

Complaint Investigation Report
Parent & Parent v. CDS First Step

December 20, 2011

Complaint #12.030C
Complaint Investigator: Jonathan Braff, Esq.

I. Identifying Information

Complainants: Mother
Address
City, Zip

Father
Address
City, Zip

Respondent: Marnie Morneault, Board Chair
16 Huckins St.
Lewiston, ME 04240

Site Director: Holly Day

Child: Student
DOB: xx/xx/xxxx

II. Summary of Complaint Investigation Activities

The Department of Education received this complaint on October 24, 2011. The Complaint Investigator was appointed on October 26, 2011 and issued a draft allegations report on October 31, 2011, amended on November 1, 2011. The Complaint Investigator conducted a complaint investigation meeting on December 1, 2011 (rescheduled from the original date of November 15, 2011 at the Respondent's request). On December 7, 2011, the Complaint Investigator received a 2-page memorandum and 2 pages of documents from the Complainant, and received 53 pages of documents from CDS First Step (the "Site") on December 6, 2011. Interviews were conducted with the following: Karen Merrill, case manager for the Site; June Gagnon, special education consultant for the Site; Cindy Spence, OTR/L, occupational therapist; Jessica Mosher, COTA/L, occupational therapy assistant; Palmer Curtis, Ph.D., speech/language pathologist; Ranae L'Italien, child care director; and the Child's mother.

III. Preliminary Statement

The Child is xx years old and is currently receiving special education services under the eligibility criterion Speech or Language Impairment. This complaint was filed by the Child's mother, alleging violations of the Maine Unified Special Education Regulations (MUSER), Chapter 101, as set forth below.

IV. Allegations

1. Failure to conduct sufficiently comprehensive testing before determining to discontinue the Child's occupational therapy services in violation of MUSER §V.2.B(1)(b)

V. Summary of Findings

1. The Child lives primarily in Augusta with his brother and his mother, and is presently attending a xx program at the Kennebec Valley YMCA ("KVYMCA"). Shortly after he was born, the Child had a cyanotic episode requiring positive pressure ventilation. A subsequent MRI revealed a left-sided temporal lobe infarction. He began receiving early intervention services at the age of six months.

2. Pursuant to the Child's IEP dated May 5, 2011, the Child received speech/language services, one one-hour session per week, and occupational therapy ("OT"), two one-hour sessions per week. The IEP contained one OT goal as follows: "[The Child] will improve sensory processing skills, gross motor skills, fine motor skills, visual motor skills, self care skills, and oral motor function to age appropriate expectations by 5/4/12."

3. At the May 5, 2011 meeting, the Child's IEP Team determined to have a developmental, speech/language and OT evaluation conducted of the Child to assess his skills upon transferring to the KVYMCA preschool classroom.

4. The developmental evaluation was conducted by June Gagnon on October 3, 2011. The Child obtained a score in the average range (94) on the Wechsler Preschool & Primary Scale of Intelligence-III, and on the Battelle Developmental Inventory-2 obtained scores in the low average (87) in the adaptive domain and in the average range (95) in the personal-social domain. Among the Child's challenges noted in Ms. Gagnon's report were that the Child could be difficult to understand, had problems organizing sentences and expressing himself grammatically, was fidgety and distractible, and had difficulty with paper/pencil activities.

5. The OT evaluation was conducted by Cindy Spence, OTR/L on August 15, 2011. On the xx and xx Behavior Scales, the Child was rated average in all behavior and social skill areas except for social interaction, where the Student was rated as having moderate deficit. On the Miller Function and Participation Scales, the Child scored within the typical range for visual motor (0.33 standard deviations below the mean), fine motor (1.0 standard deviations below the mean) and gross motor skills (1.0 standard deviations below the mean), although Ms. Spence stated in her report that the Child had "a great deal of difficulty with the gross motor

portions of testing.” On the Sensory Profile, measuring responses to sensory events in daily life based primarily upon parent reporting, the Child was rated in the “More Than Others” range in many of the categories. In the Discussion and Summary section of her report of the evaluation, Ms. Spence stated that “gross motor skills are a continuing area of concern. While [the Child] scores within the norm ranges that preclude his need for educationally based services in the areas of fine and gross motor skill development, there are other areas of concern that would benefit from being addressed during OT sessions. [The Child] continues to have a great deal of difficulty with transitions during his typical routines, presents with some social challenges in his xx setting and lacks quality typical for age for many of his motor skills. It is a tribute to [the Child] and his family that he has adapted well to some of his limitations and that he has been able to overcome those limitations quite successfully.”

6. On October 18, 2011, the IEP Team met to review the results of the evaluations. Ms. Gagnon reported on her observations of the Student in his educational setting, in which he demonstrated good play skills, good interactions with peers and was basically indistinguishable from his peers. Ms. Gagnon did report that the Student had difficulty with a tracing activity, although the teacher stated that most of the children had difficulty with the activity. On a Social Competence & Behavior Evaluation rating scale completed by Melissa Stephenson, one of the Child’s teachers, the Child scored in the average range for both social competence and general adaptation. Ms. Spence expressed her belief that the Child would benefit from further OT, but agreed that the Child’s scores on the Miller assessment, being less than 1.5 standard deviations from the mean, did not qualify him for special education OT services.

7. Based upon the information reviewed at the October 18, 2011 meeting, the Site determined that the Child would continue to receive speech/language therapy one one-hour session per week, would receive in addition speech/language consultation service to the classroom one hour per month, but would no longer receive OT services.

8. During an interview conducted by the Complaint Investigator with Karen Merrill, Ms. Merrill stated the following: She is a case manager for the Site, and has had responsibility for the Child’s case since October 1, 2011. She led the October 18, 2011 IEP Team meeting. Prior to the meeting, she observed the Child in his KVYMCA program three or four times. During an activity involving use of scissors, she saw the Child stabilize paper with one hand and cut with the other with fair to good accuracy and without need of assistance. She saw the Child cross the mid-line in several activities, including putting on his shoes. Teachers told her that they weren’t seeing the Child have difficulties with those types of activities, either.

During one observation, the class was getting ready to go outside for a walk and the Child was one of the first to be finished getting ready. He put on all of his things independently, except for needing some help getting his zipper started; he was able to finish zipping up after that. The Child had to wait until the other children were ready, and this took about 20 minutes. The Child seemed to have no trouble waiting, and was very social, talking with his brother as well as other children. He was one of the calmer children who were waiting for the activity to begin, and even kept another child entertained who was starting to lose it by

inviting him to look at a book together. During nap time, the Child did not sleep but lay quietly.

The Child appeared to be well aware of the class rules and followed them without difficulty and without needing a lot of adult support. She saw the Child play outdoors without conflict or difficulty with social interactions. The Child didn't appear clumsy on the playground equipment. She didn't see the Child have difficulty with transitions. She would never have identified the Child as a child with special needs if she hadn't already known that to be the case. She saw no meltdowns during her observations. She was told that meltdowns only occurred when Ms. Mosher or the Child's mother was present in the classroom.

At the meeting, the Team reviewed the results of the developmental, speech/language and OT evaluations. She determined to discontinue OT services based on the results of the OT evaluation, which found no significant delays in any one area that would make him eligible for services. That is, there was no one score that was 2.0 standard deviations below the mean or two scores that were 1.5 standard deviations below the mean. The only assessment reviewed at the meeting that reflected a score which supported a finding of eligibility was for speech/language. Even there, the score for articulation was borderline for eligibility, but there was supporting documentation for an eligibility determination. In OT, the results of the observations and the reports of the Child's teachers did not support such a determination. Ms. Stephenson was asked about the amount of support the Child was being given in the classroom, and she answered that it was far less than many of the Child's peers. She concluded that there was no adverse effect observed from the Child's non-speech/language disabilities that would qualify the Child for even OT consult services.

Once the determination was made, there was some discussion about further evaluations. She offered to the Child's mother to have a second OT evaluation done, with a different therapist and using different assessments. The Child's mother never took her up on that offer. Ms. Spence suggested to the Child's mother that she could get a neuro-psychological evaluation for the Child. Nothing else was said about further testing.

The program the Child is in at the KVYMCA does include xx activities, like letter and number recognition, but a public xx program (particularly the one in Augusta where the Child's mother resides) would place a greater emphasis on academics. She suggested to the Child's mother that if she were to put the Child in such a program, his deficits might show up in greater relief there, and might support a finding of adverse effect that would qualify the Child for OT services.

9. During an interview conducted by the Complaint Investigator with June Gagnon, Ms. Gagnon stated the following: She is a special education consultant for the Site, and as part of the Child's recent reevaluation, she observed the Child in the classroom, had the Child's teacher complete a social competence and behavior checklist and conducted a developmental evaluation. The observation lasted approximately 1 ½ hours. The Child was indistinguishable from the other children, performing as well or better than they. He didn't appear to be disturbed by the high noise level in the room. His behavior was appropriate at circle time, although he did need some help with where he was going to sit for the activity,

and he helped the teacher with the calendar. He transitioned to other activities with no difficulty.

On a writing worksheet activity, the Child attended to task, and had a good pencil grip. He had difficulty with tracing letters, but many of the children did. During free play, the Child played cooperatively with other children, and carried on a long conversation with another child. The class then came together to listen to a story. The Child was focused, not distractible. During the next activity, which was painting, the Child followed directions without difficulty and shared his paint with another child.

She spoke with the Child's teacher, Ms. Stephenson, who said that the Child had made really big gains. The Child fit right in with the class, was able to share and didn't need extra support. There were minor concerns about some social interaction problems (growling and tearing up when he got upset), but nothing was said about tantrums or meltdowns. Ms. Stephenson completed the checklist, and the Child was rated in the average range on all eight subscales. She reported that the Child is typically in a good mood, and doesn't get frustrated easily, although he doesn't always listen attentively and sometimes doesn't make eye contact. Clumsiness on the part of the Child was reported, but she didn't see it herself. The Child did seem to be weight bearing more on his left side in many activities, a minor asymmetry, but he was able to shift from left to right.

During the evaluation, the Child was fidgety and somewhat inattentive, though not to the extent that it was a serious concern. His full scale score on the Wechsler III was a 94, but the Child did not seem greatly invested in the testing, and she thinks his true score may be higher.

She interviewed both Ms. Stephenson and the Child's mother for the Battelle, and the combined score was in the low average range. The Child's self-care was good, and his personal social skills were rated average. The issues he had were primarily language based. The Child had difficulty organizing his responses to "What if..." questions, for example. She was excited by the results of the test, feeling that they were really good scores in light of the Child's medical history. She believed that the Child did not need special services other than speech/language therapy. Based on what the Child's mother said, she believes that the Child has more behaviors of concern at home than at school. The Child hits his mother, and fights with her and his brother. At home, he is said to be distractible and has a hard time with transitions.

She attended the October 18, 2011 IEP Team meeting. She doesn't remember there being a discussion about whether the Child was eligible under the Other Health Impaired ("OHI") classification, but she doesn't believe the Child meets the criteria. The Child's relative right side weakness is really subtle; he uses both hands, although he prefers the left. There is no right side palsy, nor a diagnosis of hemiparesis, though the Child was at risk for it. The Child is inattentive at times, but not to an extreme degree, and not more than most xx year olds. She didn't see anything that adversely affects the Child's educational performance; he functions very well in the classroom.

There was discussion at the meeting about the possibility of a neuropsychological evaluation. At the age of xx, there is not a lot of information that a neuropsychologist could get. It might be better to wait until he is older. She doesn't recall Ms. Merrill saying that CDS doesn't pay for neuropsychologists. She might have said that they can't get enough out of testing a xx year old to justify it.

Ms. Spence presents the Child as a child with very significant needs, as a disabled child with significant need for OT. Ms. Spence did report at the meeting that the Child grows and challenges limits, but didn't talk about sensory needs (she did at a subsequent meeting), only motor needs, particularly right sided weakness and asymmetry. The Child's motor scores were all fine, however. It was Dr. Curtis who brought up the sensory issues. It seemed like Ms. Spence and Dr. Curtis were going back and forth trying to come up with something that would support provision of OT services where the scores didn't support that.

The Child's scores on Ms. Spence's Sensory Profile (she doesn't recall that those scores were even discussed at the October 18, 2011 meeting) were in the Probable Difference and Definite Difference range, but CDS can't provide services based solely on sensory integration work because MaineCare won't fund it. CDS might be able to provide the services if there were a strong showing of adverse effect on educational performance, but that wasn't the case for the Child. Ms. Stephenson reported at the meeting that the Child was happy and follows directions. Ms. Stephenson said that while the Child doesn't respond when the whole class is asked a question, he will respond if you ask him directly. She also said that the Child was still having problems expressing frustration appropriately, but that there were other children in the class who needed far more support than he did.

10. During an interview conducted by the Complaint Investigator with Jessica Mosher, COTA/L, Ms. Mosher stated the following: She is an OT assistant at All Kids in Action and has been working with the Child since June 2010. She spends two hours per week with the Child, one hour at her office and one hour at the KVYMCA. She works with him on integrating the right side of his body, both the upper and lower extremity. She sometimes has to cue the Child to use his right hand when doing activities such as cutting or drawing on paper; other times the Child will remember on his own. She also works on the Child's core strength; the Child has difficulty with activities such as crab walking. The Child has less endurance on his right side, and has balance problems due to right side weakness. The Child can seem clumsy for this reason.

The Child has sensory integration issues, and needs calming and body awareness techniques in order to self-regulate. The Child overreacts emotionally if he is not successful right away or perceives himself as failing, and at such times he needs adult assistance or he will melt down. The Child also has a hard time transitioning, so that if the class is listening to a book and the teacher stops to ask the class a question, the Child will have difficulty shifting focus and will generally not be able to answer.

She plays games with the Child during every session to work on handling frustration and not winning. Some days the Child is better with this than others. The meltdowns happen more often when he is playing with peers; some meltdowns are more violent than others. Sometimes the Child says he wants to play by himself because he is afraid he will play a

game and lose. The teachers say this behavior didn't happen until she came, but that may be because the Child wasn't being challenged until then.

The Child is very set on his routines, and if there is a change in the routine, such as the presence of a substitute teacher, the Child has a hard time adjusting. The Child also has difficulty learning new information. When he first started using a scissors to cut paper, he got very frustrated because it is a bi-lateral task. She had to work with him on this for about a year before he could approach the task calmly and cut out a shape without support. Without continued OT, the Child will have a hard time learning new skills, and there will be more meltdowns. Without the sensory integration work, the Child will not be able to control his body and sit still. He will demonstrate more "silly" behavior, and this may get worse as the Child grows older. If the Child only gets OT in the clinical setting, the therapist will not know what is going on in the classroom.

She is worried that the teachers in his program will have a tendency to compare the Child to children younger than he. The Parents are intending to not enroll him in xx next year, so he will be xx years old in a xx class of xx and xx year olds, more of the former than the latter. The teachers may have inappropriately low expectations of the Student, because they will compare his behavior and skills to the xx year olds in the class. The teachers say that, compared to his peers, the Student is doing fine in class, but they are comparing him to the younger children. The attention span of a xx year old, for instance, is around 10 seconds, but should be 15-20 seconds for a xx year old. She is seeing behaviors and difficulties that the teachers are not seeing. She will know what skills the Child should be learning at xx so she can make sure he is working at the appropriate level. She thinks the Child will regress without OT because he will have a harder time learning new skills and because of the teachers' low expectations. The teachers may think the Child is just being silly, or just being clumsy, when really it's the result of his not having the sensory integration work.

11. During an interview conducted by the Complaint Investigator with Cindy Spence, OTR/L, Ms. Spence stated the following: She is the owner of and senior therapist at All Kids in Action in Farmingdale. She does the speech evaluations for the agency, and supervises Ms. Mosher, including review of her notes and helping her with problem solving. She has also observed the Child during his visits to her offices. She has observed that the Child frequently has meltdowns as he is leaving the office, due to his difficulties with transition. The tantrums are intense and long lasting. On one occasion in January or February 2011, she was present at the KVYMCA in a non-professional capacity and observed the Child screaming and having a tantrum in his classroom. She has seen him refuse a large number of tasks, not necessarily tasks that are difficult for him. She thinks this is due to a need for control. She has also seen some aggression towards his brother and his mother. If the Child doesn't win a game, he becomes very distressed, which is typical of a child with sensory processing issues.

She performed an evaluation of the Child in August 2011, using tools that looked primarily at functional skills as these were more relevant to the Child, along with a sensory profile and xx and xx behavior scales. The evaluation took about 1 ½ hours to perform.

The legal limits on CDS' provision of services require scores with a standard deviation of 1.5 or more. The Child's scores on the functional testing were not in that range. The scores on the sensory profile, however, were in that range, but when she brought this out at the October

18, 2011 IEP Team meeting the Site chose to disregard it. With the Child found eligible under the category Speech and Language Impairment, he wouldn't normally qualify for OT services, so she tried to argue that those sensory scores would qualify the Child under the eligibility category Other Health Impaired ("OHI"). The Child has limited strength (his right-sided weakness) and limited alertness (his inattentiveness) due to a chronic health problem (the stroke that impacted the brain in the Broca's Area which affects emotions as well as expressive language). Ms. Merrill said that the Site doesn't use the OHI designation, they use developmental delay, and the sensory profile is not a developmental issue.

She did not specifically evaluate gross motor skills because the Child was receiving physical therapy ("PT"), although not through CDS. She did not realize that the physical therapist would not be present at the meeting. One of the Child's areas of difficulty is related to gross motor activities, but she didn't look at this in connection with the Child's right-sided weakness or core strength issues. She believes that the Child experiences a lot of clumsiness in his educational program.

The reports she received from the Child's teachers demonstrated that the Child had moderate deficits in social interaction skills. The Child growls when he is angry or doesn't want to socialize. The Child's teachers talk with Ms. Mosher about concerns they have for the Child in the classroom, but at the meeting Ms. Stephenson denied that there were any issues in the classroom at all (although towards the end she acknowledged that they provided additional support to the Child). More recently, Ms. Mosher has received reports that the Child has deteriorated - that he is falling off his chair, that he had a major meltdown and that he can't swim. She sees this not as deterioration, but just acknowledgment of the Child's deficits. Swimming is part of the Child's program, and he can't swim as a function of his limited endurance. His balance and body awareness are impaired, causing the reported clumsiness (he reportedly tripped over a chair twice recently). He sits at story time and looks like he's listening, but he doesn't answer questions or indicate understanding of the story. This may be due to attentional issues or to a processing issue (it is difficult to assess auditory processing at his age). The Child's frustration tolerance is also an issue. The age-appropriate skills the Child is displaying in class are the result of years of OT, drilled into him through continuous practice. He will not build the next level of skills without further OT services.

She wonders whether the teachers are asking less of the Child because of his medical history. Some things they describe, such as the growling, would not be acceptable from other children. While it is true that other xx year olds have tantrums, they are not to the extent and severity of the Child's.

With regard to discussion at the meeting of possible additional testing, Ms. Gagnon thought the Child may be having visual perception difficulties, but she said that she doesn't have resources that would enable her to test this; it's very hard to tell at the Child's age. There was also talk about a neuropsychological exam, but CDS said they don't do this. There was an overall sense at the meeting that there was more going on with the Child than what they were seeing from the assessments that had been performed.

12. During an interview conducted by the Complaint Investigator with Palmer Curtis, Ph.D., Dr. Curtis stated the following: She is a speech language pathologist, and has been providing speech/language services to the Child since having conducted an initial evaluation of him in 2009. She participated in the October 18, 2011 IEP Team meeting. In her opinion, there had been adequate OT testing conducted and adequate information presented at the meeting to warrant a continuation of the Child's OT services. The OT test scores showed that the Student was not performing at age-appropriate levels in many ways. Ms. Spence said at the meeting that, based on her results, the Child needed OT services. She recalls Ms. Spence saying that it was unfortunate that the Student's scores did not meet his service needs, but Ms. Spence substantiated those needs from her clinical judgment. She didn't feel that the Site adequately explained its decision to discontinue that service.

The Child had a significant brain lesion at birth – the blood vessel involved is a major artery that supplies key areas of the brain. As a consequence, the Child has a lot of issues - neurological problems that are never going to go away. The Child has so many sensory issues across so many modalities that the removal of OT services will be devastating.

She observed the Child at his KVYMCA program on October 11, 2011 for over an hour. She saw the Child follow what the other children did. During a coloring activity, he was seated at a table and was 100% on task during the activity. It was a teacher-directed activity. The Child knew how to hold the marker and how to color, but he only colored a little area at a time, and then put away the marker and picked another color. This was not how the other children were doing the activity. He also was not using appropriate colors (grey and purple for an apple tree, for instance). The Child did very little talking. When it came to cutting, the Child needed help from the teacher with manipulating the paper. The Child also was unable to write his name without the teacher's help, while other children were able to do this independently.

The next activity took place at a table where play-doh had been laid out. There were 5 or 6 children at the table with no adult supervision. The Child was moving around, not sitting quietly. He was grabbing and throwing the play-doh, and it was flying everywhere. He didn't roll it, flatten it or stretch it. His voice was getting louder, and other children were moving away from him. She called out to the teachers that the Child needed some help. The teachers needed OT recommendations for this activity, or perhaps the teachers were not following through on recommendations that had been given.

She is unable to say whether the Child needs OT in order to benefit from his speech/language instruction, because there's never been a time when he was getting speech/language services without also getting OT. An OT has always been available to her if she had any questions or concerns.

13. During an interview conducted by the Complaint Investigator with Ranae L'Italien, Ms. L'Italien stated the following: She has been child care director for the KVYMCA for six years. She has known the Child since September 2010. She has been in the Child's classroom to observe or to provide coverage for other staff members approximately two hours per month. If one were to walk into the classroom not knowing anything about the Child, one

would not identify him as a child with special needs. The Child blends in quite well, and he is well liked by the other children. They interact easily with him and enjoy being with him. She has noticed that the Child tends to go from child to child, playing with each one for only a short time. This is atypical behavior.

The Child does need some assistance at times with staff modeling socially appropriate behavior, but nothing out of the norm for children in the 3-5 year cohort. The Child does have some of the issues that the providers talk about. The Child sometimes becomes hyper-focused, for instance. He can be so engrossed in his computer activity that you can say his name and he won't react. The teachers have learned to touch his shoulder to get him to attend. He also sometimes gets fidgety, but he can be easily redirected. Ms. Mosher is good at providing the teachers with techniques they can use with the Child, and sometimes those techniques can be done with the whole class. Ms. Mosher is not there to act as a consultant to the teachers. She is working directly with the Child, but she sometimes talks to the teachers towards the end of her time in the classroom.

Although the Child blends in well with a large group, in a small group with one or two other children and with someone getting on him about something he's supposed to do, the Child can react. This can happen when the Child's mother or Ms. Mosher is in the classroom. She thinks Ms. Mosher particularly creates an environment that stresses the Child. That's in the nature of her work with the Child; Ms. Mosher makes him work on things at which he's not so successful. She has occasionally seen the Child have a meltdown when part of the larger group, but it's not as severe, and the Child can be easily redirected.

The Child is getting better at following two-part directions (e.g., wash your hands and go sit at the table). There is a big range in the class's ability to do that, with the Child somewhere in the middle of that range. Sometimes the Child can follow the directions independently, and sometimes he needs reminders. She has heard it reported that the Child has difficulty at home or with his providers when there is a break in his routine, but she hasn't seen this in the classroom. Breaks in routine happen all the time in the program, such as a change in schedule or in personnel, and it's definitely not an issue for the Child.

The teachers have made certain modifications for the Child. They have learned, for example, that the Child shouldn't be together with his brother for the whole day, and shouldn't sit next to him at lunch time. They avoid calling on the brother and then on the Child, because the Child then tends to repeat what his brother said.

The Child has shown real improvement in some of the classroom skills, like cutting. Ms. Mosher has worked hard on this skill with the Child, and he can do it well now. Whenever the Child is well able to do an activity that includes crossing the mid-line, then the Child was probably working on that with Ms. Mosher. The Child needs help with writing his name, but this is true of about half the children in the class.

14. During an interview conducted by the Complaint Investigator with the Child's mother, the Child's mother stated the following: At the October 18, 2011 IEP Team meeting, Ms. Merrill was focused on Ms. Stephenson's assessment of the Child's abilities in the classroom.

Since the Child didn't need as much attention and support as some of the other children in the class, Ms. Merrill determined that he no longer needed OT. Ms. Spence reported her observations in the classroom, and they were the same sorts of things she saw with the Child at home, so she didn't understand why Ms. Stephenson's observations were so different. Ms. Spence said that the Child still needed OT, so she believes that Ms. Merrill relied too heavily on the teacher's report.

After Ms. Stephenson gave her report and Ms. Merrill stated the decision to discontinue OT, the meeting basically ended. She thought there should have been discussion about what further testing could be done. Ms. Merrill may have offered to have another OT do an evaluation using different assessments, but all the OT tests are pretty much the same. They test skills on which the Child works with Ms. Mosher, so he's not going to look that bad. The Child is pretty good now with his cutting skills, for example. He's been tested using those kinds of tests many times. She doesn't believe that those tests will capture what are the Child's needs and what OT can do for him. One option she is looking into is a neuropsychological exam, but she hasn't asked CDS to provide that evaluation.

The Child tested only one standard deviation below the mean in fine and gross motor skills, and she understands that a score of 1.5 standard deviations is required, but that score shows that the Child is still behind his peers even after receiving OT services since he was 6 months old. The Child can do most of the physical tasks on which he works in OT, but not as well as his peers. He can't stand on one foot as well as his peers, for example, so when the Child played soccer this fall, he would kick the ball and fall down. This is not a situation where there is developmental delay with no physiological basis. The Child's neurologist says that 0 to 6 years of age is the critical time for the Child to form, realign and reconnect neural pathways that were damaged by the stroke. It will become increasingly difficult to make up for those injuries once the Child is older.

The Child shies away from things he's not good at. He doesn't like to trace his name, for example. When he's outside playing with his brother, he will get tired, sit down and not want to play. It is still hard for the Child to do activities that involve both hands. She recently was baking with the Child, and he had trouble holding the measuring cup with both hands and turning it over; the flour got on the counter instead of in the bowl.

There are also sensory integration and self-regulation issues. She thinks that the Child's teachers see him as looking like any other xx year old - unpredictable and cranky - but she sees the difference. Just recently, one of the teachers said the Child had fallen and hit his cheek on the floor, that he was having a clumsy day. She told this to Ms. Mosher, and Ms. Mosher said it was because the Child was not self-regulating. She gives the Child a sensory diet - she will brush him, or do joint compression. Ms. Mosher has also taught her to ask the Child "How is your engine running?" and the Child might answer "I'm fast," meaning that he is too excited for the task he needs to work on. The follow-up question is "How can you get to medium?" and the Child might suggest rolling on a ball or other sensory stimulation. This helps to calm the Child down and get him in the right frame of awareness and the right activity level. Ms. Mosher teaches some of these techniques to the Child's teachers.

She doesn't know the extent to which the Child's inability to self-regulate interferes with his performance in the classroom. She drops off and picks up the Child at day care, but doesn't observe him while he is there. When teachers say that he is doing well, she attributes this to the OT the Child is getting. She is afraid that without continued OT the Child's hyper-focus and inattention will not allow him to capture the information he needs. She is afraid that the Child will fall further behind in his fine and gross motor skills. The Child's OT program is not static; he is still learning new techniques and new skills.

VI. Conclusions

Allegation #1: Failure to conduct sufficiently comprehensive testing before determining to discontinue the Child's occupational therapy services in violation of MUSER

§V.2.B(1)(b)

VIOLATION FOUND

When the Student's IEP team met on October 18, 2011, they addressed the issue of whether the Child should continue to receive OT services as one of eligibility. All the team members shared the belief that a child could only receive OT services if the child was assessed on an instrument that produced scores of at least 1.5 standard deviations below the mean. This standard appears in the special education regulations among the criteria for eligibility under the disability category Developmental Delay (MUSER §VII.2.D(2)(b)). The issue with regard to OT, however, was not an eligibility issue. The Child had been deemed eligible under the category Speech or Language Impairment (MUSER §VII.2.K). OT was being provided as a related service, defined as "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 CFR §300.34. See Also MUSER §XI. The issue, therefore, properly was whether OT services were required to assist the Child to benefit from his education.¹

The Parents' allegation shown above appears to be based on a further confusion of the nature of the decision being made by the IEP Team. Whereas the regulations require a comprehensive evaluation before a child is dismissed from special education (MUSER §VII.4), this requirement is not applicable to a determination to discontinue a related service. Such a determination, of course, must be based on appropriate, meaningful data, but the scope of such information need only be that which speaks to the child's need for the service. Such a determination could be based, for example, on data that established that the child had attained the relevant IEP goal.

The Child's IEP dated May 5, 2011 included an OT goal under which the Child was expected to improve his "sensory processing skills, gross motor skills, fine motor skills, visual motor skills, self care skills, and oral motor function to age appropriate expectations by 5/4/12." Presumably, the Team made a determination on May 5, 2011 that the Child required those services (despite Ms. Spence's apprehension that OT would not be provided to a child whose disability category was Speech or Language Impairment). The Team appears to have

¹ Note that this issue does not include within it the willingness of MaineCaire to reimburse some or all of the proposed OT services, an issue raised by Ms. Gagnon in her interview.

reversed that decision on October 18, 2011 not so much because the goal had been achieved (although perhaps it had in part, e.g., visual motor and self care skills), but because of the standard deviations of his scores on the OT assessment. In fact, the Child's score for fine motor skills placed him at xx years, xx months age equivalent, and for gross motor at xx years xx months equivalent (the Child was xx years, xx months at the time of testing), suggesting that in regard to those skill areas, at least, the goal had not been attained. Similarly, Dr. Curtis' speech/language evaluation revealed mild delay in oral motor function, another element of the goal, which was impacting speech production. This is not to say that the fact that evaluation scores were found to be within the typical range (if barely) is of no consequence, only that this fact is not in and of itself determinative.

The above allegation expresses the Parents'

There is no doubt that the information shared at the October 18, 2011 meeting with regard to the Child's performance in the classroom, i.e., the extent to which the child's sensory processing and motor skill deficits were interfering with his ability to access his education, was of critical importance to this inquiry. The U. S. Supreme Court has explained that a mandated related service is one that would be necessary to provide a child with "meaningful access to education" and that "only those services necessary to aid a handicapped child to benefit from special education must be provided." *Irving Independent School District v. Tatro*, 468 U.S. 883, 891, 894 (1984). The First Circuit has similarly stated that those related services that are required to be provided are those that address impairments which interfere with a child's ability to learn. *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n. 3 (1st Cir. 2001). Although the Team duly considered the information regarding the Child's ability to be successful in the classroom, the misappropriation of eligibility criteria for use in determining whether the Child required OT as a related service, however, was a procedural defect of sufficient severity as to warrant a finding that the decision was infirm, and must be revisited. *See Roland M. and Miriam M. v. The Concord School Committee*, 910 F. 2d 983, 994 (1st Cir. 1990).

VII. Corrective Action Plan

The Site shall, within 30 days of its receipt of this report, convene another IEP Team meeting to again review the issue of whether the Child requires OT as a related service, in light of the above discussion. The Team may also consider whether additional evaluations are necessary to assist the Team in reaching that decision. The Site will submit a copy of the Advance Written Notice and Written Notice of the meeting to the Due Process Office and the Parents.