

Complaint Investigation Report  
Parent v. Portland  
April 11, 2006

Complaint #06.010C

Complaint Investigator: Sheila Mayberry  
Date of Appointment: January 30, 2006

### **I. Identifying Information**

Complainant: Parent

Respondent: Mary Jo O'Connor  
Superintendent  
331 Veranda Street  
Portland, ME 04103

Special Education Director: Dr. Barbara Dee

Student: Student  
DOB: xx/xx/xxxx

### **II. Summary of Complaint Investigation Activities**

On January 27, 2006, the Department of Education received this complaint from the Student's mother. The complaint investigator was appointed on January 30, 2006. On or about February 13, the complaint investigator received 36 pages of documents from the parties. Interviews were conducted with the following: the Student's mother; Beth Dwyer, the Student's advocate; and Barbara Dee, the Special Education Director for the Portland School District (District). The complaint investigator determined that a complaint investigation meeting was unnecessary, and a meeting was not held.

### **III. Preliminary Statement**

The Student is xx years old and attends the West School in Portland, Maine. He receives special education services under the category of Other Health Impairment. The complaint filed by the Student's mother alleges that the District failed to continue support of an educational technician in the Student's after-school daycare program, as reflected in the Student's amended IEP. This support was included in a written signed agreement made as part of a settlement to resolve Case number 05.099H, filed by the Student's mother on July 29, 2005.

#### **IV. Allegations**

1. Discontinuation of supportive services in the daycare program without the input of the PET. MSER § 8.3
2. **Ancillary issue:** Failure to provide FAPE by discontinuing supportive services in the daycare program. MSER § 1.3

#### **V. Summary of Findings**

1. The Student, born on xx/xx/xxxx, is xx years old. He lives in Portland, Maine with his mother. He attends the xx grade at the West School in Portland, Maine.
2. The Student has been diagnosed with Attention Deficit Disorder (ADD), mood disorder with impulsivity, and fetal alcohol syndrome with fetal alcohol effects. He is currently prescribed Ritalin.
3. The Student attended xx at the Adams Elementary School in Portland, Maine during the 2004-2005 school year. Although he was on grade level at that time, there were frequent instances of physical aggression, severe swearing, threatening, bolting and lewd behavior. He was considered unsafe to himself and others. There were no known triggers to the behaviors. It was necessary to have support with him at all times throughout the day in order to access the mainstream curriculum. He had a behavior plan.
4. On June 7, 2005, the PET reviewed the Student's IEP and discussed services for the following school year. The Student's teacher, Megan Prestes, reported that the Student continued to have unpredictable hostile behaviors and still needed continuous support. The District's educational strategist, Eileen Glaude, stated that even with all the interventions in place, the Student continued to experience significant incidents on a daily basis. The team discussed the value of placing the Student in the District's day treatment program at the West School. It was determined that the Student needed day treatment services, and that he should receive extended school year services provided by the West School. It was also determined that he needed one hour of social work services a week and 26.5 hours a week of group developmental therapy. The Student's mother expressed concerns about the program but was willing to visit the school.
5. The West School's day treatment program is on the same daily schedule as Portland's high schools. It starts at 7:30 a.m. and ends at 1:00 p.m. The Student's mother was concerned that, based upon the change of schedule, there would not be an appropriate after school daycare program for the Student. The West School houses an independent nonprofit daycare program, Children's Adventure Center. When it became apparent that there would be no support for the Student in the daycare program at the West School, the Student's mother stated that she opposed the PET's recommendation to send him to the West School.

6. The Student's mother filed a request for a Due Process Hearing on July 26, 2005. A resolution session was held on August 15, 2005. In an attempt to resolve the issues raised by the Student's mother, Dr. Barbara Dee, the District's Special Education Director, offered to amend the Student's IEP to include the following: 1) the provision of an educational technician trained in dealing with behaviors, to support the Student during after-school daycare at Children's Adventure Center Monday through Friday; 2) the placement of an air conditioner in the West School; 3) a scheduled PET meeting by October 7, 2005; and 4) the ability to reconvene the PET at any time the Student became unsuccessful and to discuss other placements. Both Dr. Dee and the Student's mother signed the agreement. The Student's case manager, Beth Dwyer, also signed the agreement. The agreement was not voided by either party three business days after it was executed.
7. The Student's mother withdrew her request for a hearing on August 15, 2005.
8. In a letter to the complaint investigator, Dr. Dee reported that on September 6, 2006, Selene Wade, an educational technician, began supporting the Student at the Children's Adventure Center daycare program at the conclusion of the West School's normal school day. She stated that the Student was the only child his age in the program at that time of day, and that he had no access to structured activities. She stated that Ms. Wade reported on October 11, 2005 that the Student exhibited friendly behaviors and that he was very good with the younger children. She noted that the time period between 2:00 p.m. to 2:45 p.m., immediately after receiving his Ritalin dosage, was difficult for him.
9. A PET was held on October 11, 2005. Ms. McCann, the Student's teacher, reported that the Student was highly motivated to learn. She stated that he still needed to learn more about identifying appropriate behaviors, but she saw that he was capable of learning this in time. The Student's mother stated that she was pleased with how well he was doing but was concerned about the afternoon time period between 2:30 p.m. and 3:15 p.m. She stated that she would change the time for administering his medication to 1:30 p.m. The West School director, Peter McCormack, stated that the educational technician who supported the Student at Children's Adventure Center was having a difficult time supporting him in a structured way. The Student was still very aggressive with other children during that time period and had a hard time settling down. Dr. Dee acknowledged that Children's Adventure Center had no structured programming in which the Student could take part. The PET agreed to investigate different ways for the educational technician to support the Student between the hours of 1:00 p.m. and 3:15 p.m. No changes to his IEP were made at that time.
10. The PET met on December 8, 2005, to discuss changes in the Student's behavior; the Parent was unable to attend the meeting. However at the December 8<sup>th</sup> meeting, Ms. McCann reported major changes in the Student's personal life that were apparently

affecting his behavior. He had become somewhat more aggressive in school, even though he was progressing academically. The PET meeting was rescheduled to December 15, 2005 in order for the Student's mother to attend.

11. In a report submitted to the complaint investigator, Peter McCormack, director of the West School, stated that the Student's behavior in the daycare program was very challenging for Ms. Wade. He noted that the Student was given the opportunity to earn school-based incentives in the West classroom behavior management program in an attempt to reduce his aggression and increase his cooperation with Ms. Wade. Such efforts were helpful until mid-November 2005. They had no impact on his behavior thereafter. He stated that, "[A]fter several episodes of very high-level aggression, Ms. Wade felt she could no longer place herself in that position, and terminated her support." It was reported by Dr. Dee that Ms. Wade stopped her services at the daycare on December 9, 2005.
12. A PET meeting was held on December 15, 2005. Ms. McCann reported that the Student's behavior had deteriorated since Thanksgiving. The Student's mother reported that the Student's father had entered their lives again, but only for a short period of time. She stated that this had an adverse effect on the Student, both at home and in school. Although it was reported that the Student was progressing academically, his after school behavior was a challenge for the educational technician. Dr. Dee stated that since the after school daycare was not a part of the Student's day treatment educational program, the District would no longer continue to provide this support. She also stated that the support at the daycare program was not a part of the Student's IEP. The Student's mother disagreed with the discontinuation of this support. The PET did not reach consensus on this matter.
13. Thereafter the Student's mother filed a request for a complaint investigation.
14. In a letter, dated February 7, 2006, submitted to the complaint investigator, Dr. Dee stated that:

The PET felt that the presence of the ed tech at the daycare center had no educational relevance. His behavior and academic progress at West is satisfactory; in fact his academic achievement is excellent. The PET is fully aware of (the mother's) concerns about the possibility of the Children's Adventure Center asking that (the Student) no longer attend due to behavioral concerns, but sending the educational technician had no impact on his experiences in daycare. The use of the ed tech began to resemble daycare, which is not an appropriate use of educational resources.
15. In an interview with the complaint investigator, Dr. Dee stated that the Student was a good fit for the day treatment program at the West School. The program was working well for him. However, the earlier release time at the West School posed challenges

for the Student and his mother. His mother depended on the regular elementary school hours, which end at 3:15 p.m. This allowed the mother to work and be able to pick up the Student from daycare at 3:45 p.m. The West School schedule made it difficult to adjust the Student's daycare schedule after school. If the Student was going to attend West, he needed an after school program that provided support to handle his behavioral issues. Dr. Dee stated that in order to resolve that matter at the resolution session, she had agreed to amend the Student's IEP to include the provision of an educational technician at Children's Adventure Center. Since the West School ends its program at 1:00 p.m., the Student went directly to the daycare at that time. However, because children in the Student's age bracket normally arrive after 3:30 p.m., there was a significant period of time during which there was no normal programming for his age group. Dr. Dee acknowledged that this was a problem. She also acknowledged that the agreement to amend the Student's IEP to include this support was binding, but did not believe it was part of his required educational program. However, she did state that the agreement amended the Student's IEP. She also stated that her office had started investigating other daycare programs for the Student. Dr. Dee also noted that she believed that the Student would be ready to mainstream back into the regular classroom in the future, given his success at the West School.

16. In an interview with the complaint investigator, the Student's mother stated that she had reservations about the Student attending the West School. She stated that the hours were not well suited for him because of the afternoon behavioral problems he would have in the daycare program. The mother stated that it was her understanding that the provision of an educational technician to work on behavior management skills during that part of the day was critical for the Student in order for him to be able to mainstream back into his regular home school. She stated that it was not until after she filed for a due process hearing that the District offered support after school. She agreed to this in writing and withdrew her hearing request. She stated that it was apparent that the Student's behavior between the time from 1:00 p.m. and 3:15 p.m. was not improving. Family issues, including the reappearance of the Student's father for a few weeks in the late fall, were disruptive to the Student's progress. She believed that the District's decision to pull the educational technician out of the daycare during the critical part of the day was not serving the Student well and was reducing the pace at which he could be mainstreamed into his regular school.

## **VI. Conclusions**

**Allegation: Discontinuation of supportive services in the daycare program without the input of the PET. MSER § 8.3 Violation Found**

The reauthorized Individuals with Disabilities Act (IDEA) 2004 became effective July 1, 2005. Under the reauthorized statute, parties are required to attend a resolution session after a due process hearing has been requested. 20 USCS § 1415 (f)(1)(B)(i), unless both parties agree to waive the resolution session. If the parties are able to reach a

written, signed agreement resolving the issues delineated in the complaint, the agreement becomes binding and enforceable in any state court of competent jurisdiction or in a federal district court. 20 USCS § 1415 (f)(B)(iii)(I)(II). However, once the terms of a resolution agreement become part of a student's IEP, the implementation of the IEP and the provision of a FAPE are within the jurisdictional authority and enforcement of the Maine Department of Education.

The Student's mother and Dr. Barbara Dee, on behalf of the District, signed an agreement on August 15, 2006, pursuant to 20 USCS § 1415 (f)(B)(iii)(I)(II), to resolve the complaint in Case number 05.099H. The agreement included amending the IEP to include the provision of an educational technician at the Children's Adventure Center for the Student between 1:00 p.m. and 3:15 p.m. The agreement was attached as an addendum to the IEP. By making the resolution session agreement with the Parent and by amending the IEP to include the support to the Student's after school daycare, the District accepted the provision of services that are not traditionally part of an IEP.

Once the IEP was amended to include support in the Student's after school daycare, it became part of the Student's right to a free appropriate public education (FAPE). The daycare support was part of the means by which the Parent would allow the Student could to attend the West School.

The Maine Special Education Regulations (MSER) require that a PET must be convened to determine any necessary changes in the student's IEP. MSER § 8.3. In this case, once the educational technician decided not to return to the daycare program, the District made the unilateral decision not to replace her. This decision was made before the December 15, 2005 PET meeting. There was no effort made to even temporarily replace the educational technician before the meeting was held. In addition, minutes from the PET meeting indicate that no discussion was held on how discontinuing the supportive services would impact the Student's educational program. Instead, the discussion was focused on the District's misunderstanding that the services were not part of the Student's educational programming at all and therefore could be eliminated. Clearly, the services were part of his IEP, as stated in the August 15, 2005 Resolution Session agreement. In addition, Special Education Director Dee, in her interview with the complaint investigator, acknowledged that they were part of the Student's IEP. By predetermining that the supportive services should be discontinued, the District violated the requirement to have the PET decide on changes to the Student's IEP.

**Ancillary issue:** Failure to provide FAPE by discontinuing supportive services in the after school daycare program. MSER § 1.3 **Violation Found**

The guarantee of equal educational opportunity entitles each student with a disability residing in the State...to be provided with a free appropriate public education that emphasizes special education and support services designed to meet their unique needs... This education includes special education and supportive services which ... are provided at public expense..., meet the standards and personnel qualifications required by these regulations..., are appropriate to the special needs of the student as defined in an

Individualized Education Program, and are provided in the least restrictive educational alternative. MSER § 1.3.

The issue in this matter is whether discontinuing the Student's support services at his daycare program, as provided in his amended IEP, violated the District's obligation to provide him a FAPE, as required by federal and state law. It is well established that the applicable standard for making such a determination is whether the IEP is reasonably calculated to enable the student to receive some education benefit. *Rowley v. Board of Education*, 102 S. Ct. 3034, 3051 (1982).

The provision of the daycare support services was a part of his educational programming per the amendment of the IEP. They became so once the District and the mother agreed that daycare support would be provided as part of the arrangement for the Student to attend the West School. Therefore, the discontinuation of daycare support services has been a failure and refusal to provide a FAPE.

## **VII. Corrective Action Plan**

The District shall continue the implementation of the portion of the amended IEP regarding the provision of an educational technician to the Student in the Children's Adventure Center between 1:00 p.m. and 3:15 p.m. on school days until and if the IEP is amended by the PET at a future meeting.

The District shall document compliance with this Corrective Action Plan by sending a signed and dated log (by the service provider) of the provision of the above services to: 1) the Due Process Office; 2) the Complaint Investigator; and, 3) the Parent.