

Complaint Investigation Report
Parent & Parent v. Franklin County CDS

April 26, 2010

Complaint #10.076C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parent & Parent
Address
City, Zip

Respondent: Ed Ferreira, Board Chair
Franklin County CDS
115 Learning Lane
Farmington, ME 04938

Site Director: Greg Armandi

Child: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on March 16, 2010. The Complaint Investigator was appointed on March 17, 2010 and issued a draft allegations report on March 18, 2010. The Complaint Investigator conducted a complaint investigation meeting on April 5, 2010, resulting in a set of stipulations. On April 8, 2010, the Complaint Investigator received a four-page memorandum and 42 pages of documents in support of the allegations from the advocate for the Parents and on April 5, 2010 received 24 pages of documents and a 2 page memorandum from Respondent, Franklin County CDS (the "Site"). Interviews were conducted with the following: Julie Shibel, case manager; Jean Rouillard, speech therapist; Carla Phair, speech therapist; Susan Zimmerman, speech therapist; parent: and parent.

III. Preliminary Statement

The Child is xx years and was found eligible for early intervention services under the eligibility criterion of developmental delay on May 20, 2008. This complaint was filed by the Child's parents (the "Parents"), alleging violations of the Maine Unified Special Education Regulations, Chapter 101, as set forth below.

IV. Allegations

1. Failure to fully provide early intervention services in conformity with the Child's IFSP by failing to provide speech/language sessions during school vacations in violation of MUSER §X.1.

V. Stipulations

1. The CDS site, for its Part B children, observed the school district's vacation schedule: from December 24, 2009 until January 4, 2010; and from February 15 until February 22, 2010.
2. The Child did not receive speech therapy on three scheduled dates (December 23, 28 and 30, 2009) during the period from December 23, 2009 until January 4, 2010.
3. The Child did not receive the two speech therapy sessions scheduled during the period from February 15 until February 19, 2010.
4. During the months of December 2009, January 2010 and February 2010, the Child received 29 of 39 scheduled speech therapy sessions.
5. The CDS site faxed to the Parents a consent form for release of information to a new speech therapy provider (Ms. Rouillard) on December 21 and 22, 2009; the CDS site received the signed consent form on December 28, 2009.

VI. Summary of Findings

1. The Child is xx years old and lives in Dixfield with her parents and her sister. She was found eligible to receive early intervention services under eligibility criteria of developmental delay on December 9, 2008.
2. The Child's IFSP team, on August 27, 2009, determined that the Child should receive speech/language therapy 3 times per week for 1 hour per session.
3. At the start of December 2009, Carla Phair was providing speech language therapy services to the Child twice a week during weekdays, and Susan Zimmerman was providing speech language therapy services to the Child once a week on Saturday.
4. Due to the fact that the Child's schedule changed so that the Child was at different locations during the week, making it difficult for Ms. Phair to consistently deliver services twice each week, the IFSP team decided on December 18, 2009 that Ms. Phair should be replaced by Jean Rouillard, a speech/language therapist whose schedule was more flexible.
5. On December 21, 2009, and again on December 22, 2009, Ms. Phair faxed to the Child's mother at her place of work an authorization for Ms. Phair to release information to Ms. Rouillard so that she could discuss with Ms. Rouillard her work with the Child. The Parents returned the authorization form to the Site on December 28, 2009.
6. Ms. Phair informed the Parents that she was unable to provide services on the scheduled date of December 23, 2009 due to an issue with her own child's medical condition. The next two scheduled dates for service were December 28 and 30, 2009. Ms. Phair believed that Ms. Rouillard was responsible for providing services on those dates.

7. In order for Ms. Rouillard to start providing services, her agency (Androscoggin Home Care) required an order for services from the child's doctor. This order for services was not received by the agency until December 28, 2009. On December 30, 2009, Ms. Rouillard contacted the Parents and offered to provide one session before the end of that week, but the Parents opted to begin her services the following week.

8. During the week of February 15, 2010, when the public schools were closed for vacation, Ms. Rouillard took a family vacation and did not provide the two sessions of service to the Child during that week. These are the only two sessions that Ms. Rouillard has cancelled since she began as a provider to the Child. The two sessions were not made up by Ms. Rouillard.

9. During an interview conducted by the Complaint Investigator with Susan Zimmerman, Ms. Zimmerman stated that, starting in December 2009, she has been providing speech/language therapy to the Child on Saturdays. She is a year-round, part-time employee of the Site, and is expected to work during school vacation periods. She kept her appointment with the Child during the February 2010 vacation week. She did, however, tell the Parents that she would not have her session with the Child on December 26, 2009 because it was the day after Christmas and she was taking it as a vacation day. The Parents didn't seem to have a problem with that, and did not ask her to make up that session. There have been several times when she arrived for a session with the Child and the Child was too tired to work, so she decided not to proceed with the session. On those occasions, she has offered to make up the sessions, but the Parents have declined the offer.

She has definitely seen progress in the Child's speech/language skills since December 2009, although the progress has been slow. Given the regressive nature of the Child's condition (the Child has Rhett's syndrome, a deteriorative genetic disorder), she considers anything better than a loss of progress to be a positive outcome. The Child is making sounds a little more, putting two or three sounds together in a chain. The Child's joint attention (paying attention to what someone interacting with her is paying attention to) has gotten fairly consistent. The Child has also gotten better at getting food into her mouth, and will attempt to spoon feed herself.

10. During an interview conducted by the Complaint Investigator with Jean Rouillard, Ms. Rouillard stated that she has been providing speech/language therapy to the Child twice a week, beginning early in January 2010. She is a full-time employee of Androscoggin Home Care, and is allowed a certain number of vacation days per year. Her agency received this referral on December 23, 2009, but the agency needed an order for services from the Child's doctor before they could start providing services. The order from the doctor didn't come in until December 28, 2009. On December 30, 2009, she left a message for the Parents (recorded in her phone log) and told them she was available to begin providing services, planning to work with the Child the next day. The Child's father returned the call and scheduled the first session for the following week.

She has school-aged children, and was out of town on a family vacation during the week of February 15, 2010. She never received a request from the Parents to make up the sessions from that week. If the Parents had requested her to make up the sessions, she would have tried, but she would have needed a physician's order saying that the Child could have more than two weekday sessions in a week. It is not standard or customary for therapists to make up sessions when they go away.

Those two sessions are the only ones she has missed since she began with the Child, although the family has missed three appointments in that time. When the Parents call to cancel a session, they don't ask to make up the session at another time. She is not going away during the school vacation period in April, and she expects to have her regular sessions with the Child during that week.

The Child has definitely improved during the time she has been working with her. The Child has shown improvement with chewing and with feeding herself. The Child is also handing pictures to her when the Child wants something, and the Child is more often reaching for things.

11. During an interview conducted by the Complaint Investigator with Carla Phair, Ms. Phair stated that she is a speech/language therapist and a year-round employee of the Site, and she worked with the Child from September 2009 until December 21, 2009. She was supposed to provide two therapy sessions to the Child per week, but was having difficulty meeting this obligation because the Child changed her location frequently. On some days, the Child was with the Child's grandmother in Rumford Center, and she didn't have enough time in her schedule to travel that far. It would have meant that she would have to cancel sessions with other children. On December 18, 2009, the child's IFSP team met to discuss changing providers to someone who had more flexibility in her schedule. She had spoken with Ms. Rouillard prior to the meeting, who told her that she had that kind of flexibility. The Parents agreed to this change, and she contacted Ms. Rouillard to tell her this news and asked her to call.

On December 21, 2009, she told the Child's mother that she would have to cancel the session on December 23, 2009 due to her own child's medical condition. She also told the Child's mother that she needed a signed authorization in order to be able to share information with Ms. Rouillard, and that she would be faxing the authorization to her that day. She called later that day to tell her the fax was being sent. When she didn't get the signed authorization back from the Parents, she faxed another one on December 22, 2009. The Site didn't receive the signed authorization until December 28, 2009. She believes that if they had received it sooner, then services with Ms. Rouillard would have started sooner.

She didn't provide sessions to the Child on December 28 or 30, 2009 because she believed that she was no longer in the picture as Ms. Rouillard had assumed responsibility for providing services. Had she thought otherwise, she could have provided services to the Child. She provided services to other children during that week, although she canceled some sessions because she took vacation time.

In general, children from birth through two years of age receive services from the Site on a year-round basis, including during school vacations. This is the Site's policy, it is in the providers' contracts and has been the subject of Administrative Letters from the Department of Education. Sometimes staff members take breaks during school vacation periods; she herself might take a few days off to be with her family. When she takes days off, she tries to make up those sessions later in the week, if possible.

12. During an interview conducted by the Complaint Investigator with Julie Shibel, Ms. Shibel stated that she is a year-round employee of the Site, and is the Child's case manager. She recalls that during the December 18, 2009 IFSP team meeting, the Child's mother agreed to have Ms. Rouillard take over from Ms. Phair, but asked that services be continuous during the transition. She assured the Child's mother that they would be. The Child's mother called again the next week to make the same request, and again she assured the Child's mother that Ms. Phair would continue to provide services until Ms. Rouillard was able to take over.

She was at work during the December 2009 school vacation period, as were all part C employees at the Site. During this time, she believed that Ms. Rouillard was being delayed in getting started with the Child due to the delay in the Parents returning the signed authorization form. She was not aware that Ms. Phair was not providing services at that point. Had the Parents called her, she would have spoken with Ms. Phair about this.

13. During an interview conducted by the Complaint Investigator with the Child's mother, the Child's mother stated that at the December 18, 2009 IFSP team meeting, there was discussion of switching off to another speech/language provider because the Child goes to different locations and Ms. Phair was having difficulty getting to all those locations. At the meeting, she said that she was okay with the proposal, but she wanted to make sure that there would be no gap in services to the Child during this transition; she wanted it to be seamless. Ms. Shibel said that there would be no gap. She also called Ms. Shibel the next week to make sure that the Child would continue receiving services from Ms. Phair until Ms. Rouillard was ready to begin working with the Child, and Ms. Shibel reassured her that Ms. Phair wouldn't just drop the Child from her roster.

When the Child didn't receive services on December 23, 28 and 30, she didn't call Ms. Phair because she believed that Ms. Phair was on vacation during that period. Ms. Phair has a child and she didn't have day care for that child during the vacation. She also didn't call Ms. Shibel during that time because it was vacation week and she believed that Ms. Shibel would not be working. The Child has one other provider from the Site who provides developmental therapy. The developmental therapist provided one of his sessions to the Child that week, but cancelled the other one due to the vacation.

Ms. Rouillard cancelled her sessions during the week of February 15, 2010 because she took a family vacation, and the Parents were not going to tell her she wasn't allowed to do that. These have been the only sessions that Ms. Rouillard has cancelled. The developmental therapist provided only one of the two sessions during that week, because he didn't have day care coverage for his own child on the other day. Usually when a provider misses a session, the provider tries to make it up later in the week. Since Ms. Rouillard was out the entire

week, this couldn't happen. There were two occasions when Ms. Phair had to cancel a session and offered to make it up later in the week.

With regard to the authorization form, it was faxed to her at her place of work, and she was unable to fax it back because employees are not supposed to use the equipment for personal business. She eventually mailed it back. She didn't realize that not getting it back would result in the Child missing services; she believed that Ms. Phair would continue to provide services. Had she thought otherwise, she would have driven the form over to the Site that same day.

She does not believe that the Child has made progress in terms of feeding herself or chewing. In fact, the Child has lost skills in this area compared to a year ago. She doesn't see any improvement in the Child's making sounds; when the Child is in a good mood, she is more apt to string sounds together, and this hasn't changed. There has been some improvement in the Child's reaching for objects and handing pictures to the Parents, but only when they initiate it. She believes that the relative lack of progress in the Child's speech and language development is due to the missed sessions and to the fact that Ms. Rouillard is the first therapist who has worked on these skills.

14. During an interview conducted by the Complaint Investigator with the Child's father, the Child's father stated that he has no recollection of speaking with Ms. Rouillard on December 30, 2009. He believes that the first time he spoke with her was in early January 2010.

VII. Conclusions

Allegation #1: Failure to fully provide early intervention services in conformity with the Child's IFSP by failing to provide speech/language sessions during school vacations in violation of MUSER §X.1

NO VIOLATION FOUND

The Child's IFSP provides for the delivery of speech/language therapy to the Child three times per week. MUSER §X.1.A(3) states that the IFSP of a child from birth through two years of age is to be written on the basis of a 12 month program year, so that there is no built-in expectation that services will not be delivered during periods when the public schools are closed for vacation. The parties have stipulated that there were three sessions missed in late December 2009 and two during the week of February 15, 2010. Both of those time periods correspond to school vacation periods. The Parents characterize these events as "systemic canceling of sessions during school vacations," and contend that, where implementation of an IFSP is disrupted as the result of "anticipated breaks in services such as school vacations," the Site is legally obligated to make up those services. The Parents further contend that the failure of the Site to make up missed sessions violates the requirement of a "good faith effort" required under 34 CFR §303.346.

As a factual matter, only the two missed sessions during the February school vacation period were vacation-related. December 23, 2009 was the day before the scheduled school vacation, and the session on that date was in any event cancelled by Ms. Phair for reasons related to the health of her own child. The fact that sessions did not take place on December 28 and 30, 2009 was the result not of vacation schedules, but of a lack of coordination between the two providers. Ms. Phair assumed that Ms. Rouillard was taking over beginning on December 28, 2009, when Ms. Rouillard's agency only that day received the doctor's order for service and it took two more days for Ms. Rouillard to contact the Parents. Had the Parents contacted Ms. Shible during that week, the Child might have received the two sessions in question. The Child still could have received one session that week when Ms. Rouillard offered on December 30, 2009 to begin providing services. The Parents did not respond to that offer until the following week.

The facts uncovered through this investigation simply do not support the Parent's assertion that there is a "systemic" nature to the cancelling of therapy sessions during school vacations. The providers in question are hired on a year-round basis, and there was no evidence of an understanding, explicit or implicit, that sessions were not expected during school vacation periods. To the contrary, the providers expressed their understanding that sessions were normally to be held during these periods, and their scheduling of vacations was an individual decision.

Regardless of the presence or absence of a systemic policy, the missed sessions represent a technical failure to implement the Child's IFSP. The question arises, then, whether this technical failure to implement amounts to a legal violation. Among the courts that have considered the issue of when a failure to fully implement the provisions of a child's educational program amounts to a legal violation,¹ the Ninth Circuit, in *Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007), has provided the most cogent standard for assessing such claims. The court stated that "there is no statutory requirement for perfect adherence to the IEP nor any reason noted in the statutory text to view minor implementation failures as denials of a free appropriate public education." *Id.* at 821. The court held that only a "material failure" to implement an IEP violates the IDEA, stating that a material failure occurs "when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.* at 822. The court went on to note that, although "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail..., the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.* Applying this standard, the Montana State Educational Agency declined to find a violation of IDEA where the evidence presented was undisputed that the child in question had made dramatic progress, despite the fact that the child's school district had failed to provide nearly half of the speech therapy sessions called for in his IEP. *In re: Student with a Disability*, 6 ECLPR 79 (2009).

¹ The decisions in question all deal with IEPs of school age children; none were discovered that involved an IFSP. In the absence of any contrary authority, what distinctions exist between the two (IEP and IFSP) are not such that a different implementation standard would appear warranted.

The two sessions missed in February and the two missed in December (an attempt having been made to provide the third) constitute minor discrepancies in the implementation of the Child's IFSP. As is evident even from the brief history provided above, any number of events arise (both on the part of providers and families) which can interfere with the providers' ability to deliver services. Perfect adherence to the schedule of services, however, is not the applicable legal standard. *See Van Duyn v. Baker School District 5J, supra.* Something more than mere imperfection is required.

Indeed, the Parents attempt to further support their claim of violation by reference to the requirement of 34 CFR §303.346 that each agency or person directly involved in providing services make "a good faith effort" to assist the child in achieving the outcomes set forth in the IFSP. Nothing uncovered in this investigation, however, remotely suggests a lack of good faith effort. The brief gap in services in December was the result of miscommunication and unwarranted assumption on the parts of all the participants. As for the one week in February when services were not delivered, the Child's mother acknowledges that even providers are entitled to take vacations. There was nothing presented to suggest that any provider was abusing this privilege (Ms. Rouillard, for example, will not be taking time off during the April vacation period). Although the reports on the Child's progress were mixed, the Child also has a condition which makes progress particularly elusive. Relative lack of progress does not, in this case, appear to be the result of a lack of good faith effort on the parts of any provider.

VIII. Corrective Action Plan

None is required.