

Complaint Investigation Report
Disability Rights Center v. Department of Education

March 5, 2010

Complaint #10.064CS
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Disability Rights Center
24 Stone St.
Augusta, ME 04338

Respondent: Susan Gendron, Commissioner
23 State House Station
Augusta, ME 04333

II. Summary of Complaint Investigation Activities

The Department of Education (“DOE”) received this request for an investigation on January 7, 2010. The Complaint Investigator was appointed on January 12, 2010 and issued a draft allegations report on January 18, 2010, subsequently amended on January 20, 2010. On January 20, 2010, the Complaint Investigator received a 6-page memorandum and 29 pages of documents from the Complainant. Interviews were conducted with those parents and case managers identified by the complainant, as well as with education administrators from the areas where those individuals reside or work. Interviews were also conducted with a sampling of special education administrators from the various regions of the state, both in rural and urban areas, and with administrators of the state agencies involved in delivering the services at issue. The following individuals were interviewed: Karen Farber, advocate; David Stockford, DOE special services policy director and team leader; John McMahon, director, Department of Labor Division for the Blind and Visually Impaired; Jean Small, program director of educational services, CCME; Jane Brennan, director of education for The Children’s Center; Carrie Anderson, case manager for Life by Design; Karen Merrill, case manager, CDS Southern Kennebec County; Murray Shulman, special education director, Bangor; Paul Austin, special education director, Brunswick; Catherine Faust, special education director, RSU #23; Marjorie Gray, special education director, RSU #17; Jean Beetz, special education director, York; Rick Umphrey, special education director, RSU #39; Lew Collins, special education director, Winthrop and RSU #38; Dominic DePatsy, special education director, Cape Elizabeth; Marlene Daley, special education director, Union #103;

Barbara Dee, special education director, Portland; Holly Preston, CDS site director, Aroostook County; Sue Motta, CDS site director, York County; parent; parent; and parent.

III. Preliminary Statement

This investigation was requested in a letter to Commissioner Gendron from Disability Rights Center (“DRC”), alleging violations of the Regulations of the Offices of the U.S. Department of Education, Title 34, and the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide a free appropriate public education to children who are blind or visually impaired by failing to ensure that they receive the special education and related services which they need in violation of 34 CFR §300.101(a);
2. Failure to have in effect an interagency agreement or other mechanism for interagency coordination between the Department of Education and the Department of Labor in order to ensure that all special education and related services needed to ensure the provision of early intervention services or a free appropriate public education to children who are blind or visually impaired are being provided in violation of 34 CFR §§300.154(a) and 303.523;
3. Failure to ensure that the determination of those services needed to ensure the provision of early intervention services or a free appropriate public education to children who are blind or visually impaired are being made by the children’s IFSP or IEP teams in violation of 34 CFR §§300.154(a) and 303.343;
4. Failure to ensure that eligibility determinations for children who are blind or visually impaired are being made by the children’s IFSP or IEP teams following procedures set forth in the Maine Unified Special Education Regulations in violation of 34 CFR §§300.306 and 303.322 and MUSER §§V.2.D-G;
5. Failure to ensure that evaluations for children who are blind or visually impaired are being conducted in a timely manner and in accordance with procedures set forth in the Maine Unified Special Education Regulations in violation of 34 CFR §§300.306 and 303.322 and MUSER §V.

V. Summary of Findings

1. At the present time, there are 69 students in Maine receiving special education under the disability category visual impairment including blindness (“BVI”). There are in addition roughly 181 students receiving special education whose disability category is other than BVI, but who nevertheless have a visual impairment. Still further, there are 50 pre-school children receiving early intervention services who have a diagnosed visual impairment.
2. The Department of Labor (“DOL”) Division for the Blind and Visually Impaired (“DBVI”) administers rehabilitation and education programs for any resident of Maine who is blind or has a visual impairment significant enough to affect their daily functioning.

Education services for BVI children through DOL consist of instruction in independent movement and travel, referred to as orientation and mobility (“O & M”), and instruction by teachers of the visually impaired (“TVI”) in specialized techniques and compensatory skills to enable the children to access their school curriculum. The latter includes Braille reading and writing, adaptations and modifications of curriculum and materials, use of specialized equipment, and consultation services to school staff and families. O & M instructors are employed by DBVI; TVIs are employed by Catholic Charities Maine (“CCME”), and their services are provided under a contract with DOL.

3. The Maine statute that established DBVI, 26 MRSA §1418-C, provides that DBVI shall provide “assistance to local schools in meeting the special needs of blind students.” 26 MRSA §1418-D(2) provides that “[n]othing in this section relieves school administrative units [(“SAUs”)] from fulfilling their responsibilities under” Maine special education law.

4. There are presently 15 TVIs employed by CCME. The contract between DOL and CCME provides that, for school age children, “the TVI assesses the student’s learning mode, modifications and adaptations and recommends goals and objectives for inclusion in the students IEP or 504 plan. The IEP or 504 plan determines the most appropriate placement in compliance with Federal and Maine State Special Education regulations. For pre-school children, the IFSP goals determine the involvement” of TVIs.

5. In a document provided by CCME dated January 4, 2010 and titled “Education Services for Blind and Visually Impaired Children (“ESBVIC”) Referral Procedures as of December 23, 2009” (“Referral Procedures”), referrals are described as starting with submission of a packet to CCME consisting of an information sheet completed by a parent or guardian, permission forms signed by the parent or guardian, and a report on the child’s eye condition from an eye care specialist. One of two CCME supervisors reviews the packet and makes a determination as to whether or not the referral will be activated (an eye condition deemed minimal will not be activated). If activated, the referral will be assigned to a TVI for the performance of a Functional Vision Assessment (“FVA”) and/or a Learning Media Assessment (“LMA”). The assessment(s) “will determine needed services and will be indicated by type and amount of service.” If a TVI is not available to perform the assessment(s), the referral is placed on a waiting list for assessment and the parent/guardian is notified of this.

6. According to the Referral Procedures, after a TVI completes an assessment, services for the child are determined by using a system termed the “Maine Plan for Determining Caseload Size for TVIs” (the “Plan”). The Plan consists of a rating scale for each newly referred child “to determine the status of new referrals and when the program must implement pending services.” Children are assigned points based on a set of criteria, and the total number of points offers “a baseline in the amount of vision-related services that the individual might need from a TVI.” A score of 0 or 1 points is interpreted to mean that “no services from a vision teacher are necessary,” a score of 2-6 points means that the child “will benefit from a low degree of consultation services provided by a TVI,” and so on. The Plan contains further guidance regarding the determination of a TVI caseload, e.g., no more than three academic Braille students are to be assigned to one TVI. The Plan further states that the “type and

quantity of service provided to a student with a visual impairment will be based on the results of comprehensive assessment and recommendations by the student’s planning team.”

7. In July 2009, one of two TVIs who had been assigned to southern Maine left to take a position in another state. CCME was unable to fill that position, and only recently hired a person to be “on-call” on an hourly basis with the hope that the person will ultimately be hired as a full-time TVI.

8. There is one TVI assigned to Aroostook County. Over the last year, that TVI became responsible for instructing three Braille learners, which demands considerable direct teaching and preparation time. This left the TVI without sufficient time to provide services to all the students in her territory who required them.

9. As of February 1, 2010, there were 19 students, eligible to receive services from a TVI, who were on a waiting list to receive those services from CCME. Five children from Aroostook County and one from Cumberland County have been on the list since April 2009. Four more children from Cumberland County, one from Oxford County and eight from York County were placed on the list during the period from September to November 2009.

10. DOE and DOL are parties to a Cooperative Agreement (the “Agreement”), dated June 1, 2000, which describes the collaborative efforts of the agencies on behalf of children with disabilities. The Agreement contains the following statements:

The partners in this agreement believe that the [IEP team] serves as the most effective communication tool to facilitate cooperative planning for students with disabilities who are receiving special education services. The [IEP team] determines eligibility and develops...IEPs which specify appropriate special education services.

....

DBVI, working with...CDS, conducts the initial screening of pre-school children and an [IFSP] is developed...Itinerant teachers and educational consultants work with the [IEP team] to develop the IEP.

....

We understand that, where [DBVI] education program services are anticipated or being provided, a DBVI representative or Itinerant Teacher will participate in the [IEP] process and...IEP development.

....

The agencies will provide information and data on the numbers and type of personnel providing services to special education students. This includes...the numbers of vacancies and personnel shortages....Further, the agencies agree to...share resources and resource information [and] consolidate training where appropriate.

11. The Agreement discusses financial responsibility for services and for purchase of equipment, procedures for resolving interagency disputes under the Agreement, and policies and procedures for interagency coordination. The Agreement does not discuss conditions, terms and procedures under which an SAU must be reimbursed by DOL or DBVI.

12. During an interview conducted by the Complaint Investigator with John McMahon, Mr. McMahon stated the following: He is the director of DBVI. DBVI is not an educational agency, and is not obligated to provide FAPE to children, but is statutorily obligated to provide services to SAUs. There are two types of providers of services to BVI children. TVIs work on accessing academic instruction, and O & M instructors work on functionality. Some children need one but not the other, and some children need both. The system exists because no SAU has enough BVI children to support the hiring of a TVI or O & M instructor by the SAU. The system allows the SAUs to obtain a service for its children at no cost that it otherwise wouldn't be able to provide itself. In addition, the system allows DBVI to hire O & M instructors to work with both child and adult populations, making it much more cost-effective.

When CCME receives a referral, it first conducts a screening before deciding whether it should proceed with an evaluation. After conducting an evaluation, CCME determines whether the child should be further referred to DBVI to assess the need for O & M services. When a child is very young, it's often very difficult to do an ophthalmological workup, and also the child is not yet part of the educational system. The TVI may decide that it's too soon to provide TVI services and therefore not make the referral for an O & M assessment, even though the child could benefit from early O & M services.

There are currently 15 TVIs working for CCME, when there really should be 19 or 20. Last year DBVI sustained a decrease in education funding of \$100,000, which resulted in CCME decreasing the number of its TVIs by one. DBVI needs more funding, but there is a further problem in attracting qualified staff to Maine. When he started in his current position, DBVI had had two vacancies for O & M instructors for two years. He was able to attract two recent graduates to serve an internship in Maine, and they both decided to stay. Southern Maine lost one of their TVIs and it took several months before they could hire someone part-time having provisional certification.

He believes that there are regions that are currently adequately staffed, and others that are not. One new child that requires intensive services entering a region can change the balance. One TVI for Aroostook County used to be enough, but they received several new Braille learners. They are looking at having one of the TVIs in Bangor take up some of the case load, but then someone from somewhere else has to pick up some of the work of the TVI in Bangor.

Until recently, the needs of the BVI student population were being met at a much higher level. In addition to an increase in the population generally and a reduction in staff, there are also a greater number of children whose needs are more complex, having multiple issues in addition to a visual impairment.

He believes that there are students not receiving O & M services that need functional skills training. Besides DBVI not having enough staff, there are also not enough hours in the day. School staff members tend to focus on academics, and TVIs and O & M instructors pull the child out of their academic classes.

TVIs and O & M instructors are trained to collaborate with IFSP/IEP teams to develop goals and a service program. The team model is pushed, but there are some individuals who are

doing it better than others. He has also heard that sometimes when a TVI or O & M instructor comes to a team meeting and tells the team that he/she isn't able to provide the level of service determined by the team, the team will just change the level of service in the IEP to match what can be provided. There are also problems with coordination of effort among DBVI staff and the others involved in children's programs. One development that negatively impacted this area was the removal from DBVI of its internal case managers. These case managers handled scheduling for services, assessments and team meetings. They freed up the instructors to spend more of their time actually providing services. He doesn't believe that the SAU's case managers fully understand what TVIs and O & M instructors do.

13. During an interview conducted by the Complaint Investigator with Jean Small, Ms. Small stated the following: She is the program director of education services for BVI children at CCME. There are currently 19 children on a waiting list to receive TVI services from CCME. In addition, CCME receives five to eight requests for referral packets every month. There are presently 15 TVIs employed by CCME. Last year, there were 16 TVIs, but one that worked in the Portland area left in June to take a better-paying position in another state. She advertised to hire a replacement and received several inquiries, but when she told those people what the salary was for the position, they told her they were not interested in applying.

The salaries of TVIs are matched up with average salaries for classroom teachers in Maine. No salary increases have been authorized for the last three years. She recently hired someone on an hourly basis who is completing a certification program, and she hopes that person will take the full-time position when they have completed the program. Last year, the legislature cut the appropriation level to DOL, and DOL told CCME they would have to lose one TVI position. Mr. Stockford told her he was trying to find another funding source to make this up.

She hired the TVI working in Aroostook County by enlisting a resident of that area and offering to provide funding for her to complete a TVI certification program. She has remained working in that county. One of her students had a sudden and severe loss of vision, and became a Braille learner. She already had two other students who were Braille learners. As a result, she had to put five of the less severely impaired children on a waiting list. This situation will improve after June when one of the Braille learners graduates. There aren't enough BVI children in Aroostook County to justify hiring a second TVI there.

The capacity of TVIs is not the same across the state; some regions have sufficient capacity to serve the student population and some don't. Any given region can change suddenly, however, if a new student moves to the area or one of the existing student's conditions suddenly deteriorates. When she lost the Portland TVI, all the other TVIs in the area already had full caseloads. They redistributed cases among the other TVIs to make sure the highest-needs children were covered, and placed some of the lower-needs children on the waiting list. This led her to develop a rating scale, whereby each child is given points on a series of criteria, and the total scores for the children are then used to better distribute cases among the TVIs.

The Braille learners always get first priority, as this is a specialty that no one else has. This service is very time-intensive. Those children that have multiple disabilities, including visual impairment, are generally very challenging. Most TVIs would say that if they could, they

would spend more time in those classrooms working with those children. The reality is, however, that those children are in classrooms where there are several educational technicians, and the children are receiving services from multiple therapists. Vision is just one part of the picture, and those children do get a lower priority.

The mission of CCME is to assist schools in educating BVI children. Before committing the resources to do a full FVA, they have to first assess whether the child's visual impairment is actually impacting learning. CCME doesn't have the resources to provide FVAs and consulting services for every child who has a mild visual impairment. The TVIs all receive instruction regarding the time-frame requirements under MUSER, but an FVA can take several days, especially if the child has multiple issues. One child's FVA took four months, because the child would have seizures or be out sick. Presently, there is one TVI in the mid-coast area who is doing all the FVAs for most of the state. After she does the evaluation, she makes a determination whether the child does or does not need services. She doesn't have time to go to team meetings. She always prepares a report with recommendations. CCME instructs the SAUs that if they need a TVI to attend a meeting, they must give two weeks' notice. Even then, the scheduled meeting might conflict with the TVI providing services to a Braille learner.

The DOE recently provided training to all the TVIs (as well as O & M providers) about IEP requirements. She would like to have a second training session. Her staff has complained that they submit goals to an IEP team, and then when they read the child's IEP they find that the team has changed them. There are also some schools that will not write goals involving the "expanded core curriculum," which focuses on life skills. Those teachers say they only work on academics. Sometimes, the TVI reports to the team that she has observed the child in the classroom and the child is doing fine accessing education despite a visual impairment, but the other teachers insist that the child needs services. She looks at the TVIs' caseloads and finds that they are already nearly impossible to manage. CCME has to make the best use of its employees' time.

With regard to materials, CCME has an instructional materials center where there are materials available in either Braille or large print. CCME does not have funding to buy materials, however. There are federally-funded centers that produce these materials, and if an SAU requests something, CCME will attempt to obtain it. Then, when the student finishes using it, the SAU returns it to CCME, where it will be available to another student who requests it. If the materials are not available to CCME, CCME gives the SAU ideas of other sources that might have them. Each spring, CCME sends out a request to the SAUs asking for a list of materials the SAU will need in the coming year. There are also materials available in electronic format, that the SAUs may be able to print out in Braille or large print format. The SAU has to buy the equipment to do this printing; CCME does not supply equipment.

14. During an interview conducted by the Complaint Investigator with David Stockford, Mr. Stockford stated the following: He is the DOE special services policy director and team leader. In his view, the SAU has the responsibility to provide services to its children, and the fact that CCME provides service free of cost does not relieve them of that obligation. At the same time, DOE has a responsibility to make sure that the SAUs are providing the services that children need. School administrators often have only limited experience with the BVI

population. He is aware that it can be difficult to obtain providers of BVI services. A number of years ago, he started up a program with Boston College to train TVIs who would then work in Maine. He couldn't enlist enough people to attend the program. If CCME doesn't have enough staff to provide services to all the children that need them, it's going to be very difficult for SAUs to find them elsewhere.

He also believes that there is a problem with how CCME makes instructional materials available to SAUs. CCME claims that SAUs are not ordering their materials in a timely fashion. There is a certain capacity at the federal level to transcribe Braille materials, and CCME has access to that capacity and the means to distribute the materials. If the SAU requests materials in a timely fashion, and those materials are somewhere in the system, then CCME should be able to supply them.

He agrees that DOL is making funding decisions outside of the control of DOE that impact the delivery of services to children of Maine. He thinks that DOL may be undercounting the number of children needing BVI services, in part as a result of the increase in the number of children with multiple handicaps, one of which (but not the primary one) is BVI. He is familiar with the interagency agreement between DOE and DOL, and he thinks there is the potential for greater inter-agency cooperation, including better matching of their data systems. He believes DOE could work with DOL to influence them to add language to their contract with CCME to emphasize compliance with MUSER. The SAUs also have the capacity to contract directly with CCME, and thereby dictate conditions of performance. This would also increase the funds available to CCME and permit them to hire more TVIs.

15. During an interview conducted by the Complaint Investigator with Carrie Anderson, Ms. Anderson stated the following: She is a case manager employed by Life by Design in Aroostook County. She has worked with approximately 10 BVI children. There were times when the TVI was invited to attend IEP meetings and she attended, provided information and sometimes materials, and participated in discussion. Most often, however, the TVI did not attend, did not provide information, and did not provide reports of assessments. The TVI's schedule is always very difficult to work around.

She has had children who needed a type of service or who needed more of a type of service and CCME said they wouldn't provide it. She has requested materials from CCME for her BVI students with inconsistent results. Sometimes they said they could loan the materials and sometimes they said they couldn't. She doesn't understand how the loan program works.

She previously worked for CDS, and made referrals to CCME for services. It often took a long time before she could find out what CCME was proposing to do, and then got minimal information. The parents didn't know what was going on, and CCME wouldn't respond to their questions. She had the impression that the TVI was so busy that there was no time for contact with parents. She has had a more satisfactory experience with the O & M instructor for her area, but he recently retired, and she doesn't know what will happen now. He regularly checked in on the students, connected with the IEP teams and provided information.

16. During an interview conducted by the Complaint Investigator with Holly Preston, Ms. Preston stated the following: She is the site director for CDS Aroostook County. She has

referred children to CCME and in response been told that it would make it easier for them if she had the evaluation performed at Perkins School. They have also hired another private provider from down state to perform an evaluation. In one instance, she was told by CCME that it would take 8 months before they could complete an evaluation.

The TVI assigned to their region has attended very few meetings. The TVI doesn't understand and accept that she is part of a team and needs to attend meetings. There have been times when parents refer their children directly to CCME, and CCME does not contact CDS or refer the parents to CDS. They seem to feel that they can function wholly outside the IFSP/IEP team system.

17. During an interview conducted by the Complaint Investigator with Rick Umphrey, Mr. Umphrey stated the following: He is the special education director for RSU #39. Prior to this year, he has had visually impaired students in his district, but this is the first year he has had a blind student. He finds his TVI excellent to work with, but her availability is minimal. She has participated in meetings and made good suggestions, but he doesn't know whether the TVI could come to the next meeting if he needed her. The students' IEP teams have made the determinations, not the TVI. He would like to ask the TVI to come to the school and consult with staff members, but he doesn't believe she has the time to do this.

18. During an interview conducted by the Complaint Investigator with a parent. The parent stated the following: She is the parent of a xx year-old who attends school in the RSU #39 school district. The child was born prematurely, and at the hospital she met with someone from DBVI. When she brought the child home at 4 ½ months, she was contacted by someone from CDS Aroostook County. An IFSP team meeting was held, but no one was there from CCME or DBVI. There was discussion about BVI services, and it was determined that O & M services would have to wait until the child was ambulatory, but the child was put on a list to receive TVI services when the team determined that the child was ready. Her child first began receiving BVI services as a three-year-old when the child was starting developmental pre-school. She believes BVI services should have started much earlier. For the first 1½ years, she was pleased with the services being provided. When the TVI became busier – she had more patients that were Braille learners – the child began receiving consult services once a month. The TVI came to some of the child's IEP team meetings, and responded to phone calls. The child completed a pre-Braille program, and was ready to start learning Braille. Then, about a year ago, services were discontinued and her child was put on a waiting list. The child has not received TVI services since then. In addition, the school doesn't have Braille materials, and the TVI says she doesn't provide them. She thinks the TVI was great and did the best she could, but she's the only TVI for the whole county.

Ms. Small from CCME came to the school last fall and did an assessment of the school environment. Ms. Small wrote a report (of which she received a copy) and made recommendations. Ms. Small also responded to her questions. One of the recommendations was to have Perkins School do an evaluation and provide materials. The evaluation is scheduled for April 2010.

19. During an interview conducted by the Complaint Investigator with Karen Merrill, Ms. Merrill stated the following: She is a case manager for CDS Southern Kennebec County. She currently has one child that needs BVI services, and she has taught school in the past and had students receiving BVI services. Prior to her experience with the child for whom she currently case manages, she had no problems with TVI services - TVIs have been prompt, helpful and collaborative. Her current TVI often refers to the fact that she has only so much time available to service all of her children.

The current child was initially evaluated when she was two. The evaluation was completed in a timely fashion, but consisted only of home observation, and resulted in a finding that the child was not eligible for services. The TVI provided a report, but didn't attend an IFSP team meeting to allow the team to make the determination. CDS returned the case to CCME asking that the TVI also observe the child at her pre-school. The child's physician had reported that the child had vision in only one quadrant. This time, the TVI offered to provide consult services, and made some additional recommendations. The TVI came to one meeting, but she basically told the team what she was prepared to do. There was no collaborative discussion. More recently, the TVI was supposed to conduct a FVA, but she still has not finished it. The TVI has disrupted the child's other therapies in order to conduct the evaluation.

The TVI also recommended O & M services. So far, there has been only one introductory meeting at the child's home with an O & M provider; there have been no services.

20. During an interview conducted by the Complaint Investigator with Jane Brennan, Ms. Brennan stated the following: She is the director of education and child care at The Children's Center in Augusta. She currently has two children that are BVI. One child received a VI diagnosis on May 14, 2009, and CDS requested TVI services from CCME. The first meeting with CCME didn't happen until October 15, 2009, and this was only an introductory meeting. An evaluation was conducted on November 6, 2009 at her office. She found the evaluators to be very unprofessional. They were arguing about how to do the evaluation. The child's parent told them they were making him uncomfortable because they weren't working together, and they replied that this was how they always did evaluations. At an IEP team meeting on January 6, 2010, one of the evaluators attended and made appropriate contributions. Services to the child started on January 11, 2010. In total, then, there was a delay of eight months from the date of diagnosis (5/14/09) until services started.

Services were supposed to start for the second child 1½ years ago. When the child's parent was able to get someone from CCME to talk with her on the phone about it, she was told that there were other children with needs greater than her child's. Finally, someone from CCME came out to do the evaluation, and the parent was told that the child was not eligible for services because there was no medical diagnosis of a visual impairment, even though the child kept bumping her head on objects because she didn't see them. When the child came to The Children's Center, she referred the child back to CCME and the child eventually began receiving services.

21. During an interview conducted by the Complaint Investigator with a parent. The parent stated the following: He is the parent of a xx-year-old who is currently receiving services

through CDS Southern Kennebec County. The child had brain damage at birth. Project PEDS CDS became involved, and he believes they asked CCME to do an evaluation. It took several months, and he thought it took too long. When some people came out to do the evaluation, they wouldn't listen to anything he or his wife told them. When he called CCME, he mostly didn't get return calls, and when they did call, he didn't get much information. The child finally began receiving TVI services at the age of xx. Then the family moved to the Augusta area. It took six months until TVI services resumed.

More recently, the TVI told them she has many other children to see, and can only spend one hour per week with his child. There was an IEP team meeting a few months ago. The TVI was there along with Mr. McMahon from DBVI. The TVI got defensive and said that his child was hard to work with, but all the other providers seem able to work with her. The TVI was supposed to do a FVA, but still hasn't done it. There is nothing in the child's IEP regarding vision services because the FVA hasn't been conducted. He asked that the child receive pre-Braille training, and the TVI said the child didn't need Braille. At the meeting, he asked that all communication go through the child's case manager, but this is not happening.

He found out that the child was supposed to start receiving O & M services 1½ years ago. Once when the O & M instructor came to his house, the child had a seizure. Another time the house was very chaotic. The O & M instructor has also been to the child's school once, and is supposed to go again this week. The O & M instructor is supposed to be doing an evaluation.

He has also had difficulty getting equipment for the child from CCME. They asked for a written request, and when the child's OT provider sent one in, they said that a different provider had to make the request.

22. During an interview conducted by the Complaint Investigator with Marlene Daley, Ms. Daley stated the following: She is the special education director for Union #103. She currently has one BVI student, and previously worked in a district that had a couple of BVI students. She feels that the O & M instructor in her area is not working in a way that fosters cooperation between the parents and the school district. He has asked for things that are not realistic. She wants to provide what the student needs, but is opposed to having all the available funds go to only one student at the expense of the others

Due to the location of her school district, it takes so long for providers to get there that services every day are not possible, and even twice a week is a problem. The providers have to offer services to all the children in their region. The TVI for her region comes to meetings and tells the team the amount of time she has scheduled for the student. There is no collaborative discussion about what the student needs. When an OT provider did an evaluation, the team reviewed the recommendation, discussed with the provider how much time it would take to reach the student's goals, and then decided how to balance the OT time with the student's other needs. With the TVI, the team told her that they were putting two hours of service per week into the IEP, and the TVI said she would not do that, but would only provide one hour per week.

The TVI also refuses to provide consulting services. She is generally uncooperative. CCME took one of the district's Braille printers for repairs and haven't given it back. When she asked the TVI about it, the TVI said it wasn't her problem. The district got an embosser at the TVI's suggestion, and the TVI won't provide training on how to use it. IEP team meetings have to start at 2:30 due to one of the parent's schedules, and the TVI and O & M instructor get up and leave at 3:30, whether or not the team has begun discussing their area.

The TVI also has a private business running a skiing program, and this makes the TVI unavailable one day a week. The TVI has been pushing to get her student into the skiing program, but she doesn't believe it will provide an educational benefit. She thinks that this has made the TVI less cooperative. The previous TVI was not so uncooperative.

Her district advertised for a full-time TVI, but got no responses from qualified persons. She has to take what CCME gives her – it's either that or getting no services at all. She thinks that if the TVIs and O & M instructors were under the supervision of the DOE, the DOE would figure out a way to provide what the students need.

23. During an interview conducted by the Complaint Investigator with a parent, The parent stated the following: She is the parent of a xx-year old who has a visual impairment. The child was diagnosed at eight months, and became involved with CDS Washington County. The TVI and O & M instructor came to an IFSP team meeting, and they participated appropriately. The child has received some services from a TVI and O & M instructor, but the services have been spotty and random. The child went without O & M services for about two years when the O & M instructor transferred to another area and she was told there was no one else available. The child went without TVI services for about three months when the TVI had a family medical emergency. There have been many times when another child needed services and her child got bumped from the schedule, or the TVI and O & M instructor cut a session short because they had to see another child or attend a meeting. The school district says that it's not its responsibility - it's up to the providers.

The child was evaluated at Perkins School, and Perkins suggested various services that CCME said were not available. The TVI said she didn't have that kind of time. The child hasn't received services anything close to what Perkins recommended. One thing that Perkins recommended was ESY services, but the TVI said CCME doesn't offer summer services.

24. During an interview conducted by the Complaint Investigator with Sue Motta, Ms. Motta stated the following: She is the site director for CDS York County. She has not had a problem getting services for her BVI children. She has had problems getting evaluations from CCME completed within the regulatory timelines, but she has this problem with many providers. She agrees that TVIs often don't participate in the IFSP process but, again, this is true of other providers as well. TVIs will do whatever they decide they're going to do; sometimes this coincides with the team determination, sometimes not.

She believes that improvement in the delivery of services by CCME could be achieved if DOE and DOL developed a working agreement that would include training being provided to TVIs as to what is expected of them.

25. During an interview conducted by the Complaint Investigator with Murray Shulman, Dr. Shulman stated the following: He is the special education director for the Bangor School Department. In his experience, BVI children have been receiving the services they need, and he has gotten no complaints from parents of those children. He is aware that the TVIs are stretched thin, but this is a low-incidence population, and without CCME, he would find it difficult to find providers for his students. In his experience, the TVI comes to IEP team meetings recommending a certain level of services, but it is always a team decision.

26. During an interview conducted by the Complaint Investigator with Paul Austin, Mr. Austin stated the following: He is the special education director for the Brunswick School Department. He has had frequent contact with the TVI assigned to his area. She attends IEP team meetings and does trainings for his staff. He has never had a problem getting her to attend a meeting when she was needed. She has been generally helpful and accessible when someone had a question. She makes recommendations for services, but the IEP team reviews them and makes the determination. He hasn't experienced delay in getting evaluations performed.

27. During an interview conducted by the Complaint Investigator with Marjorie Gray, Ms. Gray stated the following: She is the special education director for RSU #17. She has worked with TVIs from CCME for over 20 years and had very few problems. The TVIs attend IEP team meetings, provide direct instruction as well as consulting services. As the TVI's case load has increased, students have received a decrease in services, but she has not heard from any of her teachers that this is creating a problem. This year, her TVI has been instrumental in developing a program for a new BVI student. She has not experienced delay in the performance of evaluations.

28. During an interview conducted by the Complaint Investigator with Jean Beetz, Ms. Beetz stated the following: She is the special education director for the York School Department. She has had three BVI students in her district, including one who graduated last year. She is not aware of any problem in getting TVI services for those students. The TVI always attended an IEP team meeting when invited, after first providing a written report, and the IEP team would discuss the TVI's recommendations and make the determination. Of course, there is always a tendency to give a lot of weight to a recommendation where the evaluator is also going to be the service provider.

29. During an interview conducted by the Complaint Investigator with Lew Collins, Mr. Collins stated the following: He is the special education director for the Winthrop School Department and RSU #38. He has had eight to ten BVI students over the years. TVIs have always come to IEP team meetings and participated in discussions as a team member. TVIs have also come into classrooms and worked with teachers.

He has been impressed with the quality of the evaluations conducted by CCME, and thinks they produce a very good report – detailed and very helpful. He has, however, had problems getting the reports within the regulatory time frame. He was not aware that CCME was bound by those time lines. He has also experienced delays in services starting up. In his experience,

Maine has never had enough BVI providers, and delays are part of what the school system lives with. He believes that the pool of qualified providers is so limited that, even if more funding was made available to hire additional personnel, there would not be enough providers willing to come to Maine.

30. During an interview conducted by the Complaint Investigator with Dominic DePatsy, Mr. DePatsy stated the following: He is the special education director for the Cape Elizabeth School Department. He currently has one blind and one visually impaired student in his district. The TVI for his area comes to IEP team meetings, and also consults with his staff members. One of the student's parents sought an evaluation from CCME and basically got nothing. His district did the evaluation and made the eligibility determination themselves based on medical documentation. His district tends to get evaluations from sources outside CCME. The district also hired an educational technician to work with Braille materials.

He has gotten some support from DBVI O & M providers, but has experienced difficulty in getting them into the schools. One of his students experienced a delay in getting services started, but is receiving them now.

31. During an interview conducted by the Complaint Investigator with Barbara Dee, Ms. Dee stated the following: She is the special education director for the Portland School Department. For the most part, she has not experienced problems with obtaining services for her BVI students. In general, when TVIs or O & M instructors are invited to team meetings, they attend and contribute appropriately. They are responsive and return phone calls. They consult with staff members regularly. Evaluations are completed in a timely manner. Last year, she had three kindergarteners who had visual impairments, and she received good support from CCME in developing their programs.

In the recent past, the district had a problem with a TVI not attending meetings for one of its students, but this year that has been corrected. There is one other student who has experienced a delay. That student's evaluation, which was overdue, was finally completed two weeks ago, but the district still has not received the report. The student has been unable to receive services as a result.

32. During an interview conducted by the Complaint Investigator with Catherine Faust, Ms. Faust stated the following: She is the special education director for RSU #23. There is currently one BVI student in her district. CCME conducted an evaluation, and it was completed within the regulatory time frame. The IEP team made the determinations regarding nature and intensity of services, and the TVI has provided the services specified in the IEP. Both the student's teachers and parents are satisfied with the services from CCME.

VII. Conclusions

Allegation #1: Failure to provide a free appropriate public education to children who are blind or visually impaired by failing to ensure that they receive the special education and related services which they need in violation of 34 CFR §300.101(a)

VIOLATION FOUND

The obligation of 34 CFR §300.101(a) to ensure that a FAPE is available to all children is that of the State. While the results of this investigation suggest that, in most parts of the State of Maine, children who require BVI services are receiving them, there are presently 19 children who are eligible to receive BVI services who are on a waiting list to receive them. Six of those children have been on the list for approximately 10 months. While the children are concentrated in just three counties (with a single child in a fourth), Mr. McMahan and Ms. Small both described a situation where, in any given location, the introduction of one more BVI child will cause the need for services to exceed the available capacity from DBVI and CCME. Moreover, others spoke of the scarcity in the State of BVI providers outside of those two agencies. Others spoke of intermittent service interruptions caused by a provider's competing claims on his or her time.

There is little doubt that some of the shortage in the number of providers available to provide these services is related to the amount of funding available to pay them. According to Ms. Small, the TVI that left CCME last year did so in order to take a position with a higher salary, and several potential applicants to replace that person lost interest once they learned what salary was being offered. It is clear that the centralization of TVIs and O & M instructors in the DOL agencies results in economic efficiencies, but to the extent that those agencies become "the only game in town," DOE has a duty to ensure that their staffing is sufficient to meet the needs of the children of Maine. Whether this comes about through interagency coordination or through some separate system that will supplement that of the DOL agencies, efforts must be made by DOE to address this service provider insufficiency.

Allegation #2: Failure to have in effect an interagency agreement or other mechanism for interagency coordination between the Department of Education and the Department of Labor in order to ensure that all special education and related services needed to ensure the provision of early intervention services or a free appropriate public education to children who are blind or visually impaired are being provided in violation of 34 CFR §§300.154(a) and 303.523

NO VIOLATION FOUND

DOE is party to the Agreement, which substantially meets the requirements of 34 CFR §§300.154(a) and 303.523, although it does not contain conditions, terms and procedures under which an SAU is to be reimbursed by DOL or DBVI (34 CFR §300.154(a)(2)). 34 CFR §300.154(b)(1)(i) states that if any non-educational public agency is obligated under Federal or State law to provide services that are also considered special education or related services that are necessary for ensuring FAPE to children with disabilities, that agency must fulfill that obligation either directly or through contract. 34 CFR §300.154(b)(2) provides that if that non-educational agency fails to provide or pay for the special education or related services, the SAU must provide or pay for these services in a timely manner, but is then

authorized to claim reimbursement from the non-educational agency and that agency must reimburse the SAU “in accordance with the terms of the interagency agreement.”

The issue, then, is whether DBVI or CCME is “obligated under State law” to provide services, so that the Agreement is required to contain provisions for reimbursement. The statute establishing DBVI describes the division’s duty towards SAUs as providing “assistance” in meeting the needs of BVI students. 26 MRSA §1418-C. That DBVI is not fully obligated to meet all of these needs is reinforced by the language of 26 MRSA §1418-D(2), which provides that DBVI’s duty of assistance does not relieve the SAUs from fulfilling their responsibilities to provide FAPE. As DBVI is not legally obligated to provide all of the vision-related educational services required by BVI students, it is not legally obligated to reimburse an SAU that secures those services elsewhere. Accordingly, the Agreement is not deficient in this respect.

Allegation #3: Failure to ensure that the determination of those services needed to ensure the provision of early intervention services or a free appropriate public education to children who are blind or visually impaired are being made by the children’s IFSP or IEP teams in violation of 34 CFR §§300.154(a) and 303.343

Allegation #4: Failure to ensure that eligibility determinations for children who are blind or visually impaired are being made by the children’s IFSP or IEP teams following procedures set forth in the Maine Unified Special Education Regulations in violation of 34 CFR §§300.306 and 303.322 and MUSER §§V.2.D-G

NO VIOLATION FOUND

Although incidents were recounted where TVIs did not participate appropriately in the deliberations of IFSP/IEP teams, where they did not attend or dictated determinations as to eligibility and/or services, a substantial majority of those interviewed reported more positive experiences. For most, the TVIs and O & M instructors attended meetings, provided information and recommendations, and participated as team members. In addition, the contract between DOL and CCME, as well as the Agreement, underscore that the role of TVIs and O & M instructors is to provide recommendations to IFSP/IEP teams, and assist and participate in the IFSP/IEP process. Furthermore, both Mr. McMahon and Ms. Small reported that TVIs and O & M instructors have received training in the importance of that process and in their participatory roles, although, as noted by Mr. McMahon, some of the providers are better at it than others. Accordingly, no systemic failure in regard to this allegation was found.

While the Referral Procedures and the Plan recently developed by CCME contain some language which could be interpreted to mean that CCME makes unilateral determinations as to eligibility and services, the Referral Procedures are better understood to be designed to assist CCME in preserving its scarce resources by requiring an initial screening before committing to conducting a FVA, and the Plan to be designed not to dictate results to IEP teams, but to assist CCME internally with apportioning caseloads. While it could be made clearer that the IFSP/IEP team, and not CCME, makes the determinations, the Plan acknowledges the importance of input from other team members with the language: “the type

and quantity of service provided to a student with a visual impairment will be based on the results of comprehensive assessment and recommendations by the student's planning team."

More importantly, regardless of the input from any one provider, it is always the team's responsibility to make determinations and develop the IFSP/IEP, and the SAU's responsibility to provide EIS or FAPE to the child. The team must determine whether the child is eligible to receive services, even if it receives an evaluation report that purports to make a determination as to eligibility, contrary to the requirements of MUSER §V.4.D. Likewise, if the team determines the child to be eligible to receive services, the team, and not the provider alone, must determine what services the child requires. If a provider is unwilling or unable to provide some or all of those services, the SAU is obligated to look elsewhere for them or else provide alternative measures, rather than simply modifying the IEP so the services required match what the provider is willing and able to offer. It would be appropriate for special education directors to issue guidance to this effect to their staff, and for DOE to enlist the cooperation of DBVI and CCME in issuing guidance to their staff with respect to MUSER's requirements for evaluation reports.

Allegation #5: Failure to ensure that evaluations for children who are blind or visually impaired are being conducted in a timely manner and in accordance with procedures set forth in the Maine Unified Special Education Regulations in violation of 34 CFR §§300.306 and 303.322 and MUSER §V

VIOLATION FOUND

As with the immediately preceding allegations, the results of the investigation suggest that SAUs' experiences vary as to whether evaluations are completed in time, with the majority of directors not reporting a problem. Some of the directors described having had to go outside the CCME (in some cases reluctantly) to obtain a timely evaluation. There is likely a common misconception that the SAUs are entitled to have CCME perform the evaluation, however long that might take. Guidance is required here to ensure that the SAUs understand that it is their obligation to comply with regulatory time lines; if CCME informs them that there will be a delay in conducting an evaluation, they must pursue getting an evaluation elsewhere, even though it will represent additional cost to the SAUs. This guidance should be coupled with information regarding the location of other sources for evaluations.

There is a further, wide-spread problem in the area of evaluations conducted by CCME. At present, according to Ms. Small, there is one person conducting most of the evaluations in the State, and she is so busy that she doesn't have time to attend meetings. Instead, she makes a determination whether the child does or does not need services and sends a report. As discussed above, it is the IFSP/IEP team's responsibility to determine eligibility for services, regardless of what conclusion is stated in the report. Even where the eligibility determination is properly being made by the team, however, the unavailability of the evaluator to attend the IFSP/IEP team meeting where that determination is being made results in a violation of the requirements of MUSER §§VI.1.B(1)(e)(IFSP team meetings must include a person directly involved in conducting the evaluation) and VI.2.B(6)(IEP team meetings must include a person who can interpret the instructional implications of evaluation results). Here again,

interagency cooperation may be useful in addressing this problem in order to find a solution that would permit the evaluator to attend meetings and the SAU to comply with the law.

VIII. Corrective Action Plan

The DOE shall identify appropriate personnel who shall proceed immediately to review the educational files of each child/student on the CCME waiting list as of the date of this report, convene and confer with the IFSP/IEP team of each such child/student in order to bring about the completion of any required evaluation, determine what services the child/student presently requires, and take whatever actions are necessary to secure provision of those services. At the IFSP/IEP team meeting, in addition to the representative of the SAU who is authorized to obligate the SAU's fiscal resources, the DOE representative shall be authorized to obligate State fiscal resources.

The DOE shall also provide training to the special education field regarding the responsibility of the SAUs for delivery of EIS/FAPE to BVI children/students, and of the responsibility of the IFSP/IEP teams for evaluation, determination of eligibility and services, regardless of the participation of DBVI and/or CCME in their children/students' care. A list of qualified alternative service providers, both within and outside the State, shall be generated and shared with SAUs as part of that training.

Following the completion of training, the DOE shall require that, for every child/student whose IFSP/IEP includes provision of BVI services, the child/student's SAU shall convene the IFSP/IEP team to review the IFSP/IEP in light of the training and any subsequent evaluation reports, to make any necessary changes to the services identified in the IFSP/IEP, and to determine the steps to be taken in order to secure those services. Documentation shall be submitted to the DOE by the SAUs in the form of Written Notices and, where appropriate, new or amended IFSP/IEPs.

The DOE shall further direct the DOE Special Services Team to convene a task force with the goal of reviewing the current system for delivery of BVI services to the BVI child/student population in the State of Maine and delivering to the DOE, within 60 days, a plan of action to be implemented by the DOE. The plan of action shall include measures to ensure the completion of BVI evaluations within the regulatory time frame and the provision of FAPE to all BVI children/students, and shall further identify the resources which must be put in place in order to accomplish those goals.