

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. 501,
Topeka Public Schools: 23FC501-004

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on October 21, 2022, by the parent, on behalf of her child, The student. In the remainder of this decision, the parent will be referred to as "the parent," and the student 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 parent's allegation, was issued on October 31, 2022. That Complaint Report concluded that there were no violations of special education statutes and regulations.

Thereafter, the parent 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 parent, the complaint report, the parent's appeal and supporting documents, and the district's response to the 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.

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

ISSUES ON APPEAL

There are two issues on appeal:

ISSUE ONE: USD #501, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA) failed to provide Free and Appropriate Public Education (FAPE) to the student by not providing accommodations regarding discipline.

Because there appears to be some mixing of issues in this appeal, the Committee finds some clarification is needed. The first issue addressed in the complaint report is clearly the issue of FAPE. The issue of parent participation is addressed in issue 2. Therefore, the committee will address these issues separately, as did the investigator.

On page 2 of her appeal, the parent states "While I understand that The student is not entitled to special education services or support, as a parent I should have a right to have my concerns addressed..." However, in the next paragraph, the parent says "The lack of response to meet, did absolutely interfere with The student receiving a FAPE..." Issue one, as it is stated in the complaint report, is about, "FAPE to the student by not providing accommodations regarding discipline." The parent's appeal indicates that the parent is asserting that the district's actions, or inactions, "did absolutely interfere with The student receiving a FAPE.

However, FAPE is defined as special education and related services that are provided in conformity with an IEP (34 C.F.R. 300.17). Without an IEP there is no FAPE obligation. The complaint report accurately stated that the student has been referred for a special education evaluation, but until it is determined if he is eligible for special education and related services, an IEP has been developed, and consent to implement the initial IEP has been obtained, a determination of denial of FAPE is impossible. There is simply no FAPE obligation at this time. (See, Report, page 7).

The essential uncontested fact in this case is that this student does not have an IEP. The appeal committee agrees with the finding of the investigator that, under this circumstance, the denial of a FAPE is impossible precisely because there is no FAPE obligation. Therefore, the appeal committee sustains the conclusion of the investigator that the parent's allegation that FAPE was denied to this student is not substantiated.

Issue 2: USD #501, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide parent participation in the student' IEP process.

This appears to be the focus of the parent's appeal. The investigator, on pages 8 and 9 of the report, correctly explains the limitations on the parent's right to participate in educational decisions during an initial evaluation. The investigator said:

Emails indicated that the parent and district have exchanged information about 1) the areas of concern by both the parent and school, 2) a review of the GEI, and 3) areas that the district proposed to evaluate and areas that will rely on record review.

Emails from the parent show the parent requested Zoom or phone meetings due to her health conditions.

An October 14, 2022, letter from the principal offered daily or weekly meetings in-person, via Zoom or by phone call. (Report, page 8).

In her conclusions, the investigator said:

The child is not currently receiving special education and related services. He was referred for an initial special education evaluation on September 23, 2022.

At this point the role of parent participation during evaluation is outlined in 34 C.F.R. 300.305(b); 34 C.F.R. 300.300(d)(1) and K.A.R. 91-40-8(c), (d); K.A.R. 91-40-27(e). It states the district has an obligation to follow a process to gather information about the student, including gathering input from the child's parent about the academic, behavioral, and other concerns as well as assist in developing an evaluation plan. These activities take place in the initial phases of an evaluation, referred to as a review of existing data. The parent has a right to participate in the review of existing data, but that participation may be obtained by the district using a variety of methods. K.A.R. 91-40-8(d) states that the district "may conduct its review without a meeting."

After speaking with the parent and reviewing the documents it is found that the district is following regulation in including the parent in preparing for the evaluation. Upon completion of the evaluation, the

district is required to meet with the parent to make an eligibility determination. When this evaluation reaches that point, the district will be required to meet with the parent and offer alternative methods of participation for the parent.

It is further found that because the student is currently being evaluated for special education and related services under IDEA, and an eligibility decision has not yet been determined, it is premature to investigate parental participation around the provision of services and interventions.

The investigator's conclusion that the parent properly participated in the evaluation process is supported by a long series of correspondence through e-mail exchanges, many of which are identified on page 2 and page 3 of the complaint report, and in the parent's appeal. In addition, the parent was provided with a Prior Written Notice (PWN), proposing an evaluation that described the kinds of assessments the district planned for the evaluation of this student. The parent provided written consent for the proposed evaluation. The very act of providing consent for the proposed assessments constitutes at least some participation in the evaluation process.

In her appeal, the parent says the investigator's report "completely disregards that I had asked for an alternative means of meeting participation, which was Zoom."

The parent's appeal cites 34 C.F.R 300.501(b) and (c), stating that parents of a child with a disability must be afforded an opportunity to participate in meetings with regard to identification and evaluation and to be involved in placement decisions. It is important to note, however, that this regulation states these rights belong to "parents of a child with a disability." A "child with a disability" is defined in 34 C.F.R. 300.8 as a child who has been evaluated and found to have a disability and to have a need for special education and related services. The student who is the subject of this complaint has not yet met that requirement, and is not a child with a disability for the purposes of 34 C.F.R. 300.501(b) or (c).

Rather, the provisions regarding parent participation during an initial evaluation are specified in 34 C.F.R. 300.305. That is the regulation that is relevant to this complaint issue. That regulation says the district has an obligation to follow a process to gather information about the student, that involves a review of existing data and information provided by the parent. These activities take place in the initial phases of an evaluation. The parent has a right to participate in the review of existing data, but, pursuant to K.A.R. 91-40-(d) the district may conduct its review without a meeting. Therefore, there

is nothing in these regulations that requires that the district fulfilling the limited requirements for parent participation in an initial evaluation (in 34 C.F.R. 300.305) do so by conducting a meeting. Accordingly, even if the district failed to agree to an alternative means of meeting participation for the parent (and the appeal committee makes no such finding), such as Zoom, that fact, standing alone, is not a violation of law.

For the reasons stated above, the findings and conclusions in the report regarding Issue 2 are sustained.

Related Commentary regarding Issue One

Although not a part of this appeal, the appeal committee believes that, for issue one, it is important to clarify the duties that a school district does have when a district is deemed to have knowledge that a child is a child with a disability because a parent requests a special education evaluation.

Under the provisions of 34 C.F.R. 300.534, the district is deemed to have knowledge that the student has a disability when, along with other specified reasons, a parent has requested an initial evaluation for special education and the student has engaged in behavior that has violated a district code of conduct. Thus, on the date this parent requested an evaluation, September 23, 2022, and thereafter when the student was subjected to suspension, the parent had the right to assert any of the protections of special education relating to disciplinary removals. This interpretation is supported in a recent OSERS guidance document. In Questions and Answers addressing the Needs of Children with Disabilities and the IDEA's Discipline Provisions, 81 IDELR 138 (OSERS 2022). In that guidance document, OSERS says (at Question I-1):

Question I-1: When are children who have not yet been determined eligible for special education and related services under IDEA entitled to the discipline protections?

Answer: A child who has not yet been identified as eligible for special education and related services under the IDEA and has violated a code of student conduct -- and their parent -- **may assert any of IDEA's discipline protections in circumstances where the LEA is deemed to have knowledge that the child is a "child with a disability" before the behavior that precipitated the disciplinary action occurred (see Question I-2 for further information). 34 C.F.R. § 300.534(a).**

There are specific exceptions to when an LEA must be deemed to have knowledge as described above. An LEA would not be deemed to have knowledge if the parent did not allow the LEA to conduct an evaluation of the child pursuant to 34 C.F.R. §§ 300.300 through 300.311 or refused special education and related services under IDEA. Also, an LEA would not be deemed to have knowledge if the child has been evaluated in

accordance with 34 C.F.R. §§ 300.300 through 300.311 and determined not to be a child with a disability under IDEA. 34 C.F.R. § 300.534(c)(2).

Question I-4: What disciplinary protections are available to a child who has been referred for an evaluation under IDEA and is removed for a violation of the school's code of student conduct prior to a determination of eligibility?

Answer: If a child engages in behavior that violates the school's code of student conduct prior to a determination of their eligibility for special education and related services and the LEA is deemed to have knowledge that the child is a child with a disability, the child is entitled to all of IDEA's protections afforded to a child with a disability, unless a specific exception applies. In general, once the child is properly referred for an evaluation under IDEA, the LEA would be deemed to have knowledge that the child is a child with a **disability for purposes of IDEA's disciplinary provisions**. However, under 34 C.F.R. § 300.534(c) and as noted above, the LEA is considered not to have knowledge that a child is a child with a disability if the parent has not allowed the LEA to conduct an evaluation of the child under IDEA, if the parent has refused special education and related services, or if the child has been evaluated and determined not to be a child with a disability under IDEA. In these instances, the child and the parent may not assert any of the disciplinary protections available under the IDEA and the LEA may utilize the same measures applicable to children without disabilities who engage in comparable behavior. However, as set out in I-6 below, certain additional conditions may apply. (Bold print added for emphasis).

That brings up the question of when may a parent assert the disciplinary protections of special education and what are the disciplinary protections that may be asserted by parents?

The disciplinary protections begin on the date on which a district is deemed to have knowledge that the student is a child with a disability and the student is suspended from school for more than ten school days without educational services. When both of those events occur, a parent may assert the right to:

- Request that educational services be provided to the child during suspension, although in another setting;
- Request that the district conduct a manifestation determination review and, if the behavior is a manifestation of the suspected disability to terminate the suspension; and
- Request a due process hearing, request mediation, or submit a formal complaint.

The parent in this case chose to file a formal complaint. That complaint included allegations regarding a failure to provide a FAPE and a failure to provide for a level of participation the parent believed was required. That complaint, and this appeal, did not

allege that the student had been suspended for more than ten school days without educational services after the parent requested the student's initial evaluation on September 23, 2022, which request would have triggered the disciplinary protections listed above.

It should also be noted that even if a child is suspended for more than ten school days in a school year, those suspensions do not count toward providing disciplinary protections when a parent has refused to consent to an initial evaluation (See 34 C.F.R. 300.534(c)(1)(ii)). In that case, the suspensions without educational services are only counted beginning the date the parent makes another request for an evaluation.

Another related question is "What constitutes a suspension of a child with a disability?"

A suspension of a child with a disability occurs when a school district removes a child from the educational setting described in the child's IEP for disciplinary reasons.

When a child does not have an IEP, but the parent has requested an initial evaluation, a suspension occurs when a school district removes the student from the regular education classroom for disciplinary reasons and does not provide educational services in an alternative setting. That means, for example, sending the student home or sending the student to the office (with or without educational services).

A suspension does not include when a parent voluntarily keeps their child at home instead of sending their child to school.

A suspension also does not include when a student is sent to an alternative setting within the school building in accordance with a Section 504 Plan or a General Education Intervention Plan for the student to help the student obtain needed respite or to develop skills to enable the student to be successful.

A suspension also does not include students who voluntarily go to another setting within the school building in accordance with a Section 504 Plan or a General Intervention Plan that permits students to voluntarily remove themselves to alternative location to relieve anxiety or to work on controlling their behavior.

CONCLUSION

The Appeal Committee concludes that the complaint report is sustained in its entirety.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 1st day of December 2022.

APPEAL COMMITTEE:

Crista Grimwood

Brian Dempsey

Ashley Niedzwiecki