

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #290
ON JULY 18, 2022

DATE OF REPORT: AUGUST 17, 2022

This report is in response to a complaint filed with our office by -----, on behalf of her son, ----- . For the remainder of this report, ----- will be referred to as "the student." ----- will be referred to as "the student's mother," "the complainant," or "the parent."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the parent on August 16, 2022. On August 1, 2022, the investigator spoke by telephone with Mr. Joe Vitt, Assistant Superintendent/Director of Special Education for the district.

In completing this investigation, the complaint investigator reviewed the following:

- Educational Evaluation dated July 21, 2021
- Academic Language-Reading Evaluation dated August 27, 2021
- Section 504/ADA Student Services Plan dated September 27, 2021
- OT (Occupational Therapy) Outpatient Evaluation dated September 30, 2021
- Email dated November 29, 2021 from the Occupational Therapist (OT) to the student's classroom teacher
- Email exchange dated December 1, 2021 between the assistant director of special education and the parent
- Email dated December 2, 2021 from the parent to the assistant director of special education
- Email dated December 3, 2021 from the parent to the assistant director of special education
- Email dated December 3, 2021 from the assistant director of special education to IEP team members from the district
- Agenda for December 6, 2021 meeting

- Audio recording of the December 16, 2021 IEP team meeting
- 2-Part Zoom recording of the December 16, 2021 IEP team meeting
- Staffing Record dated December 16, 2021
- IEP for the student dated December 16, 2021
- Email dated January 4, 2022 from the special education teacher to the parent.
- Email dated January 7, 2022 from the parent to the special education teacher

Background Information

This investigation involves an eleven-year-old boy who will be enrolled in the fifth grade in his neighborhood school for the 2022-23 school year. The student was diagnosed by Children’s Mercy Hospital with Tourette Syndrome at the end of Kindergarten after having initially been determined to have a transient tic. Diagnoses of Anxiety, Attention Deficit Hyperactivity Disorder (ADHD), and Developmental Dyslexia were subsequently identified. The student participates in Cognitive Behavioral Therapy with a private, licensed psychologist.

Issues

In her written complaint, the parent presented two issues.

Issue One: Decisions regarding the development of the student’s IEP were predetermined by the district without the meaningful participation of the parents.

Applicable Statutes and Regulations

The required members of an IEP team are specifically identified and described in state and federal statutes and regulations (K.S.A. 72-3404). Members of the team must include

- the parents;
- a classroom teacher of the child;
- at least one special education teacher or special education service provider;
- a school representative;
- a person who can interpret the educational implications of evaluation results;
- and
- others with special knowledge or expertise regarding the child.

The right of parents to participate in developing their child’s IEP is a cornerstone of IDEA (Individuals with Disabilities Education Act). (See 34 C.F.R. 300.501(b); 34 C.F.R. 300.321(a)(1); and 34 C.F.R. 300.503(a).). For that reason, it is critical for school-based

IEP team members to discuss and genuinely consider the parent's input at IEP meetings. School team members cannot truly do that if they decide what they are going to put in the IEP before the meeting begins. This is known as "predetermination."

Special education statutes and regulations state that decisions regarding the provision of special education and related services to a student are to be made by an IEP team. However, the law does permit school staff members of teams formed for the purpose of making evaluation and eligibility decisions, as well as IEP decisions, to engage in preparatory activities to develop or respond to a proposal that will be discussed later at a meeting [see 34 C.F.R. 300.501(b)(3) and K.A.R. 91-40-25(e)(1)-(2)]. In *T.W. by McCullough and Wilson v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 136 F. App'x 122, 43 IDELR 187 (10th Cir. 2005), the Tenth Circuit Court of Appeals stated:

Certainly, it is improper for an IEP team to predetermine a child's placement, and then develop an IEP to justify that decision. See *Spielberg ex rel. Speilberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988). This does not mean, however, that district personnel should arrive at the IEP meeting pretending to have no idea whatsoever of what an appropriate placement might be. "Spielberg makes clear that school officials must come to the table with an open mind. But this does not mean they should come to the table with a blank mind." *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), aff'd No. 92-2313, 1994 WL 592686 (4th Cir. Oct. 31, 1994).

Districts are allowed to develop a draft IEP before any IEP meeting. However, in order to ensure parent participation in the development of the IEP, the IEP may not be completed before the IEP team meeting. If school personnel bring drafts of some or all of the IEP content to the IEP meeting, there must be a full discussion with the IEP team, including the parents, before the child's IEP is finalized, regarding content, and the child's needs and the services to be provided to meet those needs. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting for discussion (Federal Register, August 14, 2006, p. 46678).

School team members are not required to agree with the parent or to change the IEP merely because the parent desires a change. Meaningful participation means that the team must listen to and consider parental input and, if appropriate, revise the IEP based on that information.

Parent's Position

It is the position of the parent that the Occupational Therapist (OT) and the classroom teacher conducted an “emailed IEP meeting” in which the parent did not participate and made decisions regarding classroom accommodations to be included in the student’s IEP without considering the parent’s perspective.

District’s Position

It is the position of the district that staff have the obligation and responsibility to meet, discuss and/or prepare for all meetings in which a proposal or response to a parent’s request will be discussed. The district asserts that the email from the OT was not evidence of a final judgment on IEP contents. On the contrary, the OT engaged in the authorized activity of soliciting input from the classroom teacher in the development of a proposal to be discussed at an upcoming meeting. Typically, accommodations for handwriting are utilized in the classroom setting. In this case, the classroom teacher would have valuable insights into the appropriateness of the recommendations from the IEE. The OT asked the classroom teacher which of the suggested accommodations would be appropriate for the student. The OT was not telling the teacher that she should not consider any of the suggested accommodations.

In the opinion of the district, the meeting minutes, audio recording, and the resulting IEP changes from/during the December 16, 2021 meeting clearly show that parents were able to participate meaningfully in the IEP process.

Investigative Findings

An Independent Educational Evaluation (IEE) of the student was paid for by the district. That IEE included an Academic Language – Reading Evaluation which was conducted by a Speech/Language Pathologist at a hospital/clinic setting in Overland Park, Kansas. A copy of the report of this evaluation was received by the district via email on October 14, 2021. The clinicians administered a number of tests to the student which were summarized in the report. The clinicians recommended “further evaluation of handwriting skills” and listed a number of “possible accommodations to consider.” According to the report, the list of accommodations was not “all inclusive and should be used as a guide; not all are appropriate for each student at any one point in time.”

Among the list of accommodations was a section related to handwriting. As stated in the report, the “use of handwriting accommodations and evaluation of handwriting by school occupational therapist is recommended (list of possible accommodations below).

- Consult with school occupational therapist, i.e. for help with pencil grip, posture and paper position. Rule out fine-motor problems in addition to handwriting problems.
- Give the student writing tools that are easier to use, i.e. a padded pencil, or easy flow ink.
- Use wide lined paper with dark lines for the baseline of the letters.
- Teach writing along with spelling and reading.
- Allow the student to use print or cursive, whichever is more legible.
- Allow the student more time for writing activities. (Do not have the student miss breaks/recess.)
- Do not have the student copy from the board.
- Give the student copies of teacher notes.
- Provide an assistant to help the student with longer writing activities. The assistant will be the 'scribe.' The student can dictate and the scribe can write.
- In test situations, the student should be allowed to respond verbally or with a writer/scribe or record answers into a hand-held voice recorder.
- Do not grade the student on neatness or spelling unless the subject is spelling.
- Allow abbreviations.
- Allow the use of a spell checker at the desk.
- Change the type of tests that the student must take. (example: change from essay questions to multiple choice.)
- Give the student worksheets with the math problems already on it.
- Teach and allow keyboarding or voice dictation instead of writing. Due to difficulty with writing, a laptop computer may be an essential tool for now and into the future.
- Reduce the amount of written homework.
- The student should not be required to write his answers due to difficulty efficiently expressing in the written mode.
- At home writing assignments should be completed on a computer.
- Possible Writing programs: Wilson cursive (Wilsonlanguage.com). Powerful Printing and Powerful Cursive (Write on Handwriting, epsbooks.com). Get Ready to Write (epsbooks.com). Handwriting Without Tears. www.hwtears.com"

On November 29, 2021, in preparing for the development of a draft IEP to be sent to the parent for review prior to an upcoming IEP team meeting, the OT for the school sent an email to the student's classroom teacher soliciting the teacher's input regarding the handwriting accommodations that had been included in the IEE report from the speech/language pathologist. In her email, the OT wrote the following:

“Of these recommended accommodations for [the student] for handwriting from the independent evaluation report, can you please highlight what is applicable to add as accommodations to the IEP please. I do not know [the student] so I think you would have the best knowledge! Thanks!”

The OT included in her message all but two of the “possible accommodations” listed in the IEE report, omitting the suggestions for handwriting programs and at-home writing assignments. The OT also added notes to two accommodations:

- “Give the student copies of teacher notes (NOTE: guided notes, fill in the blank);” and
- Provide an assistant to help the student with longer writing activities. The assistant will be the ‘scribe.’ (NOTE: speech-to-text).”

The district sent a draft of a proposed IEP for the student to the parent on December 7, 2021. The draft document included seven accommodations/modifications/supplementary aids and supports.

A meeting to discuss the draft and to develop the initial IEP for the student was held on December 16, 2021. Participants in the meeting included the student’s mother and father, the assistant director of special education, the student’s classroom teacher, the special education teacher, the occupational therapist, the school psychologist, the social worker, the attorney for the district, and a parent advocate.

As seen in a Google Meets recording of the December 16, 2021 meeting, the IEP team reviewed the draft IEP. The parent noted that she has “reviewed” the draft and provided input regarding changes. The team discussed the parent’s requests for changes, added items, changed the location for the provision of accommodations and modifications, and expanding and clarified various components of the section.

The active participation of the parent and the parent advocate is also reflected in the Staffing Record of the meeting. The meeting notes show that changes were made to the draft IEP based on the parents’ requests and inputs, and that changes were made to accommodations with regard to preferential seating and to the location for the provision of all accommodations. Accommodations in the draft were amended to include ‘guided notes’ and “extended time.”

A copy of the IEP developed by the team at the December 16, 2021 meeting was sent electronically to the parent on December 20, 2021 shortly before the start of Winter

Break on December 23, 2021. A paper copy of the IEP was also sent home to the parent in the student's backpack. That version of the IEP contained a total of nine accommodations/modifications/supplementary aides and supports (two more than were included in the draft IEP).

The parent reviewed the IEP and on January 3, 2022 sent an email to the special education teacher which included additional requested changes to the IEP. None of those changes related to accommodations/modifications/supplementary aides and services.

The district revised the IEP and sent the revised IEP to the parent on January 4, 2022. On January 7, 2022, the parent sent the special education teacher an email proposing additional changes to the IEP.

The student's initial IEP was finalized, and, after a brief delay resulting from a Covid-19 exposure on the part of the student, special education services were initiated on January 13, 2022. The "Accommodations/Modifications/Supplementary Aids and Supports" section of the student's finalized initial IEP included the following:

1. Separate setting for tests;
2. Speech to text/Text to speech;
3. Graphic organizers, which could include fill-in-the-blank, guided notes;
4. Explicit and repeated directions and instructions;
5. Checks for understanding;
6. Shortened assignments/tasks and extended time;
7. Preferential seating;
8. Ignore behaviors associated with tics/Tourette's (blinking, head rolling, shrugging, grunting) and address any other inappropriate behaviors privately with [the student] through redirection and give praise for positive behaviors; and
9. Prompt for changes in routine/schedule.

Summary and Conclusions

The sending of an email by the OT to the student's classroom teacher in preparation for the development of a draft IEP did not, as the parent asserts in her complaint, constitute an IEP team meeting. As permitted by special education statutes and regulations, the district engaged in preparatory activities in order to develop and share with the parent a draft version of an initial IEP for the student. That draft was sent to the parent well ahead of a properly constituted IEP team meeting on December 16, 2021. That meeting was attended by both parents and a parent advocate, all of whom were – as shown in a video recording of the meeting – actively engaged in the discussion regarding the development of the IEP. The parent acknowledged that she had reviewed the draft document. Both the parent and the parent advocate suggested changes to many portions of the draft, including to the accommodations/modifications section which was the focus of the email from the OT to the classroom teacher.

The video recording of the IEP team meeting of December 16, 2021 provided ample evidence that school team members actively sought the parent's input in the discussion of a draft IEP document and incorporated many of the parent's requests into the IEP. That revised document was then sent to the parent who requested additional changes to the IEP on January 4, 2022. Those changes were made, and a revised version of the IEP was sent to the parent. Additional changes were made by the district after the parent requested more revisions to the IEP on January 9, 2022.

The sending of an email by the OT to the classroom teacher was not an IEP team meeting. There is no evidence to support the parent's contention of predetermination regarding the development of the student's initial IEP. A violation of special education statutes and regulations is not substantiated on this issue.

Issue Two: The district discussed the student's eligibility for special education services and made decisions regarding special education services for the student outside of the IEP team and thereby deprived the parents of meaningful participation in the decision-making process.

Applicable Statutes and Regulations

To address the requirement to strengthen the role of parents in the special education process, Congress mandated that schools afford parents the opportunity to be members of any decision-making team for their child, including eligibility, initial evaluation and reevaluation, and development of an individualized education program

(IEP) for the provision of a free appropriate public education (FAPE). Schools are to ensure that parents have the opportunity to be members of the IEP team that makes decisions on the educational placement of their child.

As noted above under Issue One, however, the law permits school staff members of teams formed for the purpose of making evaluation and eligibility decisions, as well as IEP decisions, to engage in preparatory activities to develop or respond to a proposal that will be discussed later at a meeting.

Parent's Position

The parent asserts that an email sent by the assistant director of special education to district members of the student's evaluation/eligibility/IEP team provides corroboration of the parent's assertion in Issue One that decisions regarding special education services for the student were made outside of the IEP team process.

District's Position

As in Issue One above, it is the position of the district that special education statutes and regulations allow preparatory activities regarding issues that will be discussed in a later meeting (such as sending an email to staff regarding the agenda and location for an upcoming meeting). The district asserts that the audio recording of the December 6, 2021 team meeting clearly show that there had been no predetermination regarding the student's eligibility to receive special education services and that the parent actively and meaningfully participated in that meeting.

Investigative Findings

On December 1, 2021, the assistant director sent an email to the parent stating

I wanted to give you an update about the upcoming meeting. We have been gathering present levels of performance for (the student) for the team to discuss, and we have been trying to put together an addendum to the original eligibility report that encapsulates our conversation from the last time and also attempts to answer the qualifying questions for eligibility. There are still parts of eligibility the team has not discussed and eligibility has not been determined. We also have not signed any documents yet for eligibility. Eligibility is the first step in the process and will be the focus of our Monday (December 6, 2021) meeting. While (the special education teacher) has gathered present levels, there will not be an IEP to review until the team determines eligibility and

completes that process. Since eligibility paperwork will be discussed and signed, we will also invite...the speech pathologist to the meeting.

An agenda for Monday's meeting has been attached to this email.

According to the attached agenda, seven topics would be discussed.

- Purpose of the meeting;
- parent concerns;
- brief review of IEE (independent educational evaluation) from the previous meeting;
- discussion of present levels of performance in the area of social/emotional needs;
- discussion of present levels of performance in reading, math, and written language;
- discussion of eligibility questions (exceptionality and need); and
- final eligibility determination.

Also on December 1, 2021, the district mailed the parent notice of a December 6, 2021 meeting which stated that the meeting would be held for the purpose of developing an IEP for the student and also to "review the evaluation and determine eligibility."

On December 1, 2021, the parent sent an email to the assistant director of special education indicating that the parent's advocate would be attending the meeting. The assistant director responded via email stating

With additional people, I think we have outgrown our space at [the student's school] and need a bigger meeting location. We are going to change the location to the Board of Education office conference room where we can spread out just a little. I have notified our team today of the change. Please confirm with me that you will be at the Board of Education office as our new meeting location.

On December 2, 2021, the parent sent an email to the assistant director of special education objecting to revisiting a discussion of the student's eligibility for special education services, stating

Any further consideration of [the student's] eligibility is unwarranted, would cause unnecessary delay, and is highly prejudicial to his right to FAPE.

I am concerned that the assertion that [the student's] eligibility was not determined by the Team is the product of a discussion outside of the Team with other personnel who did not participate in the meeting and did not have the benefit of reviewing the transcript. On the advice of my counsel, I demand that the LEA cease and desist from any further discussion outside of an IEP Meeting, as such discussion spawns suspicion, causes confusion and leads to further delays in [the student] obtaining FAPE.

On December 3, 2021, the assistant director also sent the school-based members of the student's IEP team an email stating

I wanted to make each of you aware that we are changing the location of Monday mornings meeting to the Board of Education office. With attorneys joining us and having more team members than last time, we need a larger space.

I also wanted you to know that we will likely begin the meeting with reviewing our last discussion, but probably not dwelling there or reconsidering our initial decision. We will likely move forward with picking up where we left off in the social emotional section and considering his present levels to complete the eligibility report. Please let me know if you have questions.

At the December 6, 2021 meeting, no change was made to the team's decision in November 2021 regarding the student's eligibility for special education under the category of Specific Learning Disability.

Summary and Conclusions

A December 3, 2021 email from the assistant director of special education to school-based team members addressed two topics: the location of an upcoming meeting scheduled for December 6, 2021 and the agenda for that meeting. Both topics had been the subject of separate emails between the parent and the assistant director. Nothing in the email directs any decisions on the part of staff regarding special education services for the student. Rather, the message briefly summarizes the anticipated agenda which the assistant director sent to the parent on December 1, 2021. The email references what will be discussed; it does not direct team members to make any specific decisions on those topics.

As was established above under Issue One, districts are allowed to engage in planning and preparatory discussions prior to team meetings. A violation of special education statutes and regulations is not established on this issue.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on the issues presented in this complaint. Therefore, no corrective actions are required.

Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal in accordance with K.A.R. 91-40-51(f)(1). The written notice of appeal may either be emailed to formalcomplaints@ksde.org or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. Such notice of appeal must be delivered within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which can be found at the end of this report.



Diana Durkin
Complaint Investigator

K.A.R. 91-40-51(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect.

Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with

respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

(2) If an appeal committee affirms a compliance report that requires corrective action by an agency, that agency shall initiate the required corrective action immediately. If, after five days, no required corrective action has been initiated, the agency shall be notified of the action that will be taken to assure compliance as determined by the department. This action may include any of the following:

- (A) The issuance of an accreditation deficiency advisement;
- (B) the withholding of state or federal funds otherwise available to the agency;
- (C) the award of monetary reimbursement to the complainant; or
- (D) any combination of the actions specified in paragraph (f)(2).