

Complaint Investigation Report
Parents v. Sanford

December 9, 2010

Complaint #11.032C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parents
Address
City, Zip

Respondent: Elizabeth St. Cyr, Superintendent
917 Main St.
Sanford, ME 04073

Special Education Administrator: Stacy Bissell

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on November 3, 2010. The Complaint Investigator was appointed on November 4, 2010 and issued a draft allegations report on November 8, 2010, subsequently amended on November 10, 2010. The Complaint Investigator conducted a complaint investigation meeting on November 22, 2010 (rescheduled from the original date of November 16, 2010 at the request of both parties), resulting in a set of stipulations. On November 22, 2010, the Complaint Investigator received 24 pages of documents from the Complainants, followed by a memorandum of two pages and 5 additional pages of documents on November 30, 2010 and a seven-page document on December 2, 2010, and received a 7-page memorandum and 27 pages of documents from the Sanford School Department (the "District") on November 30, 2010. Interviews were conducted with the following: Stacey Bissell, special education administrator for the District; Betsy St. Cyr, superintendent for the District; Tracy Pariseau, IEP Coordinator for the District; Crystal King, administrative assistant for the District; the Student's mother; and the Student's father.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Autism. This complaint was filed by the Parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide a copy of the Student's IEP to the Student's parents within 21 days of the IEP Team meeting at which the IEP was developed in violation of MUSER §IX.3.G;
2. Failure to consider the results of the student's audiological evaluation and appropriately revise the IEP in violation of MUSER §VI.2.J(5);
3. Failure to sufficiently identify the additional evaluation data needed to determine whether the Student needed additions or modifications to special education and related services in the nature of a FM system in violation of MUSER §V.3.A(2)(d);
4. Failure to obtain parental consent before disclosing personally identifiable information to third parties in violation of MUSER §XIV.11.

V. Stipulations

1. The evaluation report of Yvonne Michaud was mailed to the Parents without the inclusion of certain additional recommendations.
2. The Parents subsequently received Ms. Michaud's complete report at least three days prior to the November 15, 2010 IEP Team meeting.

VI. Summary of Findings

1. The Student lives in Sanford with her siblings and the Parents, and is presently attending xx grade at Sanford High School. She began receiving special education services under the category Autism through CDS prior to entering school.
2. During the summer of 2010, the Student complained of ringing in her ears and hearing loss, apparently associated with exposure to very loud music. Some time in August, 2010, the Parents asked the District to set up an emergency IEP Team meeting to address these complaints. The Parents were told that, as a practical matter, it would not be possible to convene a meeting during the summer vacation period, and that a meeting had already been scheduled for September 9, 2010. The Parents were also told that the IEP Team would need documentation of the Student's condition in order to consider what services the Student required.
3. The Parents scheduled an audiological exam for the Student with Northeast Hearing and Speech in Portland, Maine on August 24, 2010. The report of the exam, written by Cindy Hyman, M.A., CCC-A, referenced the Student's complaints, including that she "has some difficulty hearing and focusing on the teacher" in the academic setting, and that "background

noise is distracting.” The test results were reported as normal, with the impression that the Student’s “peripheral hearing and middle ear function are within normal limits.” The report went on to note that there is a difference between peripheral hearing and auditory processing, that it is not uncommon to see auditory processing difficulties in people with Asperger’s Syndrome, and that “use of FM may help [the Student] to focus on the teacher’s voice and be less distracted by other sounds in the room.”

4. Among the recommendations in the report were consultation with an ENT physician and consideration of a trial with an FM system. An FM (frequency modulating) listening system lets a teacher talk into a hand-held microphone, which transmits the sound of the teacher's voice directly to a hearing impaired student's hearing aid.

5. The Parents submitted the audiological evaluation report to the District and, on September 2, 2010, asked Ms. Bissell whether the District would agree to provide an FM system based upon the recommendations in the report. Ms. Bissell told the Parents that the audiological evaluation report did not provide sufficient information regarding the Student’s condition to enable the Student’s IEP Team to order that service. The Parents again requested that an IEP Team meeting be scheduled right away, and were told that, as a practical matter, a meeting could not be convened any earlier than September 9.

6. On September 9, 2010, the Student’s IEP Team met and considered the Parents’ request for an FM system to support the Student with her hearing problem. The Team felt that the data in the audiological report was insufficient to support a determination as to what, if any, services the Student needed, and determined to order a speech and language evaluation. The Parents gave written consent for this evaluation at the meeting. The Team also decided that the Student would continue to receive special education services on a consultation level. The Written Notice of the meeting was prepared and sent to the Parents on the day of the meeting.

7. After the meeting, the District developed an IEP for the Student with an effective date of September 8, 2010. In the section titled “Present level of academic and functional performance,” the IEP states that the Student “is having some difficulty with her hearing, and is undergoing evaluations to determine the extent of any loss she may be experiencing.” The IEP indicates that it was sent to the Parents on October 5, 2010. On that date, the District put the IEP into the mail for delivery to the Parents.

8. On September 22, 2010, a speech and language evaluation of the Student was conducted by Yvonne Michaud, M.S., CCC/SLP. Ms. Michaud concluded that auditory processing was an area of weakness for the Student which could negatively impact the Student’s classroom performance, particularly in the presence of background noise. Ms. Michaud provided certain strategies for auditory processing deficits, and stated that the Student might benefit from the use of an FM system.

9. The Student’s IEP Team met again on November 15, 2010, reviewed Ms. Michaud’s report and a note from a neurologist, Dr. Dolan, who had reviewed the Student’s audiological report, and determined to conduct a trial with the Student using an FM system in all academic classes until the end of the first semester (January 21, 2011).

10. On November 8, 2010, while the Student's mother was acting as a substitute teacher in one of the classrooms in the high school, she was visited by Tracey Pariseau, IEP coordinator for the District. The Student's mother stepped out of the classroom, and she and Ms. Pariseau discussed something relative to the Student's IEP meeting or IEP.

11. During an interview conducted by the Complaint Investigator with Betsy St. Cyr, Ms. St. Cyr stated the following: She is the District superintendent. Sometime in late August or early September, she received from Ms. Bissell a page from an audiological report on the Student and spoke about it with Ms. Bissell. The report mentioned an auditory processing disorder, but the District didn't have any data supporting that. The audiological report was the only data the District had. There was no comprehensive evaluation. She and Ms. Bissell agreed that the IEP Team was going to have to decide what additional data was necessary.

Soon afterward, she received an e-mail from the Parents that referred to a problem the Student had with "white noise." She didn't know what that was based on; it wasn't in the audiological report.

12. During an interview conducted by the Complaint Investigator with Stacey Bissell, Ms. Bissell stated the following: She is the special education administrator for the District. Ms. King told her around August 24, 2010 that the Parents wanted a special education meeting as soon as possible. There was already a meeting scheduled for September 9, 2010, and this request was made during the summer vacation, so that it would be difficult to get all the necessary team members together. On September 2, 2010, the Student's mother brought in the audiological evaluation. Prior to this, the Student had never reported any issue with her hearing. From the report, it appeared to her that there had been an acute episode over the summer, and by the time of the evaluation it had resolved. The report showed that the Student's hearing was normal, but it also contained discussion about auditory processing.

The Student's mother said she wanted the Student to have a FM system. She told the Student's mother that the information in the report was not sufficient to meet educational requirements - that the District needed more than just the one report. She tried to explain the difference between medical and educational standards, and that just because a doctor writes something on paper doesn't mean it satisfies educational criteria. She also told her that she had shared the report with Ms. St. Cyr, who agreed that it was not sufficient by itself. She said that the IEP Team would have to consider what additional information was needed. The Student's mother said that she wanted that meeting to happen in the next 24 hours. She explained to the Student's mother that the September 9 meeting was only 4 working days away, and that she couldn't get the IEP Team together for a meeting any faster than that.

Some time after the meeting, she was reviewing the minutes of the September 9 meeting with Ms. Pariseau, and she suggested to Ms. Pariseau that the Parents might want to have a copy of them. She asked Ms. Pariseau to find out if the Parents wanted them.

The first time she became aware that the Parents claimed not to have received the Student's IEP was at the November 15, 2010 IEP Team meeting.

13. During an interview conducted by the Complaint Investigator with Tracy Pariseau, Ms. Pariseau stated the following: She is the IEP coordinator for the District. She was responsible for coordinating the September 9, 2010 IEP Team meeting for the Student. About five minutes before the meeting, Ms. Bissell told her that the Parents would have an audiological evaluation report to share with the Team. She responded that she wasn't an audiologist, would not be qualified to interpret the results, and wasn't expecting to have anyone present at the meeting who was so qualified.

The Student's mother did bring up the subject of the audiological evaluation towards the end of the meeting and read some of the report, saying that the Parents were also planning to bring the Student to a neurologist. She told the Parents that the Team would consider those evaluations, but that the District would conduct its own evaluations as well. The Team determined to have the Student undergo a speech and language evaluation as a first step to address the Parents' concerns about the Student's auditory processing. The Parents signed the consent form at the meeting, and right after the meeting she went to Ms. Michaud to alert her that a referral on the Student would be coming soon.

On November 8, 2010, she was going over the September 9 meeting minutes with Ms. Bissell, who noted that there was information in the minutes that did not make it into the Written Notice. Ms. Bissell thought that the Parents might want a copy of the minutes, and she asked her to find out if the Parents wanted them. She called the Parents' home and left a message, but then someone told her that the Student's mother was in the building working as a substitute teacher. She looked into the classroom where the Student's mother was working and it looked like the class was taking a test, so she knocked on the door of the classroom and gestured for the Student's mother to come out of the room. At first, the door was open but, after a moment, she asked the Student's mother to shut the door. She told the Student's mother about the minutes, and the Student's mother said that she would like to have them. She asked if the minutes should be handed to her or put in the mail, and the Student's mother asked for them to be mailed. They were speaking very softly. There was no discussion about the IEP, only about the IEP Team meeting minutes.

14. During an interview conducted by the Complaint Investigator with Crystal King, Ms. King stated the following: She is the IEP special education administrative assistant, grades 7-12, for the District. With regard to the processing of an IEP, once she is notified by a student's case manager that the student's IEP has been developed, she notifies Ms. Bissell that the IEP is ready for her to review. As soon as Ms. Bissell informs her that she has approved it, she puts a lock option on it (to prevent it from being altered), prints it out, delivers a copy to all staff members that need to have it and mails it to the parents.

This same process was followed for the Student's IEP. In early October 2010 she heard from the Student's case manager that the IEP was ready and notified Ms. Bissell. On October 5, 2010, after Ms. Bissell notified her that the IEP was approved, she typed in the delivery date on the first page, locked it in, made copies and prepared it for delivery to the Parents. She then put the Parents' copy in the mailbox outside the Springvale post office. She specifically remembers this because that was her grandmother's birthday, and she mailed a card to her

grandmother at the same time. The Parents never notified the District that they had not received the IEP until the November 15, 2010 meeting.

At the end of August, the Student's mother came to her and asked whether an emergency IEP Team meeting could be scheduled. She told the Student's mother that this would not be possible because there weren't enough staff members available at that time, and she reminded her that there was already a meeting scheduled for September 9, 2010 (which was the third full day of school after summer vacation). At some point, she had a conversation with the Student's mother who said she was taking the Student to an outside medical provider and wanted to know what kind of information the District would need. She told the Student's mother that medical reports generally had to contain a diagnosis, approximate duration of the illness, limitations as a result of the illness plus any other relevant information, and must be on a doctor's letterhead. Also at some point, the Student's mother handed her the audiological evaluation report and said it was for the IEP Team meeting. She date stamped it and put it in the folder for the September 9 meeting.

On September 2, 2010, the Student's mother came to the office and found both her and Ms. Bissell getting ready to go to a meeting. The Student's mother asked whether Ms. Bissell had seen the evaluation. There was some confusion about what evaluation the Student's mother was referring to, but once Ms. Bissell understood she meant the audiological report, Ms. Bissell told the Student's mother that she had looked at it. The Student's mother asked whether the District would agree to provide an FM system to the Student, and Ms. Bissell said that there wasn't enough information to warrant providing an FM system. The Student's mother became belligerent, said that she didn't believe that Ms. Bissell had read the report, and that she would speak with Ms. St. Cyr about it. Ms. Bissell told the Student's mother that she had already spoken with Ms. St. Cyr about the report, and that Ms. St. Cyr agreed that the report did not provide enough information to justify provision of the FM system. The Student's mother asked what other information the District might need, and Ms. Bissell said she had no idea – the report was just one piece of information, and didn't present the whole picture.

Prior to this occasion, she had never had any problem with the Student's mother. The Student's mother would come to the office and speak with her, without ever asking to see or speak with Ms. Bissell. All of her conversations have been with the Student's mother; she has never spoken with the Student's father.

15. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: The Parents never received the Student's IEP until they went to the November 15, 2010 meeting. The parents received an IEP for one of the Student's siblings around October 23, 2010, and that sibling's IEP Team meeting had also taken place on September 9, 2010. The next day after she received the sibling's IEP, she spoke to Ms. King and told her that they had still not received the Student's IEP. Ms. King said she would look into it.

A week or so later, Ms. Pariseau came to the classroom where she was substitute teaching and asked her to come outside and speak with her. Ms. Pariseau was apologetic, saying there had

been some kind of computer glitch that prevented her from preparing the Student's IEP, and that it was now being typed up. Ms. Pariseau asked whether she wanted to have the IEP delivered in person or mailed to her, and she said she wanted it to be mailed. When they began this conversation, the door to her classroom was open. After Ms. Pariseau had already referred to the IEP, Ms. Pariseau asked her to close the door to the classroom. She didn't think she should close it completely because she had to monitor what was happening in the classroom, so she left her hand on the door. The two of them spoke in a normal tone of voice. She could hear the students in the classroom, so she assumes the students could hear her and Ms. Pariseau.

At the beginning of August 2010, she went to Ms. King and described her concerns with the Student's hearing. She told Ms. King that she had contacted the Student's pediatrician, and she wanted things to be ready for the Student when the school year began. She told Ms. King that the Parents didn't yet know what was going on with the Student's hearing, and Ms. King said that the District needed to know this information. Ms. King said there was nothing the District could do until the Student saw the doctor. She asked that an emergency meeting be set up, because she didn't want to wait two years for the Student to start getting the services she needed. She kept calling Ms. King and asking her what information the District was looking for, and she would answer that they didn't know until the Student saw the doctor. Several times she asked to speak with Ms. Bissell, and Ms. King said there was nothing to talk about until the Student saw the doctor.

After the Student saw the audiologist, she brought the report to Ms. King. The next day she went to the special education office and found Ms. Bissell about to go to a meeting with Ms. St. Cyr. She asked Ms. Bissell if she had gotten the paperwork. Ms. Bissell told her there was no way the District was going to pay for an FM system for the Student. She explained that there was an auditory processing issue in addition to the question of hearing loss, and Ms. Bissell denied knowing anything about that. She asked Ms. King if she had conveyed that information to Ms. Bissell, and Ms. King said there was nothing in writing about that issue. She reviewed the Student's history with regard to that issue, and she told Ms. Bissell that the audiologist had said that the Student's hearing had diminished significantly when she was tested with static in the background and that the Student's hearing levels were at the lowest end of normal. The audiologist had said that auditory processing was not in her area of expertise – it was a neurological issue - and she told Ms. Bissell that the Student was going to see a neurologist.

At the September 9, 2010 meeting, the IEP Team said that it wanted to review the neurologist's report at the next meeting, as well as an evaluation to be conducted by Ms. Michaud. She asked Ms. Pariseau what else the Team needed, and Ms. Pariseau said she didn't know. She was upset that Ms. Bissell wasn't present at the meeting, because Ms. Bissell might have been able to answer that question. Starting in August, the Parents kept asking staff members what the District requires in a situation like this, and they never got an answer. She feels that someone should have suggested the speech and language evaluation a long time before the meeting, so that it could have been available earlier.

16. During an interview conducted by the Complaint Investigator with the Student's father, the Student's father stated the following: Before the start of the current school year, in early August, the Parents went to the District and verbally requested an emergency IEP Team meeting to address the Student's hearing loss that developed over the summer. Ms. King told them that the District couldn't do that, because there already was a meeting scheduled for September 9, 2010. Ms. King said that the Parents would need to have some medical documentation of the hearing loss with a diagnosis.

They talked with the Student's pediatrician and she asked what kind of documentation the District was looking for. The Parents again spoke with Ms. King, and she said she had no idea what kind of medical documentation was needed, but said they needed something from a doctor or maybe an audiologist. The Student had an appointment with an audiologist scheduled for August 24, 2010, but they were very concerned that they have the right documentation at the September 9 meeting so that the Student would have support to help with her hearing right from the beginning of the school year. Ms. Bissell wouldn't talk with them; they always had to talk with Ms. King, even when Ms. Bissell was sitting in her office right behind where Ms. King was sitting.

After the Student saw the audiologist, the Parents gave the report to the District but they were still trying to find out if there was something else the IEP Team would need to look at. They wanted the school to provide the FM system recommended in the audiologist's report. He spoke with Ms. Bissell as she was leaving her office for a meeting, and she told him that Ms. St. Cyr had already decided that the Student would not be getting the FM system.

They discussed the audiological report at the September 9, 2010 IEP Team meeting, but there were questions about it; team members were not sure how to read it, and they would not agree to provide the FM system. He said he would try and get clarification of the report. The IEP Team decided that the Student should have a speech evaluation with Ms. Michaud. The Parents then brought the Student to a neurologist, Dr. Dolan, and he reviewed the audiological report and wrote a note. The Parents gave the note to the District.

The Parents never received the most recent IEP in the mail. When the Parents went to the IEP Team meeting on November 15, 2010, other team members had the IEP and they asked for a copy. That was the first time they ever saw it. Ms. King supposedly says she walked it to the post office on October 5, 2010, but their home is actually closer to the high school than is the post office; she could have just brought it to their home. Ms. King's statement also contradicts what Ms. Pariseau told the Student's mother in November, 2010.

VII. Conclusions

Allegation #1: Failure to provide a copy of the Student's IEP to the Student's parents within 21 days of the IEP Team meeting at which the IEP was developed in violation of MUSER §IX.3.G

NO VIOLATION FOUND

The Parents are very certain that they never received the IEP prior to the November 15, 2010 meeting; Ms. King is very certain that she mailed the IEP on October 5, 2010, within the 21 day regulatory period, which would have satisfied the District's legal obligation. The Student's mother states that Ms. Pariseau spoke with her on November 8, 2010 and apologized about not having completed the Student's IEP; Ms. Pariseau states that she was speaking only about the IEP Team meeting minutes. The U.S. Supreme Court has held that, in the context of a due process hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). The reasoning of that case applies equally well to the complaint investigation process, placing the burden of proof on the Parents. On the basis of the foregoing evidence, the Department cannot sustain a finding of a violation.

Perhaps more importantly, no evidence was uncovered that the Student suffered any harm from the delay in the Parents' receipt of the IEP. The District sent the Written Notice of the meeting to the Parents on the day of the meeting. There were no allegations that the IEP did not conform to the determinations stated in the Written Notice. Neither were there any allegations that the services set forth in the IEP were not being provided.

Allegation #2: Failure to consider the results of the student's audiological evaluation and appropriately revise the IEP in violation of MUSER §VI.2.J(5)

Allegation #3: Failure to sufficiently identify the additional evaluation data needed to determine whether the Student needed additions or modifications to special education and related services in the nature of a FM system in violation of MUSER §V.3.A(2)(d)

NO VIOLATION FOUND

Towards the end of the summer 2010, the Parents were understandably concerned about a possible hearing problem that could impact the Student's ability to access her education. At that point, however, nothing was known about the nature or extent of the hearing problem, including whether it was only temporary. When the Parents requested that the District convene an IEP Team at once to address the issue, the District appropriately pointed out that there wasn't enough information to enable the Team to make a proper determination. At that point, the problem appeared to be medical in nature, and the District rightly placed the responsibility for assessing it on the Parents. Rather than the guidance the Parents sought from the District as to what kind of information the Team needed, the Parents needed guidance from a physician as to what kind of examinations were needed to identify the nature of the problem and what limitations, if any, it might place on the Student. Furthermore, any decision as to what data the Team might need to enable it to make a determination about provision of services was a decision for the Team to make, not for the special education director.

The Parents then had the Student undergo an audiological evaluation, and again sought an expedited decision by the District to provide services to the Student. The report of the evaluation, however, found the Student's hearing to be within normal limits. Although the report referenced a possible auditory processing issue, and contained a recommendation for a trial with an FM system, the report did not indicate upon what data that reference and

recommendation were based. At the September 9, 2010 meeting, the IEP Team appropriately determined that any decision as to provision of an FM system would have to await the opportunity to review more data. The Parents said that the Student was scheduled to see a neurologist, and the Team determined to refer the Student for a speech/language evaluation. The District moved swiftly to provide the speech/language evaluation, and another meeting was scheduled at which the Team would be able to review the results of both the evaluations.

At that next meeting, on November 15, 2010, the Team reviewed the additional data and made the determination to provide the FM system. Although the Parents prefer that the process had moved more rapidly, it could not do so at the expense of the Team being able to make determinations based on adequate, reliable data.

Allegation #4: Failure to obtain parental consent before disclosing personally identifiable information to third parties in violation of MUSER §XIV.11
NO VIOLATION FOUND

Ms. Pariseau's discussion in a public place of the Student's IEP (or of the IEP Team minutes), even to simply say that it (or they) was (were) being typed up, constitutes a disclosure of personally identifiable information. Whether the information was disclosed to third parties, however, depends on whether any of the students in the classroom where the Student's mother was teaching overheard the conversation taking place outside the room at normal (or softer than normal) volume next to a door that was open only slightly. The Parents are not aware of any student who overheard the reference to an IEP. For the Department to question all of those students to discover what parts of that conversation, if any, they heard would only stir up unwelcome interest in the subject on the students' part. The Department chooses not to do so.

The Student's mother has expressed a clear preference that she not be approached in the school setting for anything connected with the Student's special education, and it is expected that the District will honor that preference.

VIII. Corrective Action Plan

As no violations were found, none is required.

IX. Recommendations

Although there were no findings of a legal violation, note is taken of a breakdown in communication and trust between the Parents and the District. It is hoped that, in the future, the District makes an effort to offer more assistance to the Parents, including helping them to understand the reasons for the District's decisions. For example, a message of "the decision about what kinds of medical examinations should be done to determine what is happening with the Student's hearing is for you to make together with the pediatrician" might have

sounded better than “we have no idea what additional information you need to give us.” At the same time, it is hoped that the Parents will listen to the District’s explanations and accept its assistance without unnecessarily assuming an adversarial position. The IEP process is designed to be a collaborative one between the District and the Parents, and it is in the Student’s best interest that it operates that way.