

SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #259
ON NOVEMBER 7, 2022

DATE OF REPORT: DECEMBER 7, 2022

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

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the parent on November 16, 2022. On November 15 and 23 and December 1, 2022, the investigator spoke via telephone with Amy Godsey, Mediation/Due Process Supervisor for the district.

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

- Psychological Evaluation report dated January 3-5, 2020
- Notice of Meeting dated May 12, 2021
- Multidisciplinary Team Report dated May 19, 2021
- IEP for the student dated May 19, 2021
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated May 19, 2021
- Behavior Specialist Data report covering the period of October 19 through November 23, 2021
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated December 9, 2021
- IEP for the student dated May 11, 2022
- IEP Progress Report – Annual Goal dated May 6, 2022
- Elementary Progress Report for the student for the 2021-22 school year
- IEP Progress Report – Annual Goal dated October 14, 2022
- October 19, 2022 email from the parent to the building principal et al

- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated November 3, 2022
- Email dated November 15, 2022 from the Chief Human Resources Officer for the district to the Mediation/Due Process Supervisor
- IEP Amendment Between IEP Meetings dated November 8, 2022
- IEP Amendment dated November 16, 2022
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 16, 2022
- Elementary Progress Report for the student for the first quarter of the 2022-23 school year
- Attendant Care Guidelines and Considerations
- Special Ed Student Contact Log dated November 23, 2022
- Daily Goals sheets for the period of November 8, 2021 through November 4, 2022
- Online Board Policy #5116 for the district @ usd259.org

Background Information

This investigation involves a nine-year-old boy who is enrolled in the third grade in a science and technology magnet school in his home district. Following an initial evaluation by the district in September of 2019, it was determined that the student was eligible to receive special education support under the Gifted category. On November 17, 2022, the parent gave written consent for Gifted services to be increased from 60 to 90 minutes per week (30 minutes for ELA enrichment and 60 minutes for mathematics enrichment).

The student has been diagnosed as having ADHD and Autism Spectrum Disorder. Following a May 2021 reevaluation, the student was determined to be considered an exceptional child under the category of Autism and began receiving special education support to address related needs.

The student's parents are divorced and share custody of the student. The student's father reports that he and the student's mother collaborated on the development of this complaint.

Issues

In his complaint, the parent identified four concerns.

Issue One: The district has repeatedly failed to provide an individual paraeducator for the student as recommended by professionals in the field of autism spectrum disorder, child psychology, and child psychiatry.

Applicable Statutes and Regulations

To address the requirements 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 regarding placement and services for their child (K.A.R. 91-40-17(a); 34 C.F.R. 300.501(b)).

Prior written notice must be provided to parents whenever the school refuses a parent's request to initiate or change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services (FAPE) to the child (K.S. A. 72-3430(b)(2); 34 C.F.R. 300.503(a)(2)).

While a district must consider recommendations regarding the student from outside evaluations presented by the parents, special education laws do not obligate the school to implement those recommendations.

At K.A.R. 91-40-51(b)(1), regulations state that a formal complaint must allege a violation of state or federal special education laws or regulation occurred not more than one year before the date the complaint is received and filed with the commissioner of education.

Parent's Position

The parent contends that the district has ignored the recommendations of professionals in the field of autism spectrum disorder, child psychology, and child psychiatry and failed to provide objective or valid reasons to deny the requests of both parents for the assignment of an individual paraeducator for the student.

District's Position

The district acknowledges that during the 2021-22 school year, the school did not conduct a reevaluation or initiate an IEP team meeting with the parents to complete district-required forms to determine whether the student needed 1:1 paraeducator support.

Investigative Findings

Parental Requests for 1:1 paraeducator support

The SPED Student Contact Log provided by the district shows that the school social worker contacted the student's mother by telephone on September 1, 2021 to

"clarify if [the mother] had [during a previous telephone conversation with the building principal] made an official request for one on one para support for her student...SW asked if [the mother] was just discussing ideas for intervention and seeking information about what was available or if she was making a formal request that we re-evaluate her student for this service. Parent mentioned that she had a friend who's [sic] grandson has a one on one paraeducator and she was wondering if this might be helpful for her student. SW explained the continuum of special education services, least restrictive environment, and parents rights. SW emphasized that it is [the mother's] right to make a request for any service at any time, just as the school may request she sign consent if we are seeing that student may need a re-evaluation. Parent stated that she wanted to let us know that she is open to any recommendations the school has along the continuum of special education support but was not making a formal request for a re-evaluation at this time."

According to the SPED Student Contact Log, the school social worker again spoke with the student's mother by telephone on October 28, 2021. According to the log, the social worker was again following up with the student's mother regarding a request for a "one on one paraeducator." The log states that the

"SW explained different options for paraeducator support (more interrelated time vs. one on one) and asked [the student's mother] to clarify what she was requesting. Parent stated that she was requesting that [the student] be re-evaluated for one on one para support and also requested that he 'test out' of 2nd grade standards and not be required to do work that is tedious...SW explained the continuum of services that is typically given to students with disabilities and emphasized that while [the

mother] has a right to request her student be evaluated for any service she believes he needs, one on one para services would be very restrictive and are generally not recommended. SW asked [the mother] if she was sure that she wanted to request this. SW also asked if she had discussed this with the student's father, recommending that they be on the same page about any re-evaluation that may be requested for the student. Parent agreed to put her request on hold until she spoke with the student's father. [The student's mother] requested that SW send her resources and information to help her have this conversation. SW mailed KSDE handbook, parents rights, and website for Families Together Inc., along with information about the continuum of special education services.

By report of the Mediation/Due Process Supervisor, the student's father subsequently made a request on November 16, 2021 for the student to receive 1:1 attendant care (a paraeducator) throughout his school day.

On December 7, 2021, the Mediation/Due Process Supervisor for the district directed the school to initiate an IEP team meeting with the parents to determine whether 1:1 attendant care support was needed. The team was directed to use the district-established "Attendant Care Guidelines and Consideration" to guide their discussion.

According to the attendant care guidelines established by the district, the assignment of a staff member to provide daily assistance to a student is a

"critically important decision that can have serious negative consequences to the student. It is extremely resource intensive. A group process is required to consider the addition of attendant care. IEP team members (which includes parents) and your Campus Support must comprise the group."

The attendant care guidelines established by the district outline the procedures that are to be followed when determining whether or not attendant care for a student is required. According to the guidelines, "Special Education Campus Support" must meet with the IEP Team (which includes parents) to review the completed Student's Abilities and Assistance Needs Matrix for Attendant Care...(consistent with needs as identified in the PLAAFPs [Present Level of Academic Achievement and Functional Performance]..."

No evidence was provided by the district to show that an IEP team meeting was convened to discuss the student's need for attendant care support. No evidence was provided by the district to show that the district-required matrix was completed.

The SPED Student Contact Log shows that the school social worker again spoke with the student's mother by telephone on December 10, 2021. The social worker explained to the student's mother the school-based team's reasons for refusing the parents' request to add paraeducator services. She offered to schedule an IEP team meeting with both parents in attendance to discuss any changes that were needed to the IEP. According to the log, "parent stated IEP meeting would not be needed." The social worker told the student's mother that she had "a right to request an IEP meeting or to request [the student] be re-evaluated for any service at any time in the future." According to the log, "SW asked the parent if she would prefer PWN [prior written notice of refusal] be emailed or paper copy sent home with student. [The student's mother] stated email was fine. SW emailed PWN with a copy of parents rights."

According to the prior written notice document which was dated December 9, 2021, (which was emailed to the parents on December 10, 2021) the district refused to conduct the reevaluation because

"current data does not support that a more restrictive environment is needed at this time...Current special education services in place and behavior plan data were used as a basis for the proposed action. [The student] currently receives services for the exceptionalities of Autism and Gifted. He receives direct special education services in the regular education classroom (2nd grade), direct special education services in the regular education classroom (gifted), direct special education services outside the regular classroom (special ed room), counseling services outside the regular education classroom, and a behavior intervention plan that is implemented throughout the school day. Behavior Intervention Plan data for the 2nd quarter indicates that [the student] has had successful transitions an average of 82% (5/25 days were 70% or below) and completes work an average of 69% (8/25 days were 50% or below, 13/25 days were 75% or above). [The student] has been taken home by his father for behavior related issues at school 4 times this school year, but [the student] has not had any out of school suspensions.

[The student] began taking a new medication on 11/20/2021 and if successful, this could decrease his needs for behavior support. 1:1 attendant care as a related service would be a significant change in level of restrictiveness and it may be in [the student's] best interest to consider other interventions along the continuum of services first."

The SPED Student Contact Log contains no record of any additional discussion with the student's parents regarding the student's need for a one to one paraeducator during the remainder of the 2021-22 school year.

On October 19, 2022, the parent sent an email to the building principal and others requesting "an emergency reevaluation of the IEP."

The Mediation/Due Process Supervisor states that she spoke with both of the student's parents by telephone on October 21, 2022 to discuss their ongoing concerns. The parents once again requested a reevaluation and 1:1 attendant care for the student. The parents reiterated their request for the student to receive 1:1 support during the school day to assist with his behavioral needs. The supervisor informed the parents that she would contact the Executive Director of Elementary Student Support Services to request that "interim/intervention 1:1 attendant care for the student" be provided pending completion of a reevaluation and the development of a new IEP for the student. The parents agreed to this proposal.

Prior written notice of a proposed reevaluation was provided to the parents on November 3, 2022, and the parents provided written consent for the reevaluation on November 7, 2022.

On November 7, 2022, an attendant care paraeducator was transferred to the student's school to provide him with 1:1 support. The Mediation/Due Process Supervisor was informed of the transfer on November 15, 2022.

In a telephone call on November 16, 2022, the supervisor notified the parents that the paraeducator was in place. According to the supervisor, she told the parent that the paraeducator would not be with the student throughout the day but would be present at times which observations and existing data showed the student to be of need of support. Data would be collected while a paraeducator was in place pending completion of the reevaluation. That data would be used to inform decisions regarding the student's ongoing need for 1:1 support.

On November 17, 2022, a staff member with expertise in Autism, behavior management, and data collection and analysis began working with staff to complete an FBA (Functional Behavior Assessment), to develop targeted interventions including the use of 1:1 paraeducator support, to collect and analyze data for the reevaluation, and to provide input for the development of a new IEP for the student.

District's Failure to Follow Recommendations from outside providers

According to the district, the parents have provided only one report from an outside licensed clinical psychotherapist referencing an evaluation completed on January 3 and 5, 2020. That report does not contain any recommendation for the student to have 1:1 support.

Provision of FAPE

Progress toward attaining annual goals:

The student's May 19, 2021 IEP included six annual goals. According to the IEP Progress Report – Annual Goal form dated May 6, 2022, the student did not meet all of his goals, but demonstrated progress over baseline on each of his goals throughout the 2021-22 school year.

The student's current IEP was developed on May 9, 2022. That IEP includes eight annual goals. According to the IEP Progress Report – Annual Goal form dated October 14, 2022, the student was making progress at or above expected levels on five of these eight annual goals (63%). On two of the eight goals (#5 and #7), the student had made progress, but it was not yet clear whether, at the demonstrated rate of progress, the student would be able to achieve the annual goal. On one of his eight goals (#6) the student's progress was considered insufficient for him to meet his target by the end of the IEP period.

Goal #5 targets the student's response to non-preferred, whole-group or small-group activities and/or independent assignments. The goal aims at having the student attend to and remain on task for 15 minutes 75% of the time with no more than one verbal cue and without demonstrating task avoidance behaviors. The student's baseline level of performance for this goal was 20%. At both the May and October 2022 monitoring periods, data showed the student to be engaging in non-preferred activities for 10 minutes 85% of the time (with a target of 80% for 10 minutes with two verbal cues).

While he was not in May 2022 making adequate progress to achieve goal #7 related to transitioning without refusal 75% of the time (up from a baseline of 50%), the student was transitioning appropriately 88% of the time at the October 2022 monitoring period.

In both May and October of 2022, the student was not making adequate progress to achieve his sixth goal – a goal related to his recognition of his anxiety in "a situation

that intensifies [the student's] emotions" and subsequent implementation of previously taught replacement behaviors.

Elementary Progress Reports:

The student's Elementary Progress Reports for the 2021-22 school year and the first quarter of the 2022-23 school year contain a key to proficiency skill levels for the report:

- Level 3.0: Proficient: Student demonstrates mastery on grade level standards. This is the target/goal for student success and should be celebrated.
- Level 2.5: Student demonstrates partial success on grade level standards.
- Level 2.0: Developing: Student demonstrates understanding of the foundational skills related to the grade level standard.
Level 1.5: Student demonstrates partial success on foundational skills but demonstrates major errors on grade level standards.
- Level 1: Emerging: With help, student demonstrates some understanding of foundational skills and grade level standards.

During the 2021-22 school year, the student was given proficiency marks in eight general categories. The student's marks fell below Level 3 in all but two of the ten areas assessed under the category of "Elem Behavior and Work Habits." Of the 27 total marks given in this category, only three fell at Level 3. For two quarters, the student earned a mark of three for "Core Principals: Demonstrates traits of good character in a variety of settings, such as honesty, kindness, self-control, and perseverance." During the second quarter, the student earned a three for "Participation and Engagement: Listen, participate in class, and engage in the learning process on a consistent basis." Of the remaining 24 marks under this category, 18 (67% of the 27 total) were at Level 2. The fourth quarter mark for "Follow Directions: Know and act in accordance to classroom routines and verbal or written directions" was at Level 1. Only two marks were given for "Social Awareness: Demonstrates awareness of others' thoughts, feelings, and differences [the student appropriately reacts to others in a variety of situations]." Those marks for the third and fourth quarters fell at Level 1.5. The fourth quarter mark for "Interpersonal Skills: Demonstrates communication and social skills to interact effectively within relationships" also fell at Level 1.5.

Of the 15 marks given under the category of Visual Arts on the 2021-22 progress report, the student earned marks below Level 3 in six:

- Level 2 for the first quarter in "Control art tools, materials, and processes," "Participation and Engagement," and "Follow Directions;" and

- Level 2.5 for the second quarter in “Work Completion,” “Participation and Engagement,” and “Follow Directions.”

The majority of the student’s marks for the 2021-22 in, Science, Social Studies, and Vocal Music were at Level 3 or above. Marks of 2.5 or lower in Physical Education came in the areas of “Work Completion,” “Participation and Engagement,” “Following Directions,” and “Following multi-step directions” and well as under the category of “Dribble with feet.”

The student’s progress report for the first quarter of the 2022-23 school year shows that the student fell below Level 3.0 in the following seven areas (18% of the 39 areas assessed):

- Participation and Engagement: Listen, participate in class, and engage in the learning process on a consistent level (2);
- Follow Directions: Know and act in accordance to classroom routines and verbal or written directions (1.5);
- Edit for correct capitalization (2);
- Edit for correct punctuation (2);
- Edit for correct spelling (2);
- Organize the events in a narrative chronologically and provide a sense of closure (2); and
- Use dialogue to show how characters respond to an event or experience (2).

All other marks place the student at Level 3 (22 of 39 or 56%) or at Level 4 (10 of 39 or 26%).

Summary and Conclusions

The district responded in a timely manner (less than 15 school days) to the October 19, 2022 request from the student’s father for an “emergency reevaluation” of the student’s IEP. The district requested written consent for the reevaluation on November 3, 2022 and initiated the reevaluation on November 17, 2022 after receiving written parental consent on November 7, 2022. Interim paraeducator support was put in place for the student pending completion of the reevaluation when decisions regarding the student’s need for continuing paraeducator support will be made by an IEP team.

The timeliness of the district's responses to parental requests made during the 2021-22 school year prior to November 7, 2021 for the assignment of a paraeducator for the student were not investigated because these requests were made more than one year prior to the date this complaint was received by the Kansas State Department of Education on November 7, 2022.

However, the district's response to a November 16, 2021 request for paraeducator support for the student was investigated. In response to the request, the district sent the parents prior written notice of refusal to conduct a reevaluation to determine the student's need for paraeducator support on December 10, 2022. The prior written notice form was dated December 9, 2022. These dates fall within the required one year limit.

The prior written notice states that it could be in the student's "best interest to consider other interventions along the continuum of services" before conducting a reevaluation since "current behavior data does not support that a more restrictive environment [was needed at that time]." This determination was made by the school team without the participation of the parents and outside of the district's own established procedures which called for an IEP team meeting to review a completed district-developed matrix regarding the student's need for attendant care support. While the school social worker had on more than one occasion told the student's mother that she had the "right to request an IEP meeting or to request [the student] be re-evaluated for any service at any time in the future," the district failed to either reevaluate the student or to convene an IEP team meeting to discuss the student's need for reevaluation or paraeducator support. Because the district made decisions regarding the provision of services to the student outside of an IEP team meeting that included the parents, a violation of special education statutes and regulations is identified.

In his complaint, the parent asserts that the district failed to follow the recommendations of outside professionals who have supported the provision of paraeducator support for the student. However, only one report from an outside evaluator has been presented to the district by the parents, and that report does not include any reference to the student's need for paraeducator support. Had the district been provided with such a recommendation, the district would be required to consider the recommendation but would not have been required by statutes and regulations to implement it, though notice of refusal would have been required. A violation of special education statutes and regulations is not substantiated on this aspect of this issue.

The student's Elementary Progress Reports (grade cards) show that the student has been able to participate and make progress in the general education curriculum during the last 12-month period. While the growth of his academic skills is relatively greater than the development of his behavior and work habits, the student is nonetheless improving his understanding of foundational skills related to grade level standards in the latter area. Skills related to both behavior and work habits have strengthened during the first quarter of the 2022-23 school year as compared to the 2021-22 school year. A violation of special education statutes and regulations regarding the lack of provision of a FAPE is not established.

Issue Two: School personnel do not follow the student's 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

The parent asserts that the district has failed to provide the student with several of the accommodations or modifications required by his IEP. According to the parent, this assertion is based on personal observation as well as reports from the student during casual conversation and during therapy sessions.

District's Position

The district asserts that data establish a pattern of implementation of his IEP sufficient to provide the student with a FAPE.

Investigative Findings

The student's May 9, 2022 IEP does not require the district to document the use of implementation of the accommodations and/or modifications specified in the document. However, the use of some of the specified accommodations and/or

modifications has been reflected on goal sheets completed daily and sent to the parents. The district also provided photographs to support the provision of several of the accommodations discussed below.

Nonverbal/verbal cues and visuals (timer and bullseye target for behavior support):

The student's May 9, 2022 IEP states that the student "needs cues throughout the school day and visuals to stay on task. He uses a timer throughout the day to help him transition."

The parent asserts that the student has reported that the school does not use nonverbal cues to assist him when making transitions from one task to another.

The district provided the investigator with a number of examples of the use of cues and visuals. For example, a Behavior Bullseye is used with the student to process through discussions about his behavior. The student and the teacher place tokens on the chart to rank their separate impressions regarding the student's feelings and actions. A color-coded card reflecting various levels of frustration is also used with the student to facilitate discussions about his frustration.

A color countdown card with numbers one through five is used to assist the student with transitions. This year, the student has indicated that he doesn't need to see all the numbers, so the card he is using has numbers 1, 3, and 5 with two blank dots (5 O 3 O 1).

The student's "Daily Goals" sheets completed during the period of November 1 through December 9, 2021 contained a section entitled "Antecedent (Trigger). Goal sheets included in that section contain the question, "Did you use the behavior bullseye?" The goals sheet for November 8, 2021 shows that the student used the bullseye on that date.

While specific reference to the bullseye was removed from the goals sheet beginning December 13, 2021, the continued availability of the bullseye was documented on the goals sheet for January 26, 2022. During the remainder of the 2021-22 school year, the student moved throughout his school day with a backpack that contained his bullseye and countdown color cards.

The student's use of the bullseye was targeted for specific data collection by the Behavior Specialist for the district during the period of October 19 to November 23, 2021. The student made use of a bullseye target on 38% of data days during that period.

While the bullseye and countdown color cards have not been utilized extensively for the student during the 2022-23 school year, timers have been available to him. The district reports that the student has, however, often preferred to use the classroom clock to assist him with transitions. The use of the clock has been paired with verbal cues as to how much time remains before a preferred task or break. The student's classroom teacher and his interrelated resource teacher use their phone timers with the student who seems to enjoy turning off the timer when the alarm sounds.

Preferential seating/be "teacher helper" when deemed possible by teacher:

The student's May 9, 2022 IEP states that the student "needs to be seated where visual/auditory distractions are at a minimal [sic], the teacher is easily accessible, and a positive peer role model is next to him. He does well being a teacher helper during math where he can sit close to the teacher and help click through the PowerPoint lessons when used."

The parent contends that the student has not reported that he has been allowed to sit near the teacher or in a location where distractions are minimized. The parent also asserts that the student has not reported that a positive peer role model is seated nearby.

According to the district, designated seating areas for the student vary depending upon activity and classroom. In the gifted education resource room, for example, the student and peers work at a kidney-shaped table that allows the student to be near the teacher and peers for direct instruction. Partner work is done at a separate table with peers nearby.

In the general education classroom, direct instruction for the student generally occurs at a kidney shaped table that puts the student in close proximity to the teacher and peers. When in Music, the student's designated seating area on the floor is near the teacher and peers in a spot that is intended to reduce distractions.

When the teacher is providing instruction to the whole class in the Science room, the student is seated near her but away from the door to reduce distractions. The student also has the option to use the desk in his safe spot rather than sitting with classmates if he is uncomfortable being too close to others.

With regard to being able to serve as a "helper," the student has been assigned a task which he completes near the end of the school day. At that time, he goes to the office and picks up slips of paper that reflect changes in dismissal for other students. The

student then goes to the classrooms of those students and attaches the slip to a clip outside the teacher's door. Additionally, the student's gifted teacher and his resource teacher use him to make deliveries for them in the building. In the general education classroom, students are randomly chosen to carry out weekly "jobs." The student has been selected for some of these jobs; he has chosen to carry out some and declined others.

Safe place or Safe Person:

The student's May 9, 2022 IEP states that the student "needs a safe place to go to help manage his emotions."

The parent states that the student has indicated that the only safe place available to him in the classroom is one reserved for "community calm time" – a section in the corner of the classroom with pillows and books. The parent contends that he and the student's mother have asked the school to establish a separate safe place with minimal distractions for the student and to provide the student with a weighted blanket and other calming items, but the school's failure to provide these things (which are not required by the student's IEP) suggests that there would be no compliance with this accommodation.

According to the district, the student's safe spot varies by classroom. The gifted education teacher reports that, in her resource room the student has a designated calm down spot available to the student in the area where "Zones of Regulation" are housed, but the student has not had to use the spot or the "Zones" this year. According to the gifted education teacher, the student talks openly about his frustration level and is able to process that frustration with the teacher at the time it is occurring.

In the general education classroom, the student has a designated safe space where he keeps his First/Then/Choice Board. A counter in that area houses his Behavior Bullseye and color card as well as a collection of social stories. Staff report that the student likes having these items in this area because he has easy access to them.

In the Music room, the student's safe spot contains a timer and a list of calming strategies. The student also has a designated safe spot at the back of the Art room. In the Science room, the student has a safe spot where an hourglass timer and posters of ideas and instructions on calming strategies can be found.

In the interrelated Room, the student's safe spot has pillows and bean bags to lay or sit on. The area also contains a few fidgets/sensory items as well as some cards that outline strategies to help the student calm down.

Allowing for different modalities to respond:

The student's May 9, 2022 IEP states that the student should be allowed to use "a different modality to respond [to help] alleviate stress and anxiety."

The parent asserts that the school has not consistently and "gently" provided this accommodation. As an example, the parent cites an incident during an Emergency Safety Intervention (ESI) when the student was not allowed to make a paper airplane as a strategy for self-soothing. This ESI is addressed below under issues three and four.

The gifted education teacher reports that the student has been allowed a variety of response options including both verbal and written responses, drawing, and tape recording his answers.

The district has provided other examples of varying response modalities:

- Providing verbal responses;
- Dictating answers to a scribe;
- Using abbreviations rather than writing the entire word ("P" for past tense, "Pr" for present tense, etc.);
- Pointing to an answer;
- Circling an answer; and/or
- Highlighting or underlining an answer.

Failure to follow aspects of the student's Behavior Intervention Plan (BIP):

The Behavior Intervention Plan (BIP) included in the student's May 9, 2022 IEP contains four strategies/supports that have been used with the student to prevent non-compliance behaviors. The IEP reflects the effectiveness of each of these strategies/supports during the 2021-22 school year.

- **First/Then Work System:**
According to the parent, the student reports that he is given homework in the same manner as his classmates and is not allowed to engage in preferred activities until the end of the school day (rather than after each non-preferred activity as required by his IEP).

The First/Then system is addressed in the student's BIP under the "Prevention – Changes to environment, instruction, adult and peer interactions portion of the "Behavior Intervention Plan" section of the student's May 9, 2022 IEP. The IEP states that the initial implementation of the system (using a file folder containing pictures to indicate activities to be completed before earning a preferred activity) "has been revised and is smaller. It is something [the student] can refer to, but it is noted that [the student] has done well with verbal cues this year. If he sees breaks on the work system, he can often become obsessive of them and really want to focus on them instead of the "First" or the work assigned."

- **Visual countdown for Transitions:**

The IEP describes this strategy/support as using five colored strips of paper, each with a different number (1-5) written on it. The strips are stacked with the strip containing the number 5 on top. As the time for a transition nears, the strips are removed, counting down to 1 at which point the student is reminded that it is time to transition to the next activity.

The IEP states that the "visual countdown [using color strips] has not been needed this year. [The student] likes to use a timer and is able to set the timer and monitor it, himself."

- **Provision of positive reinforcement:**

Under the section of the BIP entitled "Instruction to teach and reinforce Replacement Behavior(s)," the IEP states that "staff will provide positive reinforcement."

As examples of the district's failure to follow the BIP, the parent asserts that telling the student that making a paper airplane was "not an option" and stating that the student "committed assault" when he struck a teacher are not "positive" reinforcements. The parent also states that the student has reported that staff have said "not so nice" things to him.

Daily goal sheets for the student document many examples of the provision of positive reinforcement for the student.

- "Received a sticker during Art. Positive call to dad." November 18, 2021
- "Positive call to dad." (November 19, 2021)
- "Positive call home." (November 22, 2021)
- "Made a positive call home." (November 29, 2021)

- “A superstar in Library today.” (December 5, 2021)
 - “[The student] was amazing today.” (January 5, 2022)
 - “Today was so awesome!!” (January 18, 2022)
 - “You did the right thing” (February 16, 2022)
 - “I bragged about his communication.” (February 22, 2022)
 - “[The student] was wonderful helping his math buddie with Dreambox. Very polite.” (February 23, 2022)
 - [The student] “stated, ‘I am starting to get frustrated!’ I agreed and [reinforced] his good communication.” (February 28, 2022)
- **Engaging in conversation about a preferred topic:**
The section of the BIP entitled “Identify steps to follow when examples of Target and/or Peak Behavior occurs” contains the following suggested response when the student “becomes escalated:”

“Staff member will ask [the student] to leave over-stimulating environment (if possible) to engage in conversation about a preferred topic. After giving [the student] positive attention about a preferred topic and observing that [the student] is no longer in an escalated state, staff member will reflect with [the student] on what happened and on how he can transition successfully back to being on task using the first/then system.”

According to the parent, the student has reported that his attempts to talk about a preferred topic at times other than the end of the day are either discouraged or not allowed. However, the student’s IEP does not require that the student be allowed to discuss preferred topics at any time during the school day. Rather, this strategy is to be used during those times when “Target and/or Peak Behavior occurs.”

Summary and Conclusions

The district has provided evidence to show that all of the four IEP accommodations specified by the parent in his complaint have been implemented. Four areas of alleged failure of the district to follow the student’s BIP were investigated, and the investigator determined the district was following the BIP as written in all four areas. A violation of special education statutes and regulations is not established on this issue.

Issue Three: School personnel are falsifying documentation.

Applicable Statutes and Regulations

At K.A.R. 91-40-51, Kansas regulations state that a formal complaint must allege a violation of *state or federal special education laws or regulations*.

Emergency Safety Interventions (ESI) are not governed by special education laws or regulations. At K.S.A. 72-89d03, Kansas statutes address the seclusion and restraint of students and require districts to develop and implement written policies to govern the use of ESI in schools. These written policies must include a local dispute resolution process to be used by a parent when filing a complaint with the local district regarding the use of an ESI (K.S.A. 72-89d03(g)(2)).

Parent's Position

The parent contends that, following the implementation of an ESI on October 19, 2022, the district failed to notify the parent of the ESI in a timely manner and sent the parent an improperly dated "data feedback form."

Investigative Findings

At #5116 in its Board Policies, the district addresses Emergency Safety Interventions. At item 6, the policy addresses "Dispute Resolution" and designates the district's Chief Human Resources Officer as the complaint investigator to conduct investigations of parental complaints regarding ESI.

The parent followed district-established procedures and filed an ESI complaint with the Chief Human Resources Officer on November 16, 2022. An internal investigation by the district was initiated.

Because this complaint investigator does not have jurisdiction over complaints related to the implementation of an ESI, this issue was not investigated further.

Issue Four: School personnel improperly used a physical restraint.

As stated above under Issue Three, this complaint investigator does not have jurisdiction over complaints regarding ESI. The focus of this issue is the district's action related to an ESI. Therefore, this issue was not addressed as a part of this

investigation. An internal investigation was initiated by the district under the guidelines established in the district's Board Policy.

Corrective Action

Information gathered in the course of this investigation has identified noncompliance with special education statutes and regulations on issues presented in this complaint. Specifically, violations occurred with regard to K.A.R. 91-40-17(a) and 34 C.F.R. 300.501(b) which require that parents be included as members of an IEP team making decisions regarding services for their child.

Therefore, USD #259 is directed to 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 K.A.R. 91-40-17(a) and 34 C.F.R. 300.501(b) by including the parent(s) in any IEP team meeting where decisions will be made regarding the provision of services (1:1 attendant care/paraeducator) for this student.

The district has already begun the process of completing a reevaluation of the student to better inform the team of the student's needs. Parental consent for the reevaluation of the student was provided by the parent on November 7, 2022. Special education statutes and regulations require that the reevaluation be completed within 60 school days of the date of that consent – by March 3, 2023. However, the district is hereby directed to expedite the reevaluation process and to convene a meeting to review the results of the reevaluation with the parent(s) **by no later than January 31, 2023**. If the parent declines to participate in the reevaluation process (by, for example, not providing information regarding the student's performance in the home setting), the reevaluation shall be completed without delay using all otherwise available data. Additionally,

- 1) By no later than 5 school days following the reevaluation review meeting, USD #259 shall convene an IEP team meeting to determine whether any changes to the student's current IEP are warranted. This meeting may be held on the same date as the reevaluation team meeting if the parties agree to do so.
- 2) The IEP team must consider any recommendations from outside agencies or individuals for paraeducator support if those recommendations are presented by the parent(s) in the form of a written report or statement or are offered in-person by such an outside source, but the district is not obligated to accept such recommendations.

- 3) By no later than 5 school days following the IEP team meeting described above under Item #1, USD #259 shall submit to Special Education and Title Services (SETS)
 - a) A copy of the notice of meeting for the reevaluation review;
 - b) A copy of the notice of meeting for the IEP team meeting (one notice may cover both meetings if they are held on the same day);
 - c) A copy of the reevaluation report; and
 - d) A copy of any prior written notice documents related to changes to the IEP or proposed refusals resulting from the reevaluation and IEP review.

- 4) Further, USD #259 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)