

Complaint Investigation Report
Parents v. Sanford

March 29, 2013

Complaint #13.053C

Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainant: Parents
Address
City, Zip

Respondent: David Theoharides, Superintendent
917 Main St.
Sanford, ME 04073

Special Services Director: Stacey Bissell

Student: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on February 8, 2013. The Complaint Investigator was appointed on February 12, 2013 and issued a draft allegations report on February 14, 2013. The Complaint Investigator conducted a complaint investigation meeting on March 6, 2013 (rescheduled from the original date of February 20, 2013 at the Respondent's request). On March 12, 2013, the Complaint Investigator received a 1-page memorandum and 141 pages of documents from the Complainants, and received a 9-page memorandum and 117 pages of documents from Sanford School Department (the "District") on March 13, 2013. Interviews were conducted with the following: Stacey Bissell, special services director for the District; Fran Bodkin, speech pathologist for the District; Susanne Mallon, speech pathologist for the District; Kathy Camire, teacher for the District; Jessica Allen, teacher for the District; Cecilia Pinto-Lord, M.D. , neurologist; and the Student's mother.

III. Preliminary Statement

The Student is xx years old and is currently receiving special education under the eligibility criterion Multiple Disabilities (Other Health Impairment and Speech and Language Impairment). This complaint was filed by 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 related services in the nature of direct speech therapy during the period from September 4, 2012 to October 31, 2012 in sufficient amount so as to enable the Student to advance appropriately toward attaining his 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);
2. Failure to fully and adequately implement the Student's IEP with respect to provision of speech/language services in violation of MUSER §IX.3.B(3);
3. Failure to permit the Student's parents to inspect and review requested education records relating to the Student, without unnecessary delay and before the IEP Team meeting, in violation of MUSER §XIV.3.

V. Stipulations

1. The Parents requested certain educational records of the Student on January 6, 2013.
2. The District provided educational records of the Student in response to the Parents' request on January 31, 2013.

VI. Summary of Findings

1. The Student lives in Sanford with the Parents, and attends xx grade at Sanford Junior High School (the "School"). He began receiving early intervention services at xx years of age after being diagnosed with a variant of Landau-Kleffner Syndrome, a language disorder often accompanied by seizures.

2. The Student's IEP Team met on May 2, 2012 to conduct the annual IEP review. At the meeting, Susanne Mallon (the speech/language therapist) reported that, on assessments she conducted in April, 2012, the Student scored below the 0.1 percentile in receptive language, and at the 2nd percentile in expressive language. The Student's score on the Stuttering Severity Index placed him in the severe range. She also reported her observation that the Student showed lesser competency with his speech and language in the special education classroom than she saw during the Student's speech sessions, and she therefore recommended the change in delivery of speech/language services to help the Student learn to generalize his speech/language skills to other areas of his program.

3. The Written Notice of the May 2nd IEP Team meeting recorded determinations to continue the Student's speech/language services at 150 minutes per week, noting, however, that the District recommended that the delivery of those services change from all direct service to 90 minutes per week of direct service and 60 minutes per week of consultation with the special education teachers. The Written Notice further notes that the Parents disagreed with that recommendation, and states that "At this time, the level of direct service will remain at 150 minutes of direct service, pending further discussion by the team." A further determination was made that the speech/language coordinator, Fran Bodkin, would attempt to obtain input

from the Student's neurologist, Dr. Pinto-Lord, prior to the next IEP Team meeting, which would be scheduled after May 17, 2012 to again consider the delivery of speech/language services.

4. Ms. Bodkin thereafter spoke with Dr. Pinto-Lord about the proposed change in delivery of speech/language service. Although Dr. Pinto-Lord agreed with Ms. Bodkin that the consultative service could be beneficial, it is unclear whether Dr. Pinto-Lord understood or agreed that this service would be in place of direct therapy services.

5. The Student's IEP Team met again on May 23, 2012 and determined that the Student would continue to receive 150 minutes per week direct speech/language services through the end of the then-current school year, with a change to 90 minutes per week direct services and 60 minutes per week consultation services beginning on September 4, 2012. The IEP Team further determined to reconvene no later than October 31, 2012 to review the speech/language data.

6. The Student's IEP dated May 2, 2012 provided direct speech/language pathology services for five 30-minute sessions per week during the period 5/2/12 to 6/14/12, changing to three 30-minute sessions of direct service per week during the period 9/4/12 to 10/31/12 along with speech/language consult services for two 30-minute sessions per week.

7. During September and October, 2012, the Student's schedule for speech/language therapy involved one 30-minute session on Monday, and two 30-minute sessions on Wednesday. Ms. Mallon also conducted one 30-minute classroom observation and met with the Student's teachers for 30 minutes each week. There were two sessions of direct speech/language therapy during this period (on October 1, 2012 and October 29, 2012) that Ms. Mallon was unable to provide because she was needed at an IEP Team meeting, and those 60 minutes of missed therapy have not been made up.

8. The Student's IEP Team met again on October 31, 2012 to review the Student's speech/language programming. Ms. Mallon reviewed data relating to the Student's speech, which revealed longer periods of stuttering and different types of dysfluencies compared to baseline data. Jessica Allen, the Student's teacher, also reported observing these same changes. Ms. Bodkin questioned whether these changes were related to a neurological change in the Student. The Parents stated that they were unaware that the delivery of speech/language services was to change starting on September 4, 2012, and expressed their belief that the changes in the Student's speech (they also reported observing an increase in dysfluency and stuttering) were due to the change in the delivery of speech/language services. The District agreed to restore the delivery of services to 150 minutes per week of direct speech/language services for a three month period, during which time data would be collected and then reviewed, and Ms. Bodkin would again seek to obtain further recommendations from Dr. Pinto-Lord.

9. The Student's IEP was amended on dated October 31, 2012 to provide direct speech/language pathology services for five 30-minute sessions per week during the period 10/31/12 to 1/30/13.

10. Shortly after the October 30, 2012 meeting, Ms. Bodkin wrote to Dr. Pinto-Lord and reported the Student's increased and changed dysfluencies, suggesting that the Student's stuttering appeared to be neurogenic rather than developmental in nature, and seeking information as to whether the Student had experienced any neurological changes. Dr. Pinto-Lord did not reply to this letter.

11. The Student's schedule after October 30th involved two 30-minute speech/language therapy sessions on Monday, two 30-minute speech/language therapy sessions on Wednesday (both days with Ms. Mallon), and one 30-minute speech/language therapy session on Friday (with Ms. Bodkin). During the twelve-week period from November 5, 2012 through February 4, 2013, taking into account school holidays and days when the Student was unavailable to attend a session, there were eight weeks when the Student received the full amount of therapy services. There were also additional minutes of therapy scheduled to make up for some of those sessions that were missed, so that at the end of that period the total number of therapy session minutes missed and not made up was 90. As of March 25, 2013, all those 90 minutes had been made up.

12. On January 6, 2013, the Parents wrote to Ms. Allen and requested "a copy of [the Student]'s speech records from the 2011/2012 and 2012/2013 school years. Please include a copy of the Medicaid billed paperwork."

13. On January 14, 2013, the District sent to the Parents a redacted copy of Medicaid logs showing speech services provided to the Student by Ms. Mallon between October 3, 2012 and December 19, 2012, along with a list of dates of services provided by Ms. Bodkin.

14. The Student's IEP Team met again on January 30, 2013. The Team reviewed the Student's speech/language data between 11/5/12 to 1/30/13, which showed a decrease in the Student's speech fluency with an increase in the length of his dysfluencies. Both Ms. Mallon and Ms. Bodkin reported that the Student was trying very hard to use fluency strategies that he had previously learned, but that those strategies had stopped working. The Team reviewed a note from Dr. Pinto-Lord dated December 20, 2012 (provided by the Parents) which stated that the Student's speech was regressing and was very dysfluent, and that the Student "needs intense and aggressive therapy 5x/week to improve his fluency and expressive language." The District staff expressed disappointment with the amount of information provided by Dr. Pinto-Lord. With the Parents in disagreement, the District determined to return the Student's speech/language services to 90 minutes per week direct services and 60 minutes per week consultation, while also ordering an augmentative communication evaluation for the Student.

15. At the January 30th meeting, the Parents stated that they had not received all the records they had requested on January 6, 2013. On January 31, 2013 the District supplied the Parents with copies of IEPs, Written Notices, evaluation reports and progress reports from the Student's file. On February 5, 2013, the District supplied additional records evidencing delivery of speech/language services during the period from 11/5/12 through 2/4/13. On February 20, 2013, the Parents wrote to the District, stating that they had not received "all of

[the Student]'s speech and language records including the Medicaid logs from 2011-2012 and 2012-2013 school years that we requested on January 6th."

16. During an interview conducted by the Complaint Investigator with Susanne Mallon, Ms. Mallon stated the following: She is a speech pathologist contracted to the District, and has been working with the Student since September 2011. During the current school year, she has been working with the Student along with her supervisor, Ms. Bodkin, who provides therapy to the Student on Fridays. The Student has a variety of speech goals, and during each session she works with the Student on several of those goals.

During the 2011-2012 school year, the Student's progress was minimal and slow. Although the Student made more progress in his language skills than in his speech fluency, there was not a significant amount of progress even with his language skills. She reviewed the Student's records from prior years, and saw that there was a pattern of slow progress. She also saw that the Student was using language skills in his sessions with her that he wasn't using in the classroom setting. For example, he was unable to answer "wh" questions from his teachers that she knew he was able to answer during his speech/language sessions. She spoke with his teachers about modifying the way that they asked those types of questions, and then she saw the Student being successful with those questions in class. For a student like the Student who is about to enter high school, being able to use language skills in natural settings, not just during therapy sessions, is very important. For this reason, she recommended that the delivery of speech/language services to the Student shift from all direct services to a mix of direct and consultative.

She did not recommend that the consultative services be provided in addition to the same amount of direct services because it becomes increasingly important as the Student grows older for him to not lose time in the classroom; he needs to receive the life skills instruction provided in the classroom. Furthermore, the Student's program in the classroom is heavily language-based - all of his classroom work is focused on oral communication - so he continues to work on his speech/language goals while he is in the classroom. For example, one of the Student's speech/language goals is focused on calendar skills, and every morning his class does an activity using the calendar.

The new schedule for services began when the Student returned from summer break in September 2012. With regard to language skills, the teachers followed her recommendations and she saw the Student making gains in the classroom. At the same time, she was also seeing the Student have fluency issues that were very different from what she had seen before. There were times when the Student was totally blocked - couldn't produce any speech - for as long as 40 seconds. His face turned red, and he made facial expressions and odd body movements. This was all new and different behavior for the Student. There has always been an anxiety component to the Student's speech issues, and she worked with the teachers to initiate calming strategies and to use visual cues. She observed the teachers implementing those strategies, but she didn't see improvement in the Student's fluency.

At the October 30th IEP Team meeting, she expressed concern with what the Student was presenting, saying that it didn't appear to be the developmental stuttering she had seen before but looked more neurogenic in nature. The Parents expressed their belief that the Student's

fluency issues were the result of the decrease in direct speech/language services. She didn't think that was the case, but the District agreed to restore the previous schedule of services while at the same time the Parents agreed to bring the Student to his neurologist.

By the time of the January 30th IEP Team meeting, she had observed no significant improvement in the Student's speech fluency issues; there was some decrease in the body movements, but even that was inconsistent. The Student was still experiencing long blocks with behaviors that were unlike what he had presented with in the past. The Parents provided a note from Dr. Pinto-Lord which said that the Student was very dysfluent (which the staff knew), but the note seemed to be based heavily on the Parents' reports and there was not a lot of information about the neurologist's impressions of the Student. The District determined to return to a mix of direct and consultative services, but the Parents filed this complaint and that prevented the District from implementing the change. She wanted to focus with the Student on functional language skills, and practicing those skills in the natural environment. As a student progresses through school and the end of school nears, one has to think about what comes after school. The ultimate goal for the Student is to be a functional communicator. Although the Parents report what they describe as progress in the Student's speech based on improvements in his willingness to engage in and initiate conversation, this actually demonstrates improvement in the Student's socialization skills rather than speech skills. The Student may be more willing to communicate, but his dysfluencies still interfere with his ability to do so. For example, the School's principal told her that he approached the Student in the lunchroom in February or March and asked the Student a question. He reported that he couldn't understand anything of what the Student said in response.

As far as the Student getting the full amount of speech/language services, he has been getting the full 150 minutes per week. He receives two 30-minute sessions on Monday and Wednesday (one at 8:00 and the other at 11:00), and another 30-minute session on Friday. She has reviewed the literature and found no support for the claim that the Student would benefit more from having the sessions spread out over five days rather than having five sessions over three days. She is also unaware of any research suggesting that the Student receives no benefit from a second 30 minute session in the same day; she has had many students who received more than one speech session per day. In each of the sessions, she focuses on 2 or 3 of the Student's short-term objectives, so that although there may be some overlap, for the most part she works on different skills with the Student in the different sessions.

In September and October 2012, the Student received the full 90 minutes of therapy, plus she conducted observation for 30 minutes and met with the teachers for 30 minutes each week (she missed one day at the start of the school year when she was organizing the students' schedules). There have been a few times when she was unable to provide services (absence due to illness, in an IEP Team meeting, etc.), and she has made a conscious effort to make up those missed sessions. Currently, the only minutes this year that have not been made up are 60 minutes that were missed in October. The only occasions when the Student has had more than 30 minutes in a session were times when she was making up missed sessions. The Student has also missed some sessions when he was absent or was involved in other activities, such as a class trip.

17. During an interview conducted by the Complaint Investigator with Fran Bodkin, Ms. Bodkin stated the following: She is a speech pathologist contracted to the District, and has been working directly with the Student, along with Ms. Mallon, since September 2012. The goal at that time was to provide a combination of direct and consultative services that would support a broader application of the Student's language skills. In May, 2012, when the Parents were expressing resistance to taking this approach, she was asked by the Student's IEP Team to discuss it with Dr. Pinto-Lord. She explained to the doctor the functional communication concerns that were underlying the recommendation, and the doctor agreed with the approach. They didn't have much opportunity to give it a try and to collect much data, however, before the services were changed back to all direct service. The concern was that the Student's fluency had really degraded, and they were very aware and concerned with how this affected his functional communication.

Since October 30th, when the Student's speech/language services were returned to all direct service, the Student's language skills have improved somewhat; progress has been slow, but there has been some growth and the Student has acquired some isolated language skills. The Student's fluency problems, however, remain of very great concern, and they continue to be very disruptive to the Student's communication efforts. The data shows that there has been no improvement in the number or the length of the Student's dysfluencies, and these dysfluencies have really interfered with the Student becoming a functional communicator. The quality of the Student's dysfluencies (body movements, long blocking periods) suggests that they may be neurogenic in nature. For this reason, she attempted to obtain Dr. Pinto-Lord's input on the issue. She wrote a letter and left two phone messages, but she never got a response from the doctor.

She thinks that the Student needs a completely different approach, starting with assessing the Student's need for augmentative communication support. The Student needs to communicate with a variety of people in a variety of settings, and an augmentative communication evaluation would give direction as to needed strategies and specific skills to be targeted to support the Student in becoming a functional communicator.

With regard to the timing of the Student's speech/language sessions, she doesn't believe that one session each day, rather than five sessions spread out over three days, makes any difference. Although Dr. Pinto-Lord refers to a diagnosis of dyspraxia for the Student, he does not have a neuromotor dyspraxia with regard to speech. The Student can produce speech sounds accurately, both consonants and vowels. His problems are with fluency and a language deficit. For such a student, there is no clinical evidence to support that one schedule is better than the other.

The Student has a variety of speech/language goals, and she and Ms. Mallon try to support the Student's communication throughout the entire day; the Student is always working on communication during each school day. Ms. Mallon is a very conscientious clinician. When things come up in school that interfere with sessions, Ms. Mallon strives to make up the sessions that are missed. Since she has been involved in delivery of speech/language services to the Student, the Student has been getting the full 150 minutes per week, and any missed sessions have been addressed by rescheduling.

18. During an interview conducted by the Complaint Investigator with Jessica Allen, Ms. Allen stated the following: She is a special education teacher at the School, and is the Student's case manager. The Student is in her classroom this year for functional life skills and math, and last year for language arts and reading.

Last spring, she met with Ms. Mallon and Ms. Camire to discuss how best to meet the Student's needs, and how the teachers could carry over to the classroom the skills on which the Student was working during speech/language sessions. They discussed having Ms. Mallon provide consultation services to the teachers. For example, Ms. Mallon said she was having some success with the Student using an "early onset" strategy, in which the Student took a deep breath prior to speaking. The teachers didn't see the Student using that technique in the classroom, and they wanted Ms. Mallon's guidance on how to implement it with the Student. They also discussed having Ms. Mallon help the teachers with how to phrase questions to the Student that would better enable him to provide answers.

Ms. Mallon started providing the consultation service in September 2012. Ms. Mallon would observe the Student in the classroom, and then discuss with her what she saw and make suggestions for ways that she could introduce the strategies being used during the Student's speech/language sessions, as well as how to introduce new vocabulary to the Student. She believes this consultation service was beneficial, and it was helpful to know what Ms. Mallon was working on with the Student so that there could be carry-over into the classroom. For example, she started to see the Student using the early onset technique in her classroom.

She also saw, however, a change in the Student's dysfluencies starting in September 2012. During the prior school year, the Student had made progress with his language and fluency. In September, the Student's dysfluencies became longer, and changed in quality as well. The Student had become dysfluent on sounds that had not previously been a problem (he now stuttered on the "Sh" sound, for example, for 20 seconds or so), and he uttered sounds like "Um, um, um." These were things she hadn't seen before.

After the Student returned to all direct speech/language services in November 2012, she saw no improvement in the dysfluent behaviors. In fact, after the Student returned following winter break, she began to see motor movements associated with the dysfluencies. If standing, he would rock on his feet; if seated, he would bounce in his chair. The Student also started to leave off the initial sounds of some words. Lately, there has been somewhat less of the motor movements and leaving off of initial sounds, but the dysfluencies remain longer, accompanied by vocalizations, and are occurring on initial sounds that had not been a problem previously.

With regard to whether the Student receives the full 150 minutes per week, there have been times when the Student missed a session. Sometimes this happens because Ms. Mallon had to cancel due to testing or an IEP Team meeting; sometimes it's because the Student is absent, or on a field trip. This happens roughly two or three sessions per month, and Ms. Mallon always tries to make up the missed sessions – Ms. Mallon periodically tells her that she is scheduling an extra session for the Student as a make-up.

With regard to the Parents' request for documents, the Parents sent her an e-mail requesting documents on January 6, 2013, a Sunday. The next day, she forwarded the e-mail to Ms. Bissell.

19. During an interview conducted by the Complaint Investigator with Kathy Camire, Ms. Camire stated the following: She is a special education teacher at the School, and the Student has been in her classroom during part of his day since he came to the School, this year for language arts and reading.

She believes that having Ms. Mallon provide consultative service to the teachers is very important and beneficial both to the Student and to the Student's teachers. The consultations enabled her to take the techniques and interventions which Ms. Mallon was working on with the Student and carry them over not just into the classroom, but throughout the Student's day. She discussed those strategies with staff in the lunchroom and in the Student's adaptive allied arts class, for example. The teachers and Ms. Mallon work a lot on the same goals, so it was very helpful for them to be able to consult with each other. Ms. Mallon discussed with them strategies to be used when presenting new information to the Student, like in a vocabulary lesson, or how to phrase "wh" questions. Starting in October or November 2012, she began to see the Student use some of the strategies he had worked on with Ms. Mallon in the classroom, such as the early onset technique. One of the other staff members expressed concern to her about the Student overemphasizing pulling air into his lungs before speaking, and she was able to relate that to early onset because of her discussions with Ms. Mallon. She still believes that the consultation service would be beneficial.

After the consultation services were discontinued, some of the Student's dysfluencies became more evident, and there were new issues as well. Just after the winter break, she noticed that the Student had begun to drop the initial sounds of some words, his stuttering had increased, and he was making lip popping sounds over and over before he could get his words out. There were also motor movements that accompanied his dyfluencies, like tapping his foot and bouncing in his seat. The motor movements have decreased in the last few weeks, but the other issues remain.

She only sees the Student two periods per day, and she doesn't know whether the Student receives the full 150 minutes of speech/language service per week. There are times when the Student is pulled from her class for a speech/language session. She knows that there are times when the Student has been unavailable for sessions. Ms. Mallon has made a point of making up missed sessions, and at times has given her schedules of those make-up sessions.

20. During an interview conducted by the Complaint Investigator with Stacey Bissell, Ms. Bissell stated the following: She is the director of special services for the District. At the start of the school year in September 2012, she reviewed the progress reports for the Student and saw that progress over the past years had been minimal. The Student can't really be understood by someone who isn't used to working with him. On one of the first days of school, she saw the Student with some other students, and one of them asked the Student what his name was. The Student turned red in the face and stammered, trying to speak, and finally pointed to another student so that the other student could say his name. She felt that the

District couldn't just keep doing the same thing, that there needed to be a different approach. This kind of thinking was what led to the recommendation to convert some of the Student's speech/language time to consultative service, so that an effort could be made to broaden the Student's skills into the rest of his school day.

The staff was very concerned by the Student's dysfluencies at the beginning of the school year. There was a change in the Student's pattern - he was completely blocking, unable to speak any words. The guidance counselor, after meeting with the Student at the beginning of the year, reported an inability to understand anything the Student was saying due to the Student's dropping of initial sounds. Due to the changes in the nature of the dysfluencies, the staff was concerned that there might be a neurogenic basis for the changes. This wouldn't necessarily mean seizure activity, and the fact that the Student's EEG showed no seizure activity doesn't mean that there was no neurogenic basis for the dysfluencies.

It is true that the Student has shown a pattern in the past of regression over the summer. She believes that one of the contributing factors to that regression has been that, up until recently, there has not been much follow-through by the Parents with the speech/language work that the Student does in school. Whereas, during the school months, the Student was constantly being given opportunities to use the speech that he has, when the Student was not in school he was not asked to use his speech very often. Over the past several weeks, the Student has been saying that he had "school" over the weekend. She understands this to mean that the Parents have begun working with the Student on his speech/language skills, and it wouldn't be surprising that the Student's language has improved as a result. This reinforces the idea that extending speech strategies throughout the Student's school day would be beneficial.

With regard to the amount of speech/language services being delivered, she asked Ms. Bodkin to review the records from the 2011-2012 school year, and Ms. Bodkin reported that the Student had missed only a total of six hours of service for that year. There had been an issue in the past with the speech/language therapists missing sessions due to IEP Team meetings and not making up the missed time. She addressed this with Ms. Bodkin and stressed the importance of making up missed sessions and delivering the full amount of services required under the IEP.

The Parents asked to see Medicaid logs as a way to measure the amount of services being provided to the Student, but those records don't reflect all the services, only the services that are being billed. There are service hours that are not reimbursable, or which the District decides are not in sufficient amount to be worth the effort of billing. These records are not part of the Student's special education file, but are maintained in the District's business office. There are no other records in the Student's file which document the minutes of therapy that the Student actually receives; the therapists would have such records.

During the October 30, 2012 IEP Team meeting, the Parents were questioning whether the Student was actually receiving the full number of minutes of speech/language services in the IEP. Therefore, when the Student's mother requested records, she assumed that the request was for the last three months of services. Once she understood what the Parents were

requesting, she sent a copy of all the records maintained in the Student's special education file.

21. During an interview conducted by the Complaint Investigator with Cecilia Pinto-Lord, M.D., the Dr. Lord stated the following: She is a neurologist, and the Student became her patient when he was two-years old. At the beginning, she saw him more often than she does now. She saw him twice in 2012, once in February and once in December. The Student has been on medication to prevent his seizures. The Student had an EEG shortly before his December visit, and for the first time it was a normal study. She has initiated a schedule to wean the Student off of the medication. She has hopes that removing the medication will be helpful to the Student, and that the seizure activity will not return.

When she saw the Student in February, he was fairly dyspraxic, but he was able to get some words out. He gets very anxious in new surroundings and has always been very shy. He is also going through puberty, with the accompanying hormonal changes. The Student seemed less willing to initiate conversation, and she thought that puberty could be one of the reasons. In December, however, the Student was so dyspraxic and dysfluent that she couldn't understand anything that the Student said. The Student was also very, very quiet.

The Student's mother reported that there were issues with the Student's speech services in school, that the services had been reduced and that he wasn't getting them consistently. According to the Student's mother, the school staff members were saying that the Student's increased dysfluency was the result of puberty and of seizure activity. In her letter, Ms. Bodkin referred to "neurogenic stuttering," but that term is redundant – all stuttering has a neurological basis. The Student had a normal neurological exam in December, and his EEG was normal.

The Student has a very difficult condition, and dyspraxia is a very difficult problem. In order for speech to improve, the patient's brain needs to be rewired, but it is possible to do this. The more time that is spent working on the problem, the more the brain can be rewired. The Student needs to repeat the same speech drills over and over again. 150 minutes per week is not a lot, only 30 minutes per day (minus the time involved in getting to the speech room and getting settled before work can actually begin). She understands the value of having the teachers be aware of what the Student is working on in therapy sessions, but this shouldn't come at the expense of taking away speech therapy time. The Student needs speech therapy every day, and she doesn't believe that more than one session per day is of any benefit to the Student. As with learning to play the piano, you need to practice every day if you are going to learn the skill. When you don't practice, you lose skills. The slump in performance that she observed in December could have been the result of a reduction in the amount of time practicing his speech skills.

22. During an interview conducted by the Complaint Investigator with the Student's mother, the Student's mother stated the following: The Parents have no complaints about the quality of the speech/language instruction being provided by the therapists; they believe, however, that the Student needs the full 150 minutes of direct therapy each week in order to make progress and not regress. The records provided by the District show that the Student rarely

received 150 minutes in a week, and the District only started making up missed speech sessions in January, after the Parents asked for documentation of when speech sessions were actually being provided. When speech sessions are made up, the Student sometimes receives 90 minutes of speech in one day. This is not effective. The Student does not have a long attention span; he can't focus and take it all in for that long. The Student needs to have repetition; a new technique needs to be reinforced all during the week, or he won't retain it.

The Student doesn't get as much speech therapy over the summer months, and he always regresses – his stuttering increases and his dysfluencies increase. He has always recovered, however, and eventually progressed. This year was different. During September and October, the Student's speech got worse very rapidly; this was one of the worst times for the Student's speech the Parents have ever seen. This was the first time the District had ever reduced speech therapy below 150 minutes per week, and was the first time the Student regressed so badly. The Student started smacking his lips together, and making no sounds for a long time. Ms. Bodkin suggested that there was some neurogenic issue, and Ms. Bissell wanted to blame it on the Student's age, but the problem was that the amount of therapy the Student was getting had been reduced. The problem wasn't neurogenic because the Student had an EEG on November 28, 2012, and it showed no seizure activity. For that reason, Dr. Pinto-Lord weaned the Student off of his anti-seizure medication.

The Student's speech didn't improve a lot from November to January, but by the time of February vacation (after the District started providing the full amount of therapy) the Student's speech was the best that it has been in a long time. The Student stopped doing the lip smacking in late November or early December. The Student also had started making motor movements - leg movements if he was standing or bouncing in his seat if he was sitting. When she became aware that the Student was making these movements, she told the Student to stop and he did.

Presently, the Parents don't see a difference in the Student's dysfluencies compared to what they were in May 2012; in fact, they believe that the Student has improved compared to that time. The Parents can have a conversation with the Student now, and the Student initiates conversation. The Student is more outgoing, and asks questions. Just recently, for instance, the Student approached an employee in a department store and asked where the Gatorade was. She no longer sees the Student getting stuck for 30-40 seconds. The Student occasionally stutters, but he has always done that. He sometimes drops initial sounds (usually "s" or "l"), but this has happened before. Part of Landau-Kleffner Syndrome is that continuing to use the same strategies over and over again won't work; different approaches need to be tried. The therapists keep emphasizing the early onset technique (with which the Parents are not completely familiar). The therapists told the Student to start doing deep breathing before conversation, but he kind of overdoes it. They need to change the technique and try something different.

The District made charts to try to show that the Student's dysfluencies are not improving, but the charts don't show where he was in September and October. If they did, they would show great improvement compared to that time. The Parents also don't know what the charts are

based on. If they are testing the Student based on a lot of words that start with “s” or “l”, then the Student is going to be dysfluent.

The District wants to generalize the Student’s speech work in the classroom, but the Student gets more reinforcement in one-to-one or small group therapy. Also, if a certain technique doesn’t seem to be working, in a direct therapy session the therapist can modify the technique or the training; the classroom teacher probably can’t do that. The Parents don’t disagree that the Student needs to use his speech strategies throughout the day, but he needs the full 150 minutes of direct therapy. Even before the District changed the delivery of speech service to a mix of direct and consultative, the Student’s teachers were helping the Student to implement his speech strategies in the classroom. For example, the teachers told her that they were helping the Student with initiating conversations with other children. They also work with the Student on life skills, and speech is a part of that.

With regard to the request for documents, she specifically asked for speech records for the 2011-12 and 2012-13 school years, including Medicaid records. She didn’t specifically say that she wanted the records in time for the January 30th IEP Team meeting, but she didn’t think she had to because the regulations say that the District has to provide them before a meeting. She was looking for data that would support the things that the District was claiming. The District said they had all this data, but they weren’t showing it to the Parents. The records the District provided on January 14, 2013 only showed services delivered during the period from October 3, 2012 to December 19, 2012. Additional records were sent on February 5, 2013 that covered the period from November 5, 2012 to February 4, 2013. She wanted to compare and see whether the Student was receiving the same amount of services this year that he received last year, whether the same number of sessions was missed. The records provided by the District for this investigation finally went back as far as February 2012. They show that there were some sessions missed last year as well, but sessions weren’t grouped together on the same day as much.

VII. Conclusions

Allegation #1: Failure to provide related services in the nature of direct speech therapy during the period from September 4, 2012 to October 31, 2012 in sufficient amount so as to enable the Student to advance appropriately toward attaining his 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

As the District approached the review of the Student’s IEP in May 2012, staff members appropriately considered the extent to which the programming provided to the Student in the past had resulted in meaningful progress. Finding that such progress had been minimal, the District correctly proceeded to consider whether a change in the services being provided might improve the outcome for the Student. Noting that the Student was having little success in transferring the skills on which he was working in his speech/language therapy sessions into the rest of his school day, and considering that the Student’s classroom program was

heavily language-based, District staff proposed to convert some of the Student's direct therapy service time to consultative service. This was intended to ensure that the skills and strategies which the Student was learning to use in his speech/language therapy sessions were reinforced consistently throughout the remainder of his day, with the intended result that the Student would receive speech/language instruction not just for 150 minutes per week, but for most of each school day. Although the Parents advocated for the Student's programming to remain the same, it was reasonable for the District to nevertheless propose a different approach in the face of both modest past results and the increasing need, as a function of his advancing age, for the Student to become a functional communicator.

In retrospect, given the Student's history of significant regression over the summer months, it might have been better to delay the shift in services until after the first several weeks of the new school year in order to get a clearer picture of the effects of the change. In any event, there is no dispute that not only had the Student's speech skills regressed, but that the Student was presenting with greater and markedly different dysfluencies than had been present in the past. Faced with uncertainty as to the cause of the Student's dysfluencies, and with the Parents' strong advocacy for a return to the previous programming, the District agreed at the October 30, 2012 IEP Team meeting to restore the previous program while continuing to collect data and seeking input from Dr. Pinto-Lord as to whether these changes in the Student were related to some change in the Student's neurological status. When the IEP Team met again on January 30, 2013, the District reviewed the data that had been collected since the previous meeting and found that the Student's dysfluencies had not improved. A note from Dr. Pinto-Lord told them only that she also found the Student's dysfluencies to be severe.

Given the lack of improvement noted by the IEP Team on January 30th, it was reasonable for the District to determine not to continue to provide the same programming. Although the Parents attributed the Student's dramatic regression at the beginning of the school year to the change in programming, there was nothing to support the causal connection between the two. The parties dispute the extent to which the Student's dysfluencies (as opposed to his socialization skills) have improved to date, but even the Student's mother stated that there was not much improvement from November to January, despite the increase in the amount of direct speech/language services. The District additionally determined to order an augmentative communication evaluation to see whether a communication device might enable the Student to be a better functional communicator.

An IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. Fuhrmann v. East Hanover Bd. Of Education (3d Cir. 1993) 993 F. 2d 1031, 1041.) Given the information available to the District, both at the May 20th and January 30th IEP Team meetings, the District's determination to convert a portion of the Student's speech/language services to consultative service, with the expectation that it would improve the educational quality of the Student's experience in the classroom and lead to improvement in the Student's speech, was reasonable.

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

NO VIOLATION FOUND

Although there have been numerous instances this year of the Student's speech/language sessions not taking place due to the therapist's unavailability, all but 60 minutes of those missed sessions have been made up, and the Student has received 150 minutes of services during the vast majority of weeks. Last year also saw the Student missing a total of 60 minutes. While it would be preferable for the Student to have his sessions as per the schedule each week, this is not possible as a practical matter. The District's efforts to provide the services in accordance with the Student's IEP requirements (including the ongoing efforts to make up for missed sessions) reflect a "good faith effort" to implement the IEP (*See Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 592 F. 3rd 267 (1st Cir. 2010)), and the variances in the schedule are more a "minor discrepancy" between the services provided and the services required by the IEP than a "material failure" to implement the IEP. *Van Duyn v. Baker School Dist.*, 502 F. 3d 811 (9th Cir. 2007). *See also Mr. and Mrs. C v. Maine S.A.D. No. 6*, 49 IDELR 36 (D.Me. 2007).

As to the Parents' assertion that the Student needs his speech/language sessions to be spread out over the week and not have two or more sessions provided on the same day, the IEP states only that the Student should receive 150 minutes per week pathology services in five 30 minute sessions (or 90 minutes per week in three 30-minute sessions). The scheduling of those sessions so that there are some days when the Student receives two sessions and some days when there are none does not violate the provisions of the IEP. Furthermore, other than Dr. Pinto-Lord's opinion that the Student needs speech therapy every day and does not benefit from a second session during the same day, there is no evidence to support this assertion. It must be noted that Dr. Pinto-Lord, while knowledgeable about the structure and function of the brain, is not a trained speech/language pathologist.

Allegation #3: Failure to permit the Student's parents to inspect and review requested education records relating to the Student, without unnecessary delay and before the IEP Team meeting, in violation of MUSER §XIV.3

VIOLATION FOUND

MUSER §XIV.3 requires SAUs (school administrative units) to permit parents to "inspect and review any education records relating to their child which are collected, maintained, or used by the SAU under these regulations." Upon receiving such a request, the SAU must permit this inspection "without unnecessary delay and before any meeting regarding an IEP...and in no case more than 45 days after the request has been made." MUSER §XIV.3 defines "education records" by reference to the definition found in the Family Educational Rights and Privacy Act ("FERPA"). The phrase "education records" is defined under FERPA as "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." § 1232g(a)(4)(A). The definition of education records contains an exception for "records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." § 1232g(a)(4)(B)(i).

The records requested by the Parents on January 6, 2013 (24 days before the next scheduled IEP Team meeting) were the Student's "speech records from the 2011/2012 and 2012/2013 school years. Please include a copy of the Medicaid billed paperwork." In response, on January 14, 2013, the District provided to the Parents a copy of Medicaid billing logs covering the period from October 3, 2012 to December 19, 2012, with personally identifiable information relating to other students redacted. Despite the wording of the records request, Ms. Bissell stated that, based on the Parents' having questioned during the October 30th IEP Team meeting whether the District provided the requisite number of minutes of speech/language services since the start of the current school year, her understanding of the request was that it related only to the previous three months. On this point, the Parents' request was completely clear as to the period of time it covered, and the District was not free to substitute its own, different understanding.

The District further contends that the Medicaid logs were not "education records" as they were not maintained by the District in the Student's education file, but in records of the Maine Department of Health and Human Services ("DHHS"). Providers such as the speech/language therapists in question enter records of the minutes of service they provide directly into DHHS computer data programs for billing purposes. According to Ms. Bissell, the Student's educational file contained no information that reflected the amount of speech/language services actually delivered by the District's provider to the Student, which information was maintained only by the providers and DHHS. Taken on its face, this statement suggests that the District did not inform itself as to whether its providers were in fact providing services in conformity with students' IEP requirements, and that therefore the Parents were similarly unable to do so. Such a position is counter to the U.S. Education Department General Administrative Regulations (EDGAR), at 34 CFR § 76.731, which provides that agencies must retain records which demonstrate that all eligible children with disabilities are provided a FAPE consistent with their IEPs. *See Letter to Hertzler*, 30 IDELR 713 (OSEP 1998).

Further, as noted above, the legal definition of "education records" includes records directly related to a student maintained by a person "acting for" an educational agency. Ms. Mallon and Ms. Bodkin, when providing services which the District was obligated to provide to the Student, were acting for the District. While the definition would except those records maintained solely by those providers and not revealed to any other person (such as might be the case with therapy notes recorded during individual sessions), the records of dates and number of minutes of services they provided (and which they used when entering data in the Medicaid logs) were in fact revealed to, at a minimum, DHHS. Accordingly, those records were "education records," and the District was required to respond to the Parents' request by providing, if not the Medicare billing logs, the records of the providers that documented the dates and amounts of services they provided to the Student.

As to whether the District was required to provide the records in advance of the scheduled IEP Team meeting, while it is true that the Parents did not specifically state that they wanted the records in time for that meeting, given that the meeting was for the purpose of reviewing the Student's speech/language program and that the records requested were those relating to that program, the District should have reasonably anticipated that the request was related to

the forthcoming meeting. The failure to provide the full scope of the records requested by the time of the meeting constituted a violation of the applicable regulations. As the additional records, when ultimately provided to the Parents, did not reflect a substantial variance in the delivery of speech/language services as between the 2011-2012 and 2012-2013 school years, however, the Parents were not therefore deprived of the ability to advocate for their position during the January 30th meeting as a result of the delay. It should be noted that a better outcome might have been obtained by the Parents had they been more forthcoming with their communication regarding their records request, as when they received the insufficient records provided on January 14, 2013. Hopefully, the Parents will in future be more willing to engage in communication about such matters.

VIII. Corrective Action Plan

The District shall, without unnecessary delay, provide to the Parents records of the delivery of speech/language services to the Student for the periods of September 2011 to February 2012, and September 4, 2012 to October 2, 2012. The District shall document compliance by providing to the Due Process Office a copy of the cover letter to the Parents accompanying the delivery of those records.