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June 6, 1998

To: Parent

Susan Motta, Director
CDS-York County
39 Limerick Road, Unit #2
Arundel, ME 04046

From: Katherine A. Neale, Hearing Officer

Subject: Hearing Decision #98.061, Parent v. CDS-York County

This is to provide you with my decision in the Special Education Due Process Hearing involving the parents and CDS-York County on behalf of the student.

Either party may appeal this decision by filing a petition for review in Maine Superior Court or Federal District Court within thirty (30) days of receipt of this decision. The petition for review in Superior Court must be filed in the county in which the child resides or the county in which the Administrative Unit is located.

The Administrative Unit shall submit to the Commissioner of the Department of Education, with a copy to the Due Process Coordinator, documentation that the Unit has either complied with this decision or that an appeal is pending. Such documentation shall be submitted no later than forty-five (45) days after the receipt of this decision.

The parent may request the Department of Education to review the Unit's compliance with this decision by filing a written complaint with the Commissioner of the Department of Education.

Any questions regarding this decision or the record of the hearing should be directed to: Due Process Coordinator, Division of Special Education, Department of Education, State House Station #23, Augusta, ME 04330.

cc: Dr. Opuda, Due Process Coordinator

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

June 6, 1998

Case # 98.061, Parent v. Child Development Services-York County

Both parties were pro se

Hearing Officer: Katherine A. Neale, M.Ed., J.D.

THIS HEARING WAS HELD AND THE DECISION WRITTEN PURSUANT TO TITLE 20-A, M.R.S.A., §7207 et. seq.; TITLE 20 USC, § 1415 et. seq.; AND IMPLEMENTING REGULATIONS.

On April 22, 1998, the Department of Education received a request for a Due Process Hearing from the parents on behalf of their son.

The pre-hearing was held on May 11, 1998 at the Biddeford District Court. The respective document productions were exchanged. Exhibits submitted by the Parent are numbered P-1 through P-16 and exhibits submitted by CDS-York are numbered S-1 through S-17. Additionally, there are two documents submitted jointly as J-1 and J-2. The hearing was held on May 22, 1998 at the Biddeford District Court in Biddeford, ME.

I. PRELIMINARY STATEMENT

This statement is based on the undisputed findings of Complaint Investigation Report #98.020 dated March 28, 1998. The student was referred to Child Development Services-York County (CDS-YC) by his mother on July 29, 1997 at the age of 2 years, 1 month. A screening was conducted on August 18, 1997 resulting in a recommendation for speech/language and audiological evaluations. The speech/language evaluation noted significant delays and recommended therapy and further testing in the area of cognitive/play social development. The student was found eligible for special services at an Early Childhood Team (ECT) meeting held on September 19, 1997 (absent an agency representative designated to commit funds). An Individualized Family Service Plan (IFSP) was developed providing for one hour per week of direct speech therapy and one hour per week of collateral contact services with the parent for carry over purposes. The ECT also recommended a psychological evaluation which was conducted on October 13 & 20, 1997. The evaluator diagnosed the student with Pervasive Developmental Disorder (PDD) and recommended intensive therapy and an occupational therapy (OT) evaluation. The November 17, 1997 meeting to review the psychological evaluation was not a legal ECT

meeting as it consisted only of the parent and the Case Manager. The result of this meeting was to add two hours per week of developmental therapy for the student and one hour per week of collateral contact with the parents. The OT evaluation conducted on December 2, 1997 recommended OT consultation, not direct therapy. On January 15, 1998, the ECT (absent an agency representative designated to commit funds) met to review the student's program and to discuss home based therapies versus a PDD program. Due to the fact that he was under 3 years and most programs do not admit children under 3 years of age, coupled with the parents' desire to keep the student home, the decision was to increase home based services. The parents expressed a desire for an increase of services to 20 to 25 hours per week. The final determination was to increase developmental therapy to 3 hours per week (from 2), increase speech/language therapy to 2 hours per week (from 1), and to add Parent Training for 2 hours per week. Beginning in early December and again following the January 15, 1998 ECT meeting, CDS made numerous communications with area programs serving children diagnosed with PDD. Neither of the two key providers, i.e. Spurwink and the May Institute, had staff available to provide in-home therapy. Spurwink had a two day slot available in their program, but the parents reported that the 30 mile drive was too long for the student to travel. On January 26, 1998, the CDS staff added (outside the ECT process) one hour per week of OT services and one hour per month of collateral contact with the parents. On or about January 30, 1998, the IFSP was amended (outside the ECT process) to include 20 hours of developmental therapy per week. This followed a number of heated telephone calls from the parent. On February 3, 1998, another physician confirmed the earlier diagnosis of autism and recommended a very structured and intensive intervention of at least 30 hours per week, intensive and frequent speech and language intervention, and occupational therapy for sensory integration. On February 11, 1998, the ECT (with all requisite members present) met to review therapy options for the student, develop a plan to implement the increased developmental therapy, and to update the goals and objectives in the IFSP. The minutes indicate that no determinations were made by the team. On February 18, 1998, the parent filed a complaint with the Maine Department of Education alleging: failure to develop an appropriate program, failure to have the requisite members attending the ECT meetings, failure to develop the initial IFSP in a timely manner, and failure to implement the IFSP as per developmental therapy. A violation of the regulations was found regarding each allegation. The ECT with all requisite members was ordered to develop an appropriate program for the student based on the available evaluative data and to determine how it will be implemented.

The parent filed a request for Due Process Hearing alleging a failure to implement the current IFSP and a failure to develop the IFSP pursuant to regulations.

II. ISSUES

1. Were the IFSPs developed prior to April 27, 1998 reasonably calculated to provide the student with educational benefit?
2. If not, are the student and the parents entitled to compensatory services from the point of eligibility and ECT determination, respectively?
3. Was the current IFSP (dated April 27, 1998) properly developed and is it reasonably calculated to provide the student with educational benefit?

III. STIPULATIONS

1. The parties agree to the handicapping condition.
2. There is no dispute as to the facts outlined in the recent Complaint Investigation Report #98.020, Parent v. CDS-York County dated March 28, 1998.

III. FINDINGS OF FACT

1. The initial IFSP was developed on September 19, 1997. The current levels of functioning section of the IFSP repeats “delayed skills” and “significant delay” under each developmental area, but does not identify in objective, measurable terms the student’s level of functioning. Further, the plan contains three speech/language goals with underlying objectives. For example, “1. Increase understanding of language. a. [the student] will identify simple objects. b. [the student] will following (sic) simple requests/routines. c. [the student] will identify simple pictures in books.” While the IFSP identifies on-going assessments, observations and progress reports as the procedures to be used in measuring progress, there are no objective, measurable markers identifying specifically where the team believes he should be functioning within a specified period of time. [Exhibit: P-1]
2. At the November 17, 1997 ECT meeting (absent requisite ECT members, i.e. only Case Manger and parent in attendance)), Hannah Marston, Case Manager, wrote the goals and objective for the student’s developmental therapy. At some later date, Wendy Norton, Developmental Therapist wrote a “Plan of Care” which was different from the goals and objectives in the IFSP. Presumably, the “Plan of Care” constitutes the goals and objectives she uses in her therapy with the student. They fail to contain any language of measurement. [Exhibit: P-2; J-2]
3. At the January 15, 1998 ECT meeting (absent requisite ECT members), the OT evaluator recommended consultation only, no direct services. She had failed to submit an evaluation report in time for the meeting. At this meeting the parents were asking for 20 to 25 hours per week of therapy for the student and the result was to increase DT services from 2 hours to 3 hours per week. Additionally,

Parent Training was added for 2 hours per week. Both parents testified that they had received approximately a total of 5 hours of Parent Training since January 15th. [Exhibit: P-3; Testimony: Mother and Father of the student]

4. On an undated ECT minutes form, the narrative indicates that the team did not agree with the OT's recommendation of no direct services and agreed to add one hour per week of direct OT services. This document is signed by Hannah Marston and dated January 26, 1998. Additionally, Ms. Marston wrote the OT goals and objectives. The narrative includes the following: "On 1/23/98 the OT evaluation report was reviewed at CDSYC. Funding for OT therapy at 1x/week, 1 hour session was committed by CDSYC on 1/23/98." This commitment of funds for OT occurred at a staff meeting after the January 15th ECT meeting. On February 21, 1998, Leslie Goulet, OTR/L developed goals and objectives for the student different than the ones in the ECT minutes, which again were not the written result of an ECT meeting, but rather, a staff meeting. [Exhibits: P-4; J-2]

5. The ECT met on April 27, 1998 to review the progress reports and May Institute services. The requisite members were in attendance at this meeting pursuant to the regulations and the 3/28/98 Corrective Action Plan. The Investigator ordered the ECT "to develop an appropriate program for the student based on the evaluations already in its possession." According to the minutes, the team determination was to increase developmental therapy services to 30 hours per week (from 20 hours). However, at the hearing, Sue Motta, Director of CDS-YC stated that CDS just gave the parent whatever he wanted. This is reminiscent of when the 20 hours were added on January 20, 1998 following heated calls from the parent, not following a review of the evaluative data and informed consensus of the team. Chris Manley from the May Institute was at the ECT meeting and described their process of hiring and training a provider to work in the home with the student. She also explained that speech and OT services are incorporated into their goals for the child and are not separate direct services. Ms. Manley further stated that it is not ideal for a child to have 30 hours with one staff, rather, there should be two staff members to help the child with the generalization of approaches. The May Institute uses an Applied Behavioral Analysis (ABA) treatment model for autistic children. Regarding the discussion of progress reports, the minutes reflect concern on the part of the Occupational Therapist, Leslie Goulet, who stated that it was frustrating to not get feedback from the team regarding her proposed goals and objectives, and she would like to meet with the parents, Developmental Therapist and Speech Therapist to create functional, measurable goals. The minutes also state that the "team will convene when the developmental therapy program begins to make a team consensus of goals and objectives." [Exhibits: J-1; P-9 Testimony: Ms. Motta]

6. Providers were often not available to attend the ECT meetings because it came down to a choice between having them provide services to the child or attend the meeting, and these parents chose to keep the service time for the student. Sue Motta testified that it is very difficult getting contract providers, who

are not employees, to attend ECT meetings, complete evaluations in a timely manner, submit progress reports or other requisite paper work, and at times, even show up for direct service sessions. [Testimony: Parent; Sue Motta]

7. As of May 11, 1998, the student's file at CDS-YC contained none of the "plans of care" used by his three service providers, i.e. OT, Speech and DT. For all intents and purposes, these documents are the goals and objectives of the IFSP. Not only were they not in the IFSP itself or the CDS file, but the parent had never been given a copy. [Exhibit: J-2; Testimony: Parent and Ms. Motta]

IV. CONCLUSIONS

1. Were the IFSPs developed prior to April 27, 1998 reasonably calculated to provide educational benefit?

The findings in the Complaint Investigation Report, #98.020, Parent v. CDS-YC dated March 28, 1998 are undisputed by the parties. Due to procedural violations which compromised the child's right to an appropriate program, seriously hampered the parent's opportunity to participate in the formation process and deprived the student of educational benefit, the Investigator found that CDS-YC had failed to provide the student with an appropriate program. The above-referenced Complaint Report containing a detailed discussion of the procedural and substantive violations is included in the parent's document production at P-9.

2. If not, are the student and the parents entitled to compensatory services from the point of eligibility and ECT determination, respectively.

The student is entitled to compensatory services back to the date that the ECT should have met to review the psychological evaluation diagnosing him with PDD, i.e. 45 days from the 9/19/97 referral for the psychological evaluation was 11/4/97. Instead, an illegal ECT meeting occurred on November 17, 1997. It was at that meeting that an appropriate program should have been developed and then implemented within 30 days. The exact amount of compensatory services can not be calculated at this time because an appropriate program has yet to be developed (discussion follows in Issue #3). When such program is developed and finally implemented, the compensatory services calculation will be possible.

On or about January 30, 1998, the IFSP was amended to include 20 hours of developmental therapy per week for the student (which was never implemented), but this decision was not based on the ECT's informed consensus following a review of the evaluative data. Rather, it was made unilaterally by the Case Manager following intense pressure by the parent. While the 20 hours is within the range of evaluators' recommendations of service time for an autistic child, it is not the result of the legally prescribed process under the Individuals

With Disabilities Education Act and thus, should not be used as the basis to calculate compensatory services.

On April 28, 1998, the first legal ECT meeting was held with all requisite members in attendance. The minutes indicate extensive discussion regarding placement, i.e. May Institute, Spurwink and individual providers through CDS, and a determination to provide 30 hours of developmental therapy (which has not been implemented to date). Again, the ECT has failed to develop an appropriate program based on the student's needs. It should not be discussing placement prior to developing the goals and objectives. Failing to properly develop the IFSP, the 30 hours should not be used to calculate compensatory services. Further, it is disturbing to hear that the decision to increase services to 30 hours was based on just giving the parent what he wanted. It appears that the CDS personnel are unsure as to what their roles and responsibilities are under the law.

Regarding compensation for the Parent Training services, Parent Training was added to the IFSP for two 1 hour sessions per week at the January 15, 1998 ECT meeting. Both parents testified that since January 15th they had received approximately 5 hours of Parent Training. To date that should have been approximately 32 hours of Parent Training services. The parents are entitled to be compensated for the hours of Parent Training not provided.

3. Was the current IFSP (dated April 27, 1998) properly developed and is it reasonably calculated to provide the student with educational benefit?

Once determined eligible for special services, the law requires the ECT with all requisite members [Chapter 180, § VII.2], i.e. 1.) parent, 2.) agency representative designated to commit funds, 3.) service provider, 4.) Case Manager, and 5.) member of screening/evaluation team or all individuals directly involved in screening/evaluation of the child, to develop an appropriate program for the child based on the evaluative data. The IFSP is the document created by the ECT that includes, among other components [Chapter 180, § IX.1], specific goals and objectives pertaining to the specific special education and related services to be provided to the child. While not a performance contract, it is the legal obligation of CDS to fully implement the service provisions of the IFSP.

The first requirement in the IFSP is a statement of the child's present level of performance. The statement should accurately describe the effect of the child's disability on the child's functional performance, i.e. how the disability affects the child's participation in appropriate activities. The statement must be written in objective, measurable terms and must be directly related to other components of the IFSP, such as goals and objectives and related services. In the present case, this section of the IFSP fails to contain objective, measurable terms sufficient to know the student's present functional performance levels.

The second requirement of the IFSP is a statement of annual goals, including short term instructional objectives. This requirement provides a mechanism for determining whether the child is progressing and whether the program is appropriate for the child's specific needs. The annual goals should describe what the child with this disability can reasonably be expected to accomplish within a twelve month period of time. The short term objectives are measurable steps between the present levels of performance and the annual goals. The short term objectives provide the general benchmarks for determining progress. **IFSP goals and objectives must be written before placement is addressed.** [Refer to 34 C.F.R. Part 300, Appendix C, Questions 36 through 43]

The goals and objectives must be developed by the ECT, not by the Case Manager and not in isolation by the individual service providers. In the present case, the service providers did not even send their goals and objectives ("plans of care") to CDS or the parent. It is the Case Manager's responsibility to ensure that all written results from screenings, evaluations and assessments are submitted by providers, contained in the child's file, and that the parents are informed of the results. [Chapter 180, § VI.3.3] At least one provider must attend the ECT meetings and it is CDS's responsibility to hire personnel who can deliver services in a timely manner, provide requisite paper work and attend an IFSP meeting outside the child's service session. If that necessitates hiring providers as employees, so be it.

Once the goals and objectives are developed, the discussion of placement is held. The services must be provided in the least restrictive environment and in the case of a young child that is often within their home. It is clear from the April 28th minutes that the team spent most of the meeting discussing placement and did not develop goals and objectives.

In conclusion, to date CDS has not developed an appropriate program for the student. It appears that the plan is to have the May Institute hire and train a person in the ABA model to deliver the services to the student in his home. The April 28th minutes indicate that the May Institute is in the second round of interviews with a possible candidate and that screening of the student has been conducted. It also appears that the Spurwink program remains out in the wings as a possible provider. A large part of the current problem stems from the policy of the current CDS system to contract with providers to implement services, rather than being able to directly provide services.

V. ORDER

1. CDS-YC shall convene an ECT meeting as soon as possible to develop an appropriate program for the student. The requisite participants must be in attendance. CDS shall engage the services of a professional who is knowledgeable in special education law, e.g. a Director of Special Education, to facilitate the meeting. This individual shall be provided a copy of this Hearing decision prior to the ECT meeting. Using existing evaluative data, the ECT shall

develop a new “present level of performance” section; develop appropriate goals and objectives; and then decide placement in the least restrictive environment.

2. CDS shall submit to the Hearing Officer a copy of the minutes and IFSP within ten days of the ECT meeting ordered above.

3. The CDS-YC Board shall develop a plan for ensuring there are adequate numbers of agency representatives authorized to commit funds. Staff meetings shall no longer be used as the vehicle for deciding what services a child is entitled to. That decision must be made at an ECT meeting with all requisite members present.

4. CDS shall submit to the Hearing Officer the Board’s plan within 30 days of receipt of this decision.

5. Once an appropriate IFSP is developed and implemented, CDS and the parent shall calculate the compensatory service time back to the date (November 1997 plus 30 days to implement) when the plan should have been developed minus the hours of service time already provided to the student. CDS and the parents shall also calculate how to compensate the parents for failure to provide Parent Training sessions.

Katherine A. Neale, M.Ed., J.D.
Hearing Officer

LIST OF WITNESSES

Witnesses for the Parent:

Parents (Father and Mother)
Hannah Marston, CDS, Case Manger

Witnesses for CDS:

Susan Motta, Director, CDS-York County

INDEX OF DOCUMENTS

Parent production: P-1 to P-17 (attached)

CDS-YC production: S-1 to S-17 (attached)

Joint production: J-1 to J-2 (attached)