainant, and received 38 pages of documents from the Portland Public Schools (the "District") on January 22, 2010, with an additional 3 pages of documents on January 26, 2009. Interviews were conducted with the following: Barbara Dee, director of student services; Peter McCormack, program director at the West School; Amy Leonard, social worker at the West School; Kerry Salvo, child care director of the YMCA; L. Anna Rutherford, in-home counselor; and the Student's grandmother and adoptive mother (the "Parent").

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Other Health Impaired. 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 develop or revise the Student's IEP in conformity with the determinations of the IEP team on April 15, 2009 with regard to ESD services in violation of MUSER §VI.2.J(4);
2. Failure to fully and adequately implement the student's IEP with respect to ESD services in violation of MUSER §IX.3.B(3);
3. Failure to convene the Student's IEP team within 30 days after the start of the school year when ESD services were unavailable in violation of MUSER §IX.3.B (3);
4. Failure to determine the compensatory services necessary to compensate the Student for the lack of ESD services in violation of MUSER §IX.3.B (3).

V. Stipulations

1. The Student's IEP team, on April 15, 2009, determined that an extended school day (ESD) program would be provided to the Student.
2. The Written Notice for the April 15, 2009 meeting referenced the ESD determination, but it was not referenced in the Student's IEP.
3. From June 4, 2009 until December 14, 2009, the District did not provide an ESD program to the Student.
4. An IEP team meeting was not convened from June 4, 2009 until more than 30 days from the start of the 2009-2010 school year.

VI. Summary of Findings

1. The Student lives in Portland with the Parent, and is presently attending xx grade at the West School in the District. He began receiving special education services under the category Other Health Impaired in xx.
2. On April 15, 2009, at the Student's IEP team meeting, the Student's case manager and the Parent reported that the Student was engaging in physical and verbal aggression at home after school. Peter McCormack, program director at the West School, and Ms. Dee stated that they would be meeting with staff at the Greater Portland YMCA to discuss having the Student attend an after-school program there. The Written Notice of that meeting stated that Mr. McCormack and Ms. Dee "will hopefully be able to offer [the Student] a program which will start after April vacation as an extended school day. The program will be individualized to meet [the Student's] needs. Portland schools will provide some interim support staff to help [the Student] with this transition."
3. Beginning on May 6, 2009, the Student began receiving the extended school day ("ESD") program, which consisted of being transported to the YMCA and participating in the "Youth At Promise" ("YAP") program, along with several other students from the West School. This

program allows children to participate in athletic activities, games and art projects, and is designed to assist them in various social and behavioral areas including cooperation and teamwork, conflict resolution and anger management.

4. The YAP program for West School students was discontinued beginning on June 4, 2009 through the end of the 2008-2009 school year, and did not resume when the 2009-2010 school year began. The program did not resume due to problems involving transportation (West School ended at an earlier time than the schools of other students participating in the program, and therefore its students required separate transportation) and staffing (the YMCA staff felt that the West School students needed additional support beyond their capabilities). Due to a change in programming for other students in the Student's class, the District did not have staffing sufficient to enable a staff member to support its students in the YAP program. The YMCA stated that it did not have sufficient funding to provide these things.

5. On September 15, 2009, the Parent's counsel sent an e-mail to Ms. Dee and Mr. McCormack informing them that the ESD program was not being provided to the Student, and requesting that alternative service options be identified.

6. On September 16, 2009, Mr. McCormack responded and stated that the Written Notice of April 15, 2009 "covers the after school programming discussed at [the Student's] meeting," and that he was attempting to discuss the matter with the YMCA.

7. The Parent's counsel, in response, wrote that the Student's IEP did not reference the ESD program, and she requested that the IEP be revised to include it. The IEP was not revised.

8. An IEP team meeting was convened on November 4, 2009 to discuss, among other things, the problems with the ESD program. This was more than 30 days after the start of the school year.

9. At the November 4, 2009 meeting, Ms. Dee stated that she would contact the YMCA about resuming the program and would look into the transportation issue. The Written Notice for the meeting contains the determination that ESD services would be provided, with exact programming dependent on the results of Ms. Dee's efforts.

10. The YAP program for West School students at the YMCA resumed on November 30, 2009, with the District providing one of its existing staff members for support and providing transportation to the YMCA. On December 3, 2009, the district hired a new staff member, dedicated to providing support to the students in the YAP program.

11. The Student was not at school on November 30, 2009, and the next day the Student did not have the paperwork required by the YMCA in order for the Student to participate. The Student's mother had reservations about the Student attending the program because she believed that the Student had difficulty with one of the other students attending the program. Ultimately, the Student's mother agreed to allow the Student to participate, and he began attending the program on December 14, 2009 with the YMCA providing transportation for the Student to return home at the end of the day.

12. During an interview conducted by the Complaint Investigator with Peter McCormack, Mr. McCormack stated the following: He is the program director at the West School, and has been involved in programming for the Student over the last four years. The West School is a day treatment program operated by the District serving students eligible for special education services under the categories Emotional Disturbance or Other Health Impaired.

The Student's IEP team determined to provide ESD services to the Student because historically, the Student had difficulty with his behavior at the end of the school day, and they believed that a structured program at that time of day would benefit him. He is aware that Ms. Dee decided that reference to the ESD service should remain in the Written Notice but not be included in the IEP, but he does not know the reason for that.

At the end of May, 2009, he received a phone call from Ms. Salvo saying that the YAP program would be ending two weeks before the end of the school year. The YAP program was a pre-existing program run out of the YMCA, and the District had no control over nor input into how long it would run.

Within the first week of school in September, 2009, he became aware that the Student was not attending the YAP program, but does not recall taking any specific action as a result. There was an issue with regard to both staffing and transportation that prevented the Student's participation in the program. There were not enough staff members available to support the Student in the ESD program each day. The previous year they had been able to find a staff member to fill this role, but this year one of the students was transitioning to another school which required that a staff member support that student each afternoon. Staff members were also often required to attend meetings in the afternoon. He decided that the District would have to hire someone to provide this support, and eventually that person was hired.

With regard to transportation, the YAP program ended at 2:30, which was the busiest time for the District's transportation department and therefore no transportation was available for those students. The previous year, there were days when he personally drove the Student home after the program. At some point, he discussed this issue with Ms. Salvo and she offered to allow District staff to drive a YMCA van, but the District wasn't comfortable with that arrangement. Eventually, Ms. Salvo suggested having the Student transported home in one of the YMCA vans that was picking up students in the Student's neighborhood school. He is not aware of any reason that this arrangement couldn't have been available in September.

During the period from the start of school until December 14, 2009, the Student just went home at the end of the school day. He is not aware of the Student experiencing any regression as a result of this. Since the Student resumed attending the YAP program, the Student has been doing very well, to the point that they are now considering transitioning him back to his neighborhood school.

13. During an interview conducted by the Complaint Investigator with Barbara Dee, Ms. Dee stated the following: She is the director of special services for the District. The issue of the Student's behavior in the afternoon has been a problem of long standing. The West School

serves children in kindergarten through 12th grade from all over the city. Mostly for reasons of transportation, the school day ends earlier there than at other schools, although this also allows staff additional time for training and class preparation. The Parent has not made child care arrangements for the Student after school ends. For a time, the Student's adult sister was at home when the Student arrived, but the sister moved away. The parent tried enrolling the Student in day care, but it was not successful due to the Student's behavior. The Parent kept pressuring the District to do something about the Student's afternoons, and the District ultimately agreed to look into getting the Student into the program at the YMCA. This was all about day care, and was not required by the Student in order for him to benefit from his educational program. As far as she is aware, the Student is the only student at the West School that has this problem with day care after school.

When the Written Notice for the April 15, 2009 meeting was prepared, it was not known whether the program at the YMCA could be made available to the Student. She didn't want to put it into the IEP as a requirement of the Student's program because she was not certain that it would happen. Then the program started and stopped, and she didn't know if it would start up again. She felt that it was sufficient that it was in the Written Notice, and if it turned out that the program was available to the Student, the IEP could be amended later.

Mr. McCormack was in charge of contacting the YMCA and figuring out what was needed to get the program running again. The YMCA wanted a staff member to accompany the students. Mr. McCormack first looked into whether one of the school's educational technicians was available to do this. Ultimately, the District hired someone from the list of tutors to fill that role. There was no specific reason it took as long as it did to put this in place; it could have happened sooner.

14. During an interview conducted by the Complaint Investigator with Kerry Salvo, Ms. Salvo stated the following: Since August 2009, she has been the child care director of the Greater Portland YMCA. The YAP program is one of the programs she supervises, and she directs the employees that staff the program. In addition to the YAP program for West School students, there is also a YAP program later in the afternoon for students from the other Portland public schools.

When she started in August, the staff expressed concerns with how the West School program was structured. The West School students had needs that the YMCA staff had not been trained to handle, and the staff felt that someone from the school needed to be there to provide support to the students. There were also concerns about transportation. The West School program started at 1:00, but the students for the second YAP program had to be picked up at 2:30 from several different locations. In the spring, staff members were spending too much time driving students around, and it was taking time away from the actual program. The funding from the United Way for the YAP program only covers the other, later program, and there were no other resources she could use to address these issues.

She wrote to Mr. McCormack on September 21, 2009 and then met with him on September 25, 2009 to discuss her concerns. Mr. McCormack said he would meet with Ms. Dee and then get back to her. The next week, Mr. McCormack called and said that he had met with Ms.

Dee, but that the District had no other resources at that time to address the issues. She suggested that perhaps the YMCA and the District could partner on a grant application, and Mr. McCormack asked her to let him know if she heard of any such opportunities, while he would continue looking for a solution on his end.

In mid-November, Mr. McCormack called and said that the District had come up with a way to provide a staff member for the program, and that the Students could be brought to the YMCA in a school bus accompanied by that person. She decided that the program could start running four days a week (on Wednesday, the West School dismisses students at 12:00, and she did not think it was possible to provide services at that time), and that they would work out the details later on transportation after the program. Eventually, it was decided that the Student could get a ride on the YMCA van that was picking up students at his neighborhood school. The program for West School students got started again on November 30, 2009.

15. During an interview conducted by the Complaint Investigator with L. Anna Rutherford, Ms. Rutherford stated the following: She is a licensed clinical counselor employed by Providence Service Corp., and has been providing in-home therapy to the Student for approximately 7 months. Initially, she worked with the Student three times per week, starting at 2:30 p.m. or later. Currently, she sees the Student on Wednesday from 12 to 5 p.m. Normally, she would have completed her work with the Student after 6 months, however, she felt at that time (in December 2009) that it was indicated clinically for her to continue for another 6 months.

She and everyone else have seen improvement in the Student since she began her work with him. The Student is now better able to regulate his moods, better able to turn around a bad mood. He has made gains academically, and is currently working on a book report – something he has never done before. She has found that structure is very important for the Student; she accomplishes more with him when she holds to a tight structure in her sessions with him. For this reason, she believes that the ESD program, which provides structure to his afternoons, is beneficial to the Student. She is unable to say whether the Student would have made better progress had he been attending the ESD program in September through November 2009, or whether the Student is progressing more successfully since the program began in December 2009.

16. During an interview conducted by the Complaint Investigator with Amy Leonard, Ms. Leonard stated the following: She is a social worker at the West School, attached to the Student's class. For the most part, the Student has done well this year in school. She attended the IEP team meeting on November 4, 2009, and this was the consensus of the staff members present. She is aware that there have been problems with the Student's behavior at home that they haven't been seeing at school. She is not aware of any differences in the Student's in-school behavior before and after he began attending the YAP program in December 2009.

17. During an interview conducted by the Complaint Investigator with the Parent, the Parent stated the following: The YAP program for West School students came about because she pushed for it. The Student had difficulty controlling his behavior after 1:00 p.m., and there were no school programs available at that time. The Student was unable to go to a regular

after-school program because of his behavioral issues. The Student has really enjoyed the YAP program, and it helps him keep himself together.

In June, 2009, two weeks before the end of school, she got a phone call from Mr. McCormack saying that the YAP program would end the next day. No explanation was provided and there was no discussion of alternative after-school activities. In September, when she became aware in the first week of school that the Student was not attending the YAP program, she called Ms. Salvo, who told her they weren't going to do the program this year as a result of a lack of funding and resources. On September 15, 2009, she called her attorney to ask for advice. After her attorney contacted the District, she had conversations with Mr. McCormack.

During the first three months of school, when there was no ESD program, the Student came home right from school. His grown sister would be there with him, and on Wednesday and Friday there was also an in-home service worker there. During that period, the Student was very anxious and, on bad days, would be depressed, prone to swearing and occasionally violent. The Student has been much better at home since the program resumed this year.

VII. Conclusions

Allegation #1: Failure to develop or revise the Student's IEP in conformity with the determinations of the IEP team on April 15, 2009 with regard to ESD services in violation of MUSER §VI.2.J(4)

VIOLATION FOUND

The major responsibilities of the IEP team include determining the special education and related services, as well as the supplementary aids and services, to be provided to the student, and developing the student's IEP consistent with those determinations. In this case, according to the Written Notice of the IEP team's April 15, 2009 meeting, the Student's IEP team made the determination to try to get the Student into an after-school program at the YMCA, and determined that the program would be considered as an "extended school day" program, that the program would be individualized to meet the Student's needs, and that the District would provide support staff to assist the Student. This language is at odds with Ms. Dee's contention that the YAP program was simply being offered to the Parent as a courtesy. If, indeed, that was the case, the Written Notice needed to clearly state that the YMCA program was not considered to be a part of the Student's educational program.

Having stated in the Written Notice that the YMCA program would be a part of the Student's educational programming as ESD services, the District was required to include those services in the Student's IEP. Rather than Ms. Dee's idea that the IEP could be later amended to include the program, had the program turned out to not be available, the IEP team would have then been required to meet again and discuss amending the IEP to replace or remove it.

Allegation #2: Failure to fully and adequately implement the student's IEP with respect to ESD services in violation of MUSER §IX.3.B(3)

VIOLATION FOUND

It is undisputed that the Student did not receive ESD services during the period from June 4, 2009 until the end of the 2008-2009 school year, but this was due to a decision by the YMCA as to when to terminate the YAP program and was beyond the District's control. The YAP program was also unavailable to the Student, however, from the beginning of the 2009-2010 school year until November 30, 2009, and the District was on notice of this during the first week of September 2009. The District initially decided that it was without sufficient staff members to provide the support requested by the YMCA, and that it lacked financial resources to enable it to hire additional staff. Ultimately, the District succeeded in restoring the program by finding transportation and hiring an additional staff person, but this was accomplished only after the November 4, 2009 IEP team meeting. Although the Student had the opportunity to return to the program on November 30, he chose to not participate until December 14, 2009, and the District is not responsible for the Student not receiving ESD services during those two weeks.

Districts are obligated to implement their students' IEPs, and while occasional disruptions not resulting in a substantial loss of services (such as occurred in June 2009) are inevitable and do not necessarily require corrective action, this does not describe the approximately 12 weeks that the Student was unable to access the services his IEP team determined should be provided to him. It must also be noted, however, that although the Student may have experienced anxiety and exhibited aggressive behavior at home during the time that the YAP program was unavailable to him, no evidence was presented that the Student suffered a regression or failed to make progress on any of his educational goals as a result. Ms. Rutherford and Ms. Leonard were specifically unable to make such a connection.

Allegation #3: Failure to convene the Student's IEP team within 30 days after the start of the school year when ESD services were unavailable in violation of MUSER §IX.3.B (3)

Allegation #4: Failure to determine the compensatory services necessary to compensate the Student for the lack of ESD services in violation of MUSER §IX.3.B (3)

VIOLATION FOUND

Under MUSER §IX.3.B(3), when a school district is unable to hire professional staff necessary to implement a student's IEP, the district is required to reconvene the student's IEP team to identify alternative service options and determine whether and to what extent compensatory services should be provided. The regulations specify that this meeting should occur no later than 30 days after the start of the school year. Here, the District did not convene such an IEP team meeting until well after the 30 day deadline, despite having been put on notice of the problem within that time frame. It is noteworthy that when the District did proceed to hold a meeting, action to solve the problem followed a short time thereafter.

With respect to compensatory services, although this should have been a subject of discussion at the November 4, 2009 meeting, again, there was insufficient evidence found in this investigation of any deficit experienced by the Student as a result of the unavailability of ESD services for which compensatory services would have been appropriate.

VIII. Corrective Action Plan

The District shall, without unnecessary delay, amend the Student's current IEP to include an extended school day program as a supplementary aid and service, and shall continue to provide that service unless and until the Student's IEP team makes a determination that the Student does not require it in order to meaningfully benefit from his educational program. The District will submit a copy of the amended IEP to the Due Process Office and the Parent.

The District shall also issue a memorandum to all special education staff regarding the necessity for convening an IEP team meeting, within 30 days after the start of the school year or the date that the IEP was developed, to identify alternative service options and determine whether and to what extent compensatory services should be provided whenever the District is unable to hire or contract with the professional staff necessary to implement a student's IEP. The District will submit a copy of the written memorandum, together with a list of the names and job titles of all those to whom the memorandum is issued, to the Due Process Office and the Parents.