

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. 394,
Rose Hill Public Schools: 22FC394-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on March 1, 2022, by _____ and _____, on behalf of their daughter, _____. In the remainder of this decision, Mr. and Mrs. ____ will be referred to as "the parents," and _____ will be referred to as "the student." An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education. Following the investigation, a Complaint Report, addressing the allegations, was issued on March 31, 2022. That Complaint Report concluded that there were violations of special education statutes and regulations with regard to Issue 1 and Issue 2. The investigator did not substantiate a violation with regard to Issue 3.

Thereafter, on April 9, 2022, the school district filed an appeal of the Complaint Report. Upon receipt of the appeal, an appeal committee was appointed and it reviewed the original complaint filed by the parents, the Complaint Report, and the district's notice of appeal (including 13 exhibits). The Appeal Committee also reviewed a written statement provided by the investigator, responding to the district's appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

PRELIMINARY MATTERS

A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Complaint Report. That regulation states, in part, that: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Committee does not attempt to locate the missing support. When a party submits an appeal and attaches exhibits without

stating the relevance of the exhibits, the Committee does not attempt to find how those exhibits might relate to the appeal.

No new issues will be decided by the Committee. The appeal process is a review of the Complaint Report. The Committee does not conduct a separate investigation. The committee's function will be to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

In addition, K.A.R. 91-40-51(f) specifies that an appeal of a special education complaint report may appeal the "findings or conclusions" of a complaint report. There is no provision which permits an appeal of corrective actions. Therefore, the Committee cannot, and does not, address any part of an appeal that relates to corrective actions.

DISCUSSION OF ISSUES ON APPEAL

Issue 1: The USD #394, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate child find procedures when it failed to suspect the student was a student with a disability during the past 12 months.

The investigator found a violation of the child find obligation because the district did not respond with a PWN after two instances of a parent request for an initial evaluation (Report p. 15). As indicated in the district's appeal, this appears to be somewhat problematic because, as the report says, "while the mother did not specifically state that she wanted an evaluation for special education, she did express wanting an evaluation to determine interventions and supports to address the increase in frequency, duration, and intensity of the problem behaviors occurring in the school setting (Report, p. 15)." The problem becomes larger because both of these alleged requests were verbal. Moreover, the primary documentation for the verbal exchanges were in a handwritten communication log made and kept by the parents. The parents did not make a written request for an evaluation until August 24, 2021 and the district then immediately responded with a PWN, proposing an evaluation on August 26. All of this is documented in the Report, on page 15.

This is one of those cases where the evidence is not decisive on its own and an investigator has to make credibility judgments when assessing the weight to give to whatever evidence there is. In her response to this appeal, the investigator said:

"I gave great weight to the parent's handwritten log because it was a contemporaneous account of her communication with the school staff. The school staff had recollections but no documentation that was created at the time of the interactions."

The Committee notes that there is no burden of proof requirement in special education complaints. In Letter to Reilly, 64 IDELR 219, (OSEP 2014), the Office of Special Education Programs (OSEP) expressed the view that it is inconsistent with IDEA regulations to assign a burden of proof to either party in a state complaint. OSEP added (emphasis added):

The State complaint process is intended to be less adversarial than the more formal filing of a due process complaint and possible due process hearing. The State complaint procedures in 34 CFR §§ 300.151-300.153 **do not provide the parties with the extensive procedural rights provided to parties in a due process hearing.** For example, the State complaint process does not require parties to provide evidence, **nor do they require that a State allow parties to review the submissions of the other party** or to cross-examine witnesses. 71 Fed. Reg. 46540, 46605 (Aug. 14, 2006).

Moreover, OSEP acknowledged that a state may use a "**preponderance of the evidence**" standard in making determinations in a formal complaint as to whether a public agency violated a requirement of Part B. A preponderance of the evidence means only that the evidence located by an investigator indicates that a particular conclusion is "more likely than not." Another way to describe the "preponderance of evidence" standard is that it can be a mere tipping of the scale in one direction or the other. That tipping may be minimal, perhaps only resulting in a 51% to 49% probability, but that is enough to meet the standard. In her response to this appeal, the investigator in this complaint stated that she could find no documentation from the district that was created at the time of the interactions between the parties, and that, in her judgment, the parents' contemporaneous account of her communication with the school staff significantly tipped the scale.

In addition, in her response to this appeal, the investigator added that there was other evidence supporting the parent's statements in her handwritten communication log. The investigator summarized these in her response to this appeal as: "Looking at the documentation provided by both the district and parent, there were significant ongoing behavioral concerns in the classroom which intensified as the school year progressed combined with the parent indicating she wanted some type of help for her student plus previous interventions for behavioral problems beginning in preschool in another LEA. The district had multiple 'red flags' indicating that this student may have a disability and be in need of special education and related services." That documentation also helped to tip the scale for the investigator.

The investigator concluded that the district was in violation of law because it did not respond, with a PWN, to the parent's verbal requests for an evaluation on January 18, 2021 and again on May 5, 2021 (Report, p. 15). The committee concludes that sufficient evidence exists to support the findings and conclusions that the parent made verbal requests for evaluation and the school did not respond with a PWN. Accordingly, the Complaint Report is sustained on Issue 1.

¹ In its appeal of Issue 1, the district notes that it is required to implement a multi-tiered system of supports (referred to as MTSS) rather than immediately evaluate every child who needs help for special education. The Committee agrees with this statement. State regulations require that general education interventions be attempted before referring a child for an evaluation unless both the parents and the district believe an evaluation is appropriate. There clearly was no such agreement. However, the investigator did not say the district should have immediately evaluated this student upon parent request. What the investigator said in her report was that the district should have responded to the parent's vocal requests for an evaluation with a Prior Written Notice (PWN). In its appeal, the district says: *"The findings by the investigator on this issue are not based on facts.¹ Rather, they were based on the investigator's opinion after the fact, that the school should have conducted an evaluation earlier than they did.* This is misplaced because the investigator made no such finding. The violation that was substantiated in this complaint was not for a failure to evaluate. The school could have responded to the parent's oral request for an evaluation with a PWN denying the request and providing an explanation as to why the request was being denied (still conducting general education interventions). Had it done so, it is likely that there would not have been a conclusion that there was any violation connected with this

issue. It is the fact that the school did not respond to the parent's verbal requests with a PWN that resulted in a violation.

² In a footnote to its appeal, the district states that the communication log was not provided to it and, as a result, the district was denied due process because it was "not given the opportunity to know and confront the allegations against them." The Committee disagrees. Although a copy of the communication log was not provided, the district was notified of the allegation presented for Issue 1. In a March 7, 2022 e-mail addressed to Miles Harvey and Lisa Arndt, the investigator identified all three issues that would be investigated. For Issue 1, the investigator stated that the issue to be investigated was that the district "failed to follow appropriate child find procedures when it failed to suspect the student was a student with a disability during the past 12 months." This was ample notice of the allegation to be investigated. In addition, a special education complaint investigation, such as this one, is not an open hearing where each side sees and hears each piece of evidence presented and has an opportunity to rebut. Rather, the investigative process is one of accumulating relevant information in order to make findings and conclusions regarding the issues presented. In this process, the investigator is under no obligation to disclose the accumulated evidence to either party (See Letter to Reilly cited above).

Issue 2: The USD #394, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to evaluate the student in all areas of suspected disability during the special education evaluations conducted during the 2021-2022 school year.

In its appeal, the district says "If the parent had additional concerns, why didn't the parent insist that her concern be documented in the eligibility report and refuse consent?" The Committee will not address that question because the pertinent regulation does not require the parent to take either of those steps. The pertinent regulation is 34 C.F.R. 300.305(a), which the investigator correctly described on page 22 of her report, as follows (emphasis added):

As part of an initial evaluation, federal regulation implementing the IDEA at 34 C.F.R. 300.305 (a)(1) require that the IEP team (**which includes the parents**) and other qualified professionals, as appropriate, **must conduct**

a review of existing evaluation data on the child including evaluations and information provided by the child's parents; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers.

On the basis of that review and input from the child's parents, federal regulations implementing the IDEA at 34 C.F.R. 300.305(a)(2) require school districts to identify what additional data, if any, are needed to determine whether the child is a child with a disability; the present levels of academic achievement and related developmental needs of the child; whether the child needs special education and related services; and whether any special education and related services are needed to enable the child to meet the measurable annual IEP and to participate, as appropriate, in the general education curriculum.

Thus, under these regulations, the school district has an affirmative duty to: (a) involve the parent in, and to get input from the parents, in the process of reviewing existing data, and then, on the basis of that review to: (b) obtain input from the child's parents to identify what additional data, if any, are needed to complete the evaluation.

With regard to the August 26, 2021 PWN proposing an initial evaluation, the report says:

The PWN lists data used as the basis for the proposed action as "team and parent input". However, the mother reported that she was not contacted to provide any information prior to receiving the PWN requesting consent for an initial special education evaluation. **There is no documentation to show that the parent participated in the review of existing data or provided any input into the areas to be assessed during the evaluation other than the August 24, 2021 written request for a functional behavioral assessment in order to create a behavior plan.** The mother indicated she had ongoing concerns at that time in regards to the escalation in frequency, duration, and intensity of the student's problem

behaviors which she believed were caused by impulsivity, sensory dysregulation, and pragmatic language delays. **Sensory dysregulation and pragmatic language skills were not addressed in the November 1, 2021 evaluation.**" (Page 18 of Complaint Report – emphasis added).

In its appeal, the district argues that the parent agreed with the results of the evaluation, signed the PWN, and gave consent for the evaluation. That is a factual statement, but those statements do not address the conclusion of the investigator that the parent was not involved in the review of existing data. The Committee does not find anything in the district's appeal in Issue 2 that provides any evidence of the district having obtained any parent input or other participation in the review of existing data.

With regard to a Notice of Appeal of a complaint decision, by either party, Kansas regulations, at K.A.R. 91-40-51(f)(1), state that "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, as previously stated in the "Preliminary Matters" section of this decision, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Committee does not attempt to locate the missing support. In this appeal, the district does not provide a detailed statement of the basis for alleging that the report is incorrect on Issue 2. Therefore, the Committee finds no basis on which to overturn the report. The findings and conclusions in the Report regarding Issue 2 are sustained.

CONCLUSION

The Appeal Committee concludes that there is sufficient evidence to support the findings and conclusions of the investigator regarding Issues 1 and 2. Those findings and conclusions are sustained.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 20th day of April, 2022.

APPEAL COMMITTEE:

Brian Dempsey

Stacie Martin

Mark Ward