

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #379
ON SEPTEMBER 14, 2022

DATE OF REPORT: OCTOBER 18, 2022

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the parent on September 19, 2022. On September 19, 2022, the investigator spoke with Anita Breen, Director of Special Education for the Twin Lakes Special Education Cooperative.

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

- Eligibility and Multidisciplinary Team Report dated September 15, 2021
- IEP for the student dated September 15, 2021
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 15, 2021
- Email exchange dated December 9, 2021 between the parent and the director of the cooperative
- Email dated August 18, 2022 from the parent to the director of the cooperative
- Email exchange dated August 23, 2022 between the parent and the director of the cooperative
- Notice of Meeting dated August 22, 2022
- Email dated August 26, 2022 from the building principal to the parent
- Meeting notes dated August 26, 2022

- Email dated August 31, 2022 from the parent to the building principal
- Letter dated August 31, 2022 from the student's physician
- IEP for the student dated September 7, 2022
- Conference Summary – IEP Team Considerations dated September 7, 2022
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 7, 2022
- Email exchange dated September 8-9, 2022 between the building principal and the parent
- Email exchange dated September 13-14, 2022 between the building principal and the parent
- Email dated October 5, 2022 from the special education teacher to the director of the cooperative
- Email dated October 6, 2022 from the special education teacher to the director of the cooperative

Background Information

This investigation involves a six-year-old boy who is enrolled in the 1st grade in the local Pre-K to 3rd grade building. In September 2018, following an Enterovirus infection, the student was diagnosed with acute flaccid myelitis, a rare but serious nerve-related condition similar to polio that affects the spinal cord. Symptoms include arm and leg weakness and decreased reflexes.

Speech/language, Physical Therapy, and Occupational Therapy services were provided to the student through a hospital setting prior to his enrollment in the public school system at the Kindergarten level. The student was first determined to be eligible for special education and related service under the categories of Multiple Disabilities and Speech/Language Impairment in September 2021 following an initial evaluation.

Academically and socially, the student is operating at grade level. However, according to his September 7, 2022 IEP, the student lacks “functional lower extremity strength and therefore is unable to stand effectively to assist with transfers. Core musculature is much improved but is weak enough that when sitting unsupported he could fall. Knee and hip flexion contractures do present some limitations for positioning.” The student’s fine motor skills are delayed,

and he needs assistance with table top activities including opening markers and glue sticks. He is not independent for toileting.

The student currently receives speech/language support and both Physical and Occupational Therapy.

Issue

In her complaint, the parent raises the following single issue:

The district failed to provide the student with consistent support from a paraeducator who is capable of providing the assistance called for in his IEP.

Applicable Statutes and Regulations

Federal regulations, at 34 C.F.R. 300.101(a), require that a student who has been determined eligible for, and in need of, special education services, and whose parents have provided written consent for the provision of those services, be provided with a FAPE (Free Appropriate Public Education). 34 C.F.R. 300.17(d) states that FAPE means, in part, special education and related services provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324. A district must implement a student's IEP as written.

Parent's Position

It is the position of the parent that the district has not – since the beginning of the 2022-23 school year – provided consistent support to the student from a paraeducator as required by his IEP and as recommended by the student's doctor. The parent asserts that the student had no paraeducator support whatsoever on August 13 or 14, 2022. The parent further asserts that none of the paraeducators assigned to the student since the start of the school year have been able to lift the student in order to assist him with toileting.

District's Position

The district contends that the minutes of support required by the student's IEP have been provided. According to the district, there were two half days (September 13 and 14, 2022) when there was no paraeducator in the

classroom, but support was provided by the classroom teacher, the school nurse, and the special education teacher. The district asserts that while support was provided by more than one staff member prior to September 19, 2022, special education services in the general education setting are now being provided by a single staff member.

Investigative Findings

The “Accommodations/Modifications” portion of the “Anticipated Services to be Provided” section of the student’s September 15, 2021 IEP includes the following:

- “Staff assistance” for fine motor tasks such as cutting food, opening containers, etc. because the student cannot always open items or cut food;
- “Staff assistance” with toileting because the student needs assistance moving himself from the wheelchair to the toilet; and
- “Staff assistance” with mobility to aid the student in getting into and out of his wheelchair for school activities and to help the student with navigating his wheelchair in challenging settings.

The “Special Education and Related Services” section of the September 15, 2021 IEP states that the student will receive

- 400 minutes of special education services 1 day a week in the general education classroom;
- 410 minutes of special education services 1 day a week in the general education classroom;
- 430 minutes of special education services 1 day a week in the general education classroom;
- 410 minutes of special education services 2 days a week for 3 out of 4 weeks in the general education classroom; and
- 430 minutes of special education services 2 days a week every fourth week.

Daily variation results from changes in the student’s schedule due to the provision of speech/language, occupational therapy, and physical therapy services.

One paraeducator (TD) was assigned to assist the student throughout the 2021-22 school year. In an email exchange in December 2021, the parent and the director of the cooperative engaged in discussions regarding having TD move with the student to first grade.

For the 2022-23 school year, TD was assigned other responsibilities, and another paraeducator (CH) was chosen to assist the student for his first-grade year. When the parent objected to having CH support the student in first grade, other paraeducators (SC, CP, AG, and KB) were assigned to provide support to the student on a temporary basis while the district endeavored to find another paraeducator for the student.

The first day of school for the district for the 2022-23 school year was August 17, 2022. According to a summary provided by the district, four paraeducators (SC, CP, AG, and KB) provided support to the student between August 17 and September 13, 2022. CP – a substitute paraeducator for the district – provided the bulk of that support (14 of 19 days). While CP was able to provide classroom support to the student, she was unable to lift him. When lifting was needed – for toileting, for example – other staff members provided that assistance.

After approval was given by the Board for the hiring of additional paraeducator staff for the building, a new paraeducator was selected to work with the student on September 13, 2022, but that person did not accept the position.

Another paraeducator (MH) was then assigned to the student and began supporting him on September 14, 2022. TD was also in the classroom on September 14, 2022 to provide training to MH. MH and TD worked together for two days – September 14 and 15, 2022. CP returned on September 16, 2022 to work with the student for one day. MH then began working independently with the student as of September 19, 2022 and continues in that position.

In an email to the director of the cooperative dated August 18, 2022, the parent wrote:

“I know we haven’t talked about this para situation since December but I have some concerns/issues. [The student] didn’t get to keep his para from last year [TD] and we are all very upset...His teacher has said they hired a para for him [CH]...which I’m 100% against as we don’t get along and I don’t trust her. [The student] is very selective in who can care for

him and take him to the bathroom...I really don't understand why they wouldn't let an amazing para follow him when it was in the best interest of [the student]...I am not willing to risk his health whether that be mental or physical. In the meantime he's been given paras that can't even lift him, and he's very uncomfortable with. The first day of school no one took him to the bathroom and when I picked him up to go home he couldn't even make it 5 minutes...we're off to a horrible start. He's going to have a very intensive surgery the end of October so we're going to need a one on one para, hopefully one we can trust.”

The parent sent another email to the director on August 23, 2022, writing:

“Just checking in to see if you received my last email. I am very frustrated with this whole situation. His care has been subpar at best. We have an IEP meeting on September 7th but I don't feel like he should have to suffer until then. He's almost landed in the hospital before for obstructed bowels and we're almost there again. He's not comfortable with the random paras he's been getting and so he hasn't gone poop since school started. I'm not going to put him through the stress of a hospital for something that could have been prevented.”

Notice of the annual IEP team meeting was provided to the parent on August 22, 2022.

The director of the cooperative responded to the parent via email on August 23, 2022 writing:

“I did visit with [the special education teacher and the building principal]. They both said that they talked with you about the care for your son. They also said he was very good at advocating when he needed to use the restroom. Please rest assured that his needs are being met at school (IEP services). The placement of paraeducators is a decision that is made by the special education teacher and the building administration. It is best for students to work with a variety of people, so they learn to adapt to different personalities. My suggestion to you, if you still have concerns, is to call a team meeting with the IEP team at [the school]. That is the first step to resolving any unsolved issues you may have...”

The parent responded by email on August 23, 2022 writing:

"...Why do other children have consistent paras and he doesn't? Why does he get paras that can't even lift him?...Why do I get no say whatsoever in who takes care of my child? It is not in his best interest to have ever changing paras. He does better with consistency; last year proved that..."

The director responded:

"...you have posed some great questions. Again, I would suggest you request an IEP meeting to discuss these issues with the team. As far as para assignment goes, that is the decision of the teacher and administrator of the school. If you need any help facilitating an IEP meeting, please let me know. I would be glad to make that happen."

A meeting was held on August 26, 2022 to discuss the parents' concerns regarding paraeducator services. In attendance were the parents, the special education teacher, the director of the cooperative, the school psychologist, the student's classroom teacher, the building principal, and the school nurse. At the meeting, it was determined that the para who had been designated to support the student at the start of the school year would no longer be assigned to the student. Bathroom breaks would be documented and reported to the parents on a weekly basis. The school nurse, the special education teacher and the student's Kindergarten para would assist the student for toileting until a new para could be hired and trained by the former para (if the newly assigned para had not worked with the student previously). Assurances were given that the classroom teacher and any para assigned to the student would be able to lift him.

Following the meeting, the building principal sent a summary of the meeting to the parent asking for her feedback on its contents.

On August 31, 2022, the parent emailed the building principal a letter from the student's doctor dated August 31, 2022 stating:

"Consistent care givers to facilitate transfers impacts [the student's] bowel routine, as well as his ability to optimally participate in school activities. Given this, I would recommend a consistent para while at school to assist with transfers and school based activities."

An IEP team meeting was held on September 7, 2022, and an annual review of the student's IEP was conducted. The parent, the school psychologist, the classroom teacher, the building principal, the speech/language pathologist, and the special education teacher were in attendance.

The "Accommodations/Modifications" portion of the "Anticipated Services to be Provided" section of the student's September 7, 2022 IEP includes the same accommodations as were included in the student's September 15, 2021 IEP:

- "Staff assistance" for fine motor tasks such as cutting food, opening containers, etc. because the student cannot always open items or cut food;
- "Staff assistance" with toileting because the student needs assistance moving himself from the wheelchair to the toilet; and
- "Staff assistance" with mobility to aid the student in getting into and out of his wheelchair for school activities and to help the student with navigating his wheelchair in challenging settings.

The "Special Education and Related Services" section of the September 7, 2022 IEP states that the student would receive

- 370 minutes of special education services 1 day a week in the general education classroom for 3 out of 4 weeks;
- 430 minutes of special education services 1 day a week in the general education classroom every fourth week;
- 410 minutes of special education services 1 day a week in the general education classroom every week; and
- 430 minutes of special education services 3 days a week in the general education classroom.

Daily variations continue to result from changes in the student's schedule due to the provision of speech/language, occupational therapy, and physical therapy services.

According to the Conference Summary – IEP Team Considerations dated September 7, 2022, paraeducator support would be "offered in the classroom at all times...The plan is for a single para to begin in the classroom Sept. 13."

On September 8, 2022, the parent sent an email to the building principal questioning who would be training any para assigned to work with the student.

On September 13, 2022, the parent sent an email to the building principal asking, "Does [the student] have a para today? I couldn't help but notice he didn't have one when I dropped him off this morning. Also when I picked him up for his second therapy he hadn't gone to the bathroom yet and his pull-up was soaked."

The building principal responded via email on September 14, 2022, stating:

"I can't speak on specific paras yesterday [September 13, 2022], but I know that [the classroom teacher] was working with him as was [CP]. [CP] is a long-time para in our building who recently retired and is now subbing."

According to an email from the special education teacher to the director of the cooperative dated October 5, 2022:

"There were two days [September 13 and 14, 2022] that there was no para in the morning. The teacher stated that she would be ok without one as long as someone could periodically check on them and that someone could do the toileting. I checked in with her several times and each time she said they were good. [The school nurse] did the toileting. Duties the teacher would have covered would be moving him from his wheelchair to the floor, wheelchair to his walker, and some fine motor assistance.

In the afternoon [of September 14, 2022], he actually had two paras, [MH and TD so that TD] could work with [MH] and train her."

Records are kept regarding the student's toileting during school hours. On September 13, 2022, the student was assisted for toileting at 11:45 AM as well as at 1:45 and 3:00 PM. On September 14, 2022, he was assisted for toileting at 9:10 and 11:45 AM and again at 2:45 PM. On average, a toileting break takes approximately 15 minutes.

On September 14, 2022, the Kindergarten para arrived at the first-grade classroom at approximately 12:15 PM, and the newly assigned para arrived at

approximately 12:30 PM. During the approximately 230 minutes between the start of the school day and the arrival of the Kindergarten para, the student received approximately 30 minutes of support for toileting.

On October 6, 2022, the special education teacher provided this additional statement to the director of the cooperative:

These were days that we were training and transitioning paras after the board meeting approved the hiring of an additional person...We were attempting to train the new staff, shift staff, and retrain staff for new positions those two days. We also had staff absent. The teacher was willing to work with us and based on needs throughout the building we did the best we could.

Summary and Conclusions

The student's September 15, 2021 IEP required that the student receive between 400 and 430 minutes per day of special education support in the general education setting. His September 7, 2022 IEP requires that he receive between 370 and 430 minutes per day of special education support in the general education setting. (Range variations reflect schedule changes due to the provision of the student's related services of Speech/Language, Occupational Therapy, and Physical Therapy.)

When, at the start of the 2022-23 school year, the parent objected to the assignment of a particular individual selected by the district to provide paraeducator support to the student in first grade, the district immediately began exploring other options, ultimately hiring more para staff to meet the needs of the student and the building as a whole.

Between the start of school on August 17, 2022 and September 19, 2022 (when a single para was assigned to provide the general education support of the student), a total of three paras had provided special education service to the student in the general education setting. A single substitute paraeducator provided the majority of the student's general education classroom support during this early period. However, that substitute para was not able to lift the student, so other staff members, including the special education teacher and the school nurse, assisted with the student's toileting and positioning activities.

While the assignment of multiple paraeducators to support the student for his first month of the school year may not have been ideal, the district clearly attempted to provide the student with the support called for in his September 15, 2021 and September 7, 2022 IEPs. Although the parent objected to the absence of a consistent para to cover all of the student's needs, the student's September 2021 and September 2022 IEPs did not require that a single individual provide all services and noted only that "staff" would assist the student in several key areas, including toileting and repositioning.

On September 13 and 14, 2022, the district did not have sufficient para/para substitute staff available to provide coverage for the student for the full school day. On both these dates, paraeducator support was only provided in the afternoons. In the mornings on both days, the classroom teacher assisted the student with activities that were impacted by his fine motor delays. The classroom teacher assisted the student with repositioning and other staff members aided with toileting. Although the special education teacher made numerous check-ins to ensure that things were going well, the student did not on these two mornings receive the special education services called for in his September 7, 2022 IEP.

Because, for two mornings, the district failed to provide the special education support in the general education setting required by the student's IEPs, a violation of special education statutes and regulations is identified.

The Office of Special Education Program (OSEP) is a division within the Office of Special Education and Rehabilitative Services (OSERS). OSEP administers the Individuals with Disabilities Education Act (IDEA) and occasionally issues letters to provide guidance on special education topics.

In Letter to Clarke, 48 IDELR 77 (OSEP 2007), OSEP opined that decisions regarding whether a missed service needs to be made up are made on a case by case basis with "emphasis on the impact of the missed services on the child's ability to continue to progress and meet the annual goals in the IPE." In this case, the impact, if any, of two half days of missed paraeducator support in the general education setting, was minimal because it did not deprive the student of the opportunity to participate in general education instruction on either of these mornings. Therefore, no compensatory services will be awarded.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, violations occurred with regard to 34 C.F.R. 300.101(a) and 34 C.F.R. 300.17(d) which require that the district provide a FAPE to students by implementing their IEPs as written.

Therefore, USD #379 is directed to take the following actions:

- 1) Submit to Special Education and Title Services (SETS), within 40 calendar days of the date of this report, a written statement of assurance stating that it will comply with 34 C.F.R. 300.101(a) and 34 C.F.R. 300.17(d) by implementing this student's IEP as written.
- 2) Within 10 calendar days of the date of this report, submit to SETS for approval a plan for the provision of special education services to this student when the paraeducator designated to provide support to the student in the general education setting is absent.
- 3) Within 5 calendar days of receipt of SETS' approval of the plan specified above under Corrective Action 2, provide a copy of that plan to this parent.
- 4) Further, USD #379 shall, within 10 calendar days of the date of this report, submit to SETS one of the following:
 - a) A statement verifying acceptance of the corrective action or actions specified in this report;
 - b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
 - c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51(f).

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)