

Complaint Investigation Report
Parents v. RSU #21

June 19, 2011

Complaint #11.087C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainants: Parents

Address

City

Respondent: Andrew Doloff, Superintendent

87 Fletcher St.

Kennebunk, ME 04043

Special Services Director: Susan Mulsow

Student: Student

DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on May 11, 2011. The Complaint Investigator was appointed on May 12, 2011 and issued a draft allegations report on May 16, 2011. The Complaint Investigator conducted a complaint investigation meeting on May 23. On May 31, 2011, the Complaint Investigator received 29 pages of documents from the Complainants, and received a 3-page memorandum and 177 pages of documents from RSU #21 (the "District"). Interviews were conducted with the following: Susan Mulsow, director of student support services; Cheryl Walters, speech/language pathologist for the District; Tom Berry, CCC:SLP, speech/language pathologist for the District; Susan Joakim, teacher; Elizabeth Fagan, SLPD, speech/language pathologist; and the Student's mother.

III. Preliminary Statement

The Student is zz years old and is currently receiving special education under the eligibility criterion Specific Learning Disability. This complaint was filed by the parents (the "Parents"), the Student's parents, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to provide special education and related services in the nature of speech therapy sufficient to enable the Student to advance appropriately toward attaining her annual goals and to be involved in and make progress in the general education curriculum in violation of MUSER §IX.3.A(1)(d)(i).

V. **Summary of Findings**

1. The Student lives in Kennebunk with the Parents, and is presently attending xx grade at Sea Road School. She began receiving special education services under the category Specific Learning Disability in xx grade.
2. The Parents referred the Student for a special education evaluation in December 2007. Among the reasons given for referral were receptive language and articulation/speech. On the referral form, the Parents stated that the Student “can do fairly well when reading 1:1, but in classroom with regular noise and activity, she is unable to concentrate.”
3. A psycho-educational evaluation of the Student was performed by Donna Benjamin in February 2008, which revealed weaknesses with perceptual reasoning using only visual information, with low scores in processing speed and working memory. In a speech/language evaluation of the Student in March 2008, the Student’s scores on the Peabody Picture Vocabulary Test-4 and the Language Processing Test-3 were both within the average range.
4. At an IEP Team meeting on March 11, 2008, the Team determined that the Student met eligibility criteria for Specific Learning Disability, but did not meet eligibility criteria for Speech or Language Impairment.
5. An IEP was developed for the Student, dated March 11, 2008, which provided 2 hours per day of specially designed instruction from a special education teacher 5 times per week, along with several classroom modifications.
6. The Student’s IEP Team met again on January 21, 2009 and developed an IEP, dated February 11, 2009. The IEP provided 90 minutes of daily specially designed instruction in literacy and 60 minutes daily of specially designed instruction in math. Among the supplementary aids, services and modifications were the following: LiPS 1:1 instruction away from the group; and reduce noise and audio input. At the meeting, Ms. Walters agreed that she would perform a screening of the Student to look for a possible auditory processing issue, and the Student’s mother said that she was planning on making an appointment for the Student with an ENT doctor, citing the Student’s history of ear infections.
7. On May 5, 2009, the Parents had the Student evaluated by Cristin Scott-Richards, an audiologist, who administered 3 tests purportedly designed to evaluate the Student’s auditory processing skills. Ms. Scott-Richards recorded the following results: On the speech-in-noise test, the Student performed at 96% (right) and 92% (left), indicating no difficulty in the processing of speech when in the presence of background noise; on the Dichotic Digit test, which measures the ability to process information presented to both ears simultaneously, the

Student scored 16% (left) and 28% (right), indicating difficulty in understanding speech in background noise, or poor information transfer between the two brain hemispheres; on the pitch pattern sequence test, the Student scored 25% when the task was linguistically based, but 95% when changed to a non-linguistic task, possibly indicating poor information transfer between the two brain hemispheres. Ms. Scott-Richards diagnosed a central auditory processing disorder (“CAPD”), and recommended that the Student “obtain therapy that addresses phonemic decoding, auditory memory and clarification of the speech signal,” as well as accommodations such as preferential seating. Ms. Scott-Richards specifically recommended use of a multi-modality reading program such as LiPS or Fast ForWord.

8. The Student’s IEP Team met on September 30, 2009 to conduct the annual review, and considered the results of the audiological evaluation. The Student was reported to be reading at grade level, although her reading comprehension was two years below grade level. Barbara Thyng, a regular education teacher, reported that the Student was very sound sensitive, and could not filter the various sounds in the classroom from competing voices. Cheryl Walters, a speech/language pathologist for the District, reviewed the audiological evaluation, and discussed the impacts of CAPD and what accommodations could be made. The Team determined to reduce the Student’s reading instruction to 60 minutes daily, with additional classroom modifications provided. The Team further determined that the Student did not require speech/language services as her skills in that area were age-appropriate.

9. The Student’s IEP dated October 14, 2009 provided for 60 minutes daily of specially designed instruction from a special education teacher, as well as 30 minutes per week of social work services. Supplemental aids and modifications included 1:1 LiPS tracking instruction away from the group, noise reduction and classroom audio enhancement.

10. The Student’s IEP Team met on October 8, 2010 and discussed the Student’s triennial reevaluation. The Team determined to evaluate the Student in the areas of speech/language, OT, psychological, educational and assistive technology, and to expedite the evaluation process. The Team further determined that the speech/language pathologist would assess the most appropriate amplification system for the Student, and provide staff training on CAPD.

11. Tom Berry conducted the speech/language evaluation of the Student in October 2010, consisting of the following assessments: The Comprehensive Receptive and Expressive Vocabulary Test-2; the Critical Evaluation of Language Fundamentals-4 (CELF-4); the Comprehensive Assessment of Spoken Language; and the Comprehensive Test of Phonological Processing. The Student’s scores were below average in several of the assessment subtests administered. According to Mr. Berry’s report, the results of that evaluation revealed “notable weaknesses across a number of areas, particularly in the expressive mode.”

12. On November 4, 2010, the Student’s IEP Team met to review the results of the Speech/Language evaluation, and the Team determined that the Student qualified for speech/language services. The Student’s IEP was amended to include two ½ hour speech/language sessions and three 20 minute speech/language sessions per week. Additional classroom modifications were also added to the IEP.

13. The results of the Student's psychological and academic evaluation in November 2010 reflected that she had "made significant academic gains from previous three-year testing," with average overall reading scores. The Student scored significantly below average in writing, although content of writing was scored as average. According to evaluator Eileen Harris, Psy.D., the Student's "documented difficulties with language also impacted her performance in the passage comprehension test."

14. The Student scored in the "Proficient" range on the NECAP exams for reading in both xx grade and xx grade. On the NWEA reading assessment, the Student's percentile score improved from 8% in xx grade to 21% in xx grade to 50% in xx grade.

15. During an interview conducted by the Complaint Investigator with Tom Berry, CCC:SLP, Mr. Berry stated the following: He is a speech/language pathologist for the District, and he first became aware of the Student when he was asked to attend an IEP Team meeting to discuss the classroom amplification system being used to support the Student. He said that the wall-mounted system was a good one, and that the Student's teacher was using it consistently and appropriately. At the meeting, it was also decided that the Student should undergo another speech evaluation, which he conducted soon thereafter.

With regard to the Student's 2008 speech/language evaluation, the tests that Ms. Walters administered cast a wide net that would be expected to catch many kinds of problems that could then be followed up on. That no such problems were uncovered at the time, whereas the evaluation he performed 19 months later revealed problems in several areas, may have been due to the fact that what makes a student stand out as deficient in xx grade is different than for a xx grader. The language demands on a xx grader are much greater, so that a student might perform adequately at xx years old but then fail to develop at the same rate as her peers, and a significant gap appears at age xx.

When the Team reviewed the report of the May 2009 audiological evaluation, they saw that the District was already doing several of the things that were recommended. The Student was already working with the LiPS program, for example, whereas the District didn't have the Fast ForWord program. The Team decided to add several of the recommendations to the Student's program, while continuing to support the Student's language skills by other means.

In December 2010, at the request of the Parents, the District brought in a consultant with expertise in CAPD to give a staff-wide presentation. The presenter, Mary Louise Brozena, looked at the audiologists's report and said that it was a little limited in its scope, that she would have done other tests as well. She noted that the recommendation for ear plugs was antiquated and was no longer good practice. She felt that many of the recommendations did not need to be delivered by a speech therapist, but could be embedded in the Student's academic program.

Since November 2010, he has been working with the Student using the Earobics program, an interactive computer activity that provides auditory training (Earobics is one of those programs recommended in the 2009 audiological evaluation report). He agreed to come in early to work with the Student before the start of school. There are five different activities; on

one, the Student has advanced as far as possible, on two she is at an intermediate level, and on the other two (the two she finds most difficult) she remains at the beginner's level. The Student still has difficulty hearing sound boundaries between adjoining consonants. He also sees the Student for two 30 minute sessions per week, working on linguistic relationships and higher level language processing. They have also started working on activities to improve memory. The Student's speech/language goal was for her to reach a low average score on a word association task by October 2011, and she has already reached that goal. He expects the Student to do very well when he retests her using the CELF-4 in October.

He can't say what the impact has been of the work the Student is doing with Ms. Fagan. The Fast ForWord program works on the neurological processing of sound, but Fast ForWord by itself won't miraculously cure the Student's language deficits; she needs direct instruction in linguistic functions and conceptual relationships. Another factor is how the Student is feeling about herself. For example, as a result of the assistive technology evaluation, the Student has been using a computer-based program that helps her with her writing. The Student has been very pleased with it – it has taken some of the burden off of her – and she now says she wants to write a book.

Looking at the progress the Student has made over the last two years, she is doing pretty well. This is reflected in the results of the recent psycho-educational evaluation as well as the NEWAs. The Student still has processing and memory deficits and CAPD is a factor, but the Student has academic weaknesses in addition. The Student's progress is also impacted by two other factors. The Student can get moody, and when she becomes unhappy she tends to shut down. The Student also misses a lot of school for a variety of reasons. As of May 16, 2011, she had missed 25 or 26 days this year. She also misses some of her reading program when she goes to Ms. Fagan on Wednesdays. The Student has made progress despite all those things because of the support she is getting in her program. He cannot say that the fact that the Student did not receive speech therapy from May 2009 to November 2010 has delayed her or held her back.

16. During an interview conducted by the Complaint Investigator with Cheryl Walters, Ms. Walters stated the following: She is the speech/language pathologist for Kennebunk Elementary School and is also special education team leader for all the District elementary schools. Her first contact with the Student was in March 2008 when she conducted the initial speech/language evaluation. When the Student was referred, the Parents had a lot of questions and expressed a lot of anxiety over the Student's frustrations, but it wasn't clear what was causing the frustrations. She met with the Student's classroom teacher and the special education teacher to review the referral and plan the evaluation. One of the boxes the Parents checked on the referral form was "Articulation," and the classroom teacher said she had noted a few misarticulations, so the team decided to include a speech/language evaluation. Neither of the teachers, however, was seeing language problems, and she herself didn't see one when she observed the Student; it appeared that the most significant issue was that the Student wasn't "getting" (i.e., processing) information presented to her.

She decided that the most appropriate assessment for the speech/language evaluation was a language processing test. She also wanted to look at vocabulary, because if a student doesn't have the necessary vocabulary, she won't be getting the information she needs. When the

testing was completed, the team saw a pattern of strengths in verbal comprehension on the WISC-IV, with slow processing speed and low working memory. The Team decided that speech/language was not the area that was causing the problem, but that it was a learning disability.

She was invited to attend the Student's IEP Team meeting on January 21, 2009, where there was discussion about the Student possibly having an audiological processing issue. She agreed that she would perform a screening for that type of problem and, if it was confirmed, that the IEP Team would then consider a referral for an audiological evaluation. Before she had the chance to do the screening, she learned that the Parents had already made an appointment with Mark Hammond's office.

The IEP Team reviewed that audiology report at the September 30, 2009 meeting. The Team first noted that the Student's year had gotten off to a great start. The Team saw that the audiological evaluation had not contained a language component, but used only acoustic measurements. The tests, therefore, didn't reveal a language impairment, only an audiological impairment. The recommendations were for ways to help the Student environmentally, and some programming strategies like LiPS, which were already in place. The use of the word "therapy" in the recommendations was unfortunate, as she believes the Parents understood that term differently than a private provider would have. The report did not even use the words "speech/language" therapy. She believes that the results obtained on those tests were not a valid basis for recommending speech/language therapy, and that an audiologist is not qualified to make that recommendation. The Team used the speech/language eligibility form and determined that the Student was not eligible for speech/language services.

The Student's classroom had audio enhancement technology built in. She worked with the Student's teacher and changed the seating arrangement in the class. She emphasized pre-teaching and re-teaching strategies for the Student, as well as teaching the Student to focus on the teacher's face when she was speaking. She had been careful to make sure that the Student was placed in that particular teacher's class, because that teacher is very structured and very careful with her questioning and teaching. She speaks more slowly and coaches answers in ways that other teachers don't. She also instituted the use of a "talking stick" in the classroom. Only the person holding the stick is permitted to talk. This reduces the amount of competing sound in the classroom and eliminates multiple stimulation.

The score that the Student obtained on Mr. Berry's evaluation (77 on the expressive language subtest of the CELF-4) is at the beginning of the range showing a moderate language disorder. The CELF-4 subtests were addressed to the Student's specific weaknesses, involving auditory memory and visual perception. It is not at all certain, however, that if the Student had been tested using that measure in 2008 a similar result would have been obtained. The language demands on a child increase dramatically over time. There is also an emotional component, related to how hard the child tries before giving up.

She believes that the Student has made good progress. When the Student started school, she was reading at the beginning of her grade level (DRA level 10). Her last DRA measure was

at 40, showing that she has made steady progress. Both the Student's science and social studies indicators show that the Student is working securely at her grade level. Spelling, writing and math, weak areas for the Student, are all being addressed in the resource room. She doesn't believe it is possible to say that this progress is the result of the Fast ForWord program. She doesn't know of any school that uses that program. Fast ForWord helps to retrain the brain neurologically, to improve the link between the brain hemispheres, but it does not cure the problem. A student still needs to be taught strategies to make her a better listener. The Student is getting this instruction in the resource room. The Student has been taught these strategies and her teachers have been teaching to her deficits since the first grade, and her improvement may be the cumulative effect of this work.

She does not recall having a conversation with Ms. Joakim about the Student and a possible CAPD problem before Ms. Joakim asked her to attend the January 2009 meeting. She does remember Ms. Joakim telling her that she had a student, whom she did not identify, who might have that type of issue, and that she wanted to know more about it. She gave Ms. Joakim some materials to read on the subject. She is certain she never told Ms. Joakim not to talk to the Student's parents about CAPD. The Parents, as members of the IEP Team, would be entitled to share that information. The District has made referrals for audiological evaluations for its students in the past, as recently as last summer, and she was prepared to do so for the Student had the Parents not done so themselves.

17. During an interview conducted by the Complaint Investigator with Susan Joakim, Ms. Joakim stated the following: Up until this year, she was employed as a special education teacher by the District. She was assigned as the Student's case manager during the referral process, and once the Student was found eligible, she became the Student's special education teacher during the Student's xx and xx grade years.

As she worked with the Student, it was clear to her that there was more than just a learning disability present in the Student. The things that were making it difficult for the Student to learn were not the things one typically sees with a dyslexic child. There were environmental things that were interfering with learning; the Student couldn't process when there were other sounds in the room. The Student could always hear when the microwave was being used in the teacher's room next door to her classroom, and she couldn't learn while that sound was present. She spoke with the Student's mother about this, and the Student's mother was seeing the same thing at home. She suspected that the Student had CAPD, and she knew this was something that the District couldn't diagnose.

She spoke with Ms. Walters about her suspicions, and Ms. Walters told her that it was not something the District could do anything about. Ms. Walters told her not to discuss it with the Parent, because then the District would have to pay for the Student to have an audiological evaluation. She kept bringing it up with Ms. Walters, until Ms. Walters finally agreed that she would conduct a screening of the Student and told the Student's mother that she would do that. Months went by and Ms. Walters still hadn't done the screening, until finally the Student's mother got tired of waiting and took the Student for the audiological evaluation.

In the meantime, she made a lot of adjustments to maximize the Student's learning, and the Student made a lot of gains. She got the District to approve a non-language based math program for the Student. She developed a writing program for the Student, because the Student's writing was virtually illegible. She began working with the Student using the LiPS program, but she could only do it when there were no competing sounds in the environment. The Student was progressing well enough with her reading; she was at grade level in fluency and word recognition, although she was below grade level in comprehension. She would have liked to see the Student get speech therapy, because the therapist could implement the LiPS program in a quieter environment, and could have used other programs such as Earobics.

She was present at the September 30, 2009 IEP Team meeting. The audiologist was not there, so Ms. Walters presented the evaluation report. Ms. Walters said that treatment to address CAPD was not part of special education, and that the Parents could seek this privately if they wished. Ms. Walters agreed to review the audio enhancement system in the classrooms, and had one installed in her room very soon after the meeting, but Ms. Walters refused to work directly with the Student. The Team also put into the IEP that she would work with the Student on LiPS outside of the classroom. She used a small room next to her classroom for this purpose, but it was still next to the teachers' room and the microwave was still audible. She used that room as much as possible, but later on others started using it and the room wasn't available to her as much as she needed.

She did everything she could in terms of accommodations and modifications to meet the Student's needs in the classroom, and the Student flourished. The Student was in a really good regular education classroom. The Student was very happy, and made excellent progress. The problems the Student was having were when she was out in the general public, where she could get overwhelmed.

18. During an interview conducted by the Complaint Investigator with Elizabeth Fagan, SLPD, Ms. Fagan stated the following: She has been providing speech/language therapy to the Student, beginning on October 18, 2010. The therapy involves the Fast ForWord program, a computer-based program that is based on current research regarding brain plasticity. The Student listens to sound bursts or sound sweeps, and has to identify whether they are moving upwards or downwards in pitch. The activity is believed to build neural networks in the brain that will improve processing speed and enhance transfer of information between brain hemispheres. The Student has made great progress in the program, and she expects that the Student will complete the program in another 10 sessions. At that time, she expects to recommend that the Student undergo an audiological reevaluation.

If the Student had begun work with this program in May 2009, her brain would be in better shape to learn, but she is unable to say how that would have impacted her present language skills. She is also unable to say whether beginning the therapy earlier would have made a long term difference to the Student.

With regard to the Student's May 2009 audiological evaluation, she would not have made all the same recommendations based on those results. Efforts to clarify the speech signal made

sense - the student needed environmental modifications and perhaps an FM system – but the test results did not support a recommendation for therapy based on phonemic decoding and auditory memory. She also disagrees with the recommendation for ear plugs, as they would serve to occlude sound. With regard to the recommendation for use of multi-modality programs such as Fast ForWord or LiPS, those two programs are very different, and she believes that Fast ForWord better addresses the deficits uncovered by the evaluation.

She believes that the Student's speech/language evaluation in 2008 was not very thorough, as the two assessments used looked at vocabulary and language processing only. The Student was then old enough to have undergone a more comprehensive evaluation, using an instrument such as the CELF-4 that was part of her 2010 evaluation.

19. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: At the time when the Parents went to the IEP Team meeting to review the audiological evaluation, they were uninformed about the whole IEP process. They were excited because now that there was a diagnosis, they believed that the District would be able to put into place the services that the Student needed. At that point, the Student was really struggling with her schoolwork. The Parents accepted what the IEP Team decided, assuming that it would help the Student get up to grade level. The Team said that they would continue with the LiPS program, and would get the Student special help with her reading and math. There was no mention of specific programs.

The Parents didn't know at that point that the Student needed speech/language services. At the beginning of this year, there was a problem with the District not providing to the Student the math program identified in her IEP, and eventually the Parents consulted with an advocate. The advocate looked at the IEP and said she didn't see any speech/language services, but that there should be.

After the reevaluation, in November 2010, the Student finally began to receive speech/language services. The Student started seeing Dr. Fagan privately for one hour per week and then, in December, the Student started working with Mr. Berry. As a result, the Student is having her best year ever. The Student has made significant gains in reading (she is now on grade level), and although the Student still has a lot of work to do on writing, she saw a recent sample of the Student's writing that was a big improvement over what the Student had been doing. In January, the District brought in a new computer-based writing program that has been fabulous for the Student. The math problem was ironed out in December, with the District bringing in someone from outside the District to do some math training and agreeing to provide compensatory services over the summer.

She is convinced that the Student's progress this year is due to the speech/language work the Student is doing with Dr. Fagan and Mr. Berry. She believes that if these services had started in xx grade, the Student would be further along than she is now. The Student may have made some reading progress in xx grade, but writing was torture for her. She can only speculate as to what more the Student would be doing now if those services had begun last year.

VI. Conclusions

Allegation #1: Failure to provide special education and related services in the nature of speech therapy sufficient to enable the Student to advance appropriately toward attaining her annual goals and to be involved in and make progress in the general education curriculum in violation of MUSER §IX.3.A(1)(d)(i)

NO VIOLATION FOUND

The first time there is any record of the Student's having a possible CAPD issue is in the January 21, 2009 Written Notice, where several accommodations and modifications were written into the IEP, and where Ms. Walters agreed that she would perform a screening to look for evidence of that disorder. The screening was not an evaluation subject to requirements of parental consent or specific regulatory timelines. Approximately three months went by (a not unreasonable length of time), before Ms. Walters found herself with time to conduct the screening and by that time the Parents had arranged to have the Student evaluated privately.

At the point that the Student's IEP Team met on September 30, 2009 to review the audiological evaluation report by Ms. Scott-Richards, the only speech/language data available to the Team with respect to the Student did not support the provision of speech/language services. As noted by Ms. Walters, the evaluation was acoustic in nature, rather than language-based. Although the report contained a recommendation for "therapy that addresses phonemic decoding, auditory memory and clarification of the speech signal," in both Ms. Walters' and Dr. Fagan's opinion, the test results did not support a recommendation for therapy based on phonemic decoding and auditory memory. Furthermore, the specific recommendation in the report for use of a multi-modality program such as LiPS was already being implemented by the District before the evaluation was conducted. The CAPD consultant brought in by the District, Ms. Brozena, agreed that the report's recommendations could be embedded in the Student's academic program rather than delivered by a speech therapist.

While Dr. Fagan agreed with Ms. Scott-Richards that efforts to clarify the speech signal for the Student through environmental modifications made sense, the District did in fact provide such modifications through changing the Student's seating, the choice of her teacher, the use of audio enhancement in her classroom, and other measures. When later, as part of the Student's triennial reevaluation, additional speech/language testing revealed a language impairment, the District proceeded to provide speech/language services.

Although the Student may have struggled to a greater extent in xx grade than she has this year, the data suggests that she still made progress, and this was confirmed by Ms. Joakim. That the Student's progress has been greater this year may be due in part to the therapy that Dr. Fagan is providing, but there is no sound basis for concluding that it is due to that intervention alone. More importantly, even if it could be established with certainty that, as the Parents believe, the Student's progress would have been greater had that intervention (or the work the Student is doing with Mr. Berry, or both) been initiated back in September 2009, that is not the test by which the District's conduct is to be measured. The critical inquiry is

"whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993), *citing Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). Given the information available to the District in September 2009, the IEP developed at that IEP Team meeting, though it did not include speech/language services, was adequate and appropriate for the Student.

VII. Corrective Action Plan

As no violation was found, none is needed.