In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. 229,
Blue Valley Public Schools: 22FC362-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on November 30, 2022, by attorney Matthew Rogers, on behalf of his clients, Mother and Father. The complaint involves Mother and Father's son, Student. In the remainder of this decision, Mother and Father will be referred to as "the parents," and 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 complaint allegation, was issued on December 21, 2022. That Complaint Report concluded that there was no violation of special education statutes and regulations.

Thereafter, Mother and Father filed an appeal of the Complaint Report, through their attorney, Mr. Rogers. Upon receipt of the appeal, an appeal Committee was appointed. The Committee reviewed the original complaint filed by the parent, the Complaint Report, the parent's Notice of Appeal, 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

First, 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. Accordingly, issues raised in this appeal that were not addressed in the original complaint, such as the alleged failure of the district to implement the student's Positive Behavior Protocol (see page 8 of the parent's Notice of Appeal) will not be addressed by this Committee.

Second, the parents' Notice of Appeal cited the KSDE Special Education Handbook, noting that education records must be maintained for identified students for 5 years after they exit special education services. The context of the special education handbook is, of course, special education. The provision cited in the parent's appeal, is

in Chapter 9 of the special education process handbook and is referring to special education records, and not to all education records. That is clear, not only by the context of the entire handbook, but also by the specific provision in the handbook cited in the parent's appeal, which says: "Federal auditing requires the availability of education records for identified students for 5 years after they exit from special education services (See page 160 of Kansas Special Education Process Handbook)." This refers to requirements of the federal special education grant for states under the Individuals with Disabilities Education Act (IDEA). The grant does not require that all education records be kept for five years, but only requires maintenance of those education records that document compliance with the IDEA. That includes records, for example, to verify that IEPs are developed in accordance with law, that evaluations are administered as required by law, and that disciplinary removals are conducted in the manner specified by law. In using the term "education records" rather than repeatedly specifying "special education records," the statements in the process handbook are, admittedly, too broad. That was an editorial decision, but the context is clearly on only special education records. Moreover, the Kansas Special Education Process Handbook was developed as a general guide for school districts and parents. It is not, and was never intended to be, interpreted as a statement of law or regulation, or official state policy. Accordingly, if the district destroyed the surveillance video, as apparently it has, that destruction is not a violation of the IDEA because: (1) as explained above, the video was not collected, maintained or used by the district in a matter that would make it a special education record; and (2) the federal grant requirement for preservation of any record related to federal grants, which necessarily includes special education records, is a requirement of the Education Department General Administrative Regulations (EDGAR) and not of the IDEA.

Third, with regard to the parents' appeal case citation in Denny v. Bertha-Hewit Public Schools, this federal district court decision from Minnesota is not persuasive. First, it is a district court decision outside of the Tenth Circuit with little (or no) value for precedent in Kansas. Second, and more importantly, it misstates the law when it says: "To be sure, districts must ensure that parents have an opportunity to examine all records relating to their child, including any education records relating to their children that are collected, maintained, or used by the agency (citations omitted)." Special education statutes and regulations simply do not "ensure that parents have an opportunity to examine all records relating to their child (emphasis added)." Even the more general statute, the Family Educational Rights and Privacy Act (FERPA), does not ensure that parents have an opportunity to examine "all records relating to their child." FERPA provides parents with the right to access "education records", but "education records" do not include a number of the kinds of records specified in FERPA regulations, at 34 C.F.R. 99.3. That includes items such as records that are not

maintained by the district or records kept in the sole possession of the maker that are used only as a personal memory aid. Further, even with the misstatement of the law, the Minnesota court concluded that the district in that case did not violate the IDEA. As described more clearly below, the special education regulations give parents a right to access only the education records of their child that the public agency collects, maintains, or uses for special education purposes. This court did not directly address this important component of 34 C.F.R. 300.613.

Fourth, the Notice of Appeal states that the investigator did not follow the required procedure for conducting an investigation because the investigator did not contact the parent for a personal interview. The Notice of Appeal says the investigator erred by not personally interviewing the parent, stating: "The [parents] are the complainants in this case, not their attorney." The Notice of Appeal cites the Kansas Special Education Process Handbook as saying: "the complainant is the person who signs the written complaint." More precisely, on page 173, the Handbook says: "The formal complaint must be in writing and signed by the person or organization making the complaint." This statement was included in the Handbook in recognition of Kansas regulation K.A.R. 91-40-51, which states that a special education complaint to the State Department of Education must include the signature of the complainant. One of this student's parents signed the complaint. Accordingly, this portion of the regulation was completed.

Fifth, in his Notice of Appeal, counsel for the parents cites K.A.R. 91-40-51(c), stating: "At a minimum, each investigation shall include the following: (1) A discussion with the complainant during which additional information may be gathered and specific allegations of noncompliance identified, verified, and recorded."

Counsel for the parents asserts that this regulation may only be satisfied when an investigator speaks directly with the parent who is filing the complaint, even in situations where the complaint is filed on behalf of the parent by legal counsel. The Committee disagrees.

The original complaint submitted to KSDE, dated November 30, 2022, says this:

"Dear KSDE, On behalf of [parents], attached please find a formal complaint and associated exhibits. I've cc'd [the parents] on this email. I will send a copy to Ms. Melissa Hillman, Chief Legal Officer for the Blue Valley School District by separate cover."

This correspondence constituted the filing of the complaint, and it was filed by Mr. Rogers in his capacity as attorney "on behalf of" the parents. Indeed, the parents are still the complainants.

The Committee reviewed correspondence between the parent's counsel and the investigator, and makes the following findings: When the investigator contacted Mr. Rogers by e-mail to clarify provisions in the complaint, Mr. Rogers continued to represent his client's interests by providing a written response. At no time did Mr. Rogers indicate that the investigator should directly talk to his client.

As indicated in the Notice of Appeal, K.A.R. 91-40-51(c) says "At a minimum, each investigation shall include the following: (1) A discussion with the complainant during which additional information may be gathered and specific allegations of noncompliance identified, verified, and recorded.

In an e-mail, dated December 5, 2022, and addressed to both the parent's attorney and to the general counsel of the school district, the investigator expressed his view that there was no dispute as to the facts regarding the complaint, and asked each if they would be willing to stipulate to facts specified in the investigator's e-mail. In that correspondence, the investigator stated, "If you are not willing to stipulate to any of the facts above, please explain why?"

On December 6, 2022, the parent's attorney replied by e-mail stating:

> "I agree that there is no dispute regarding the underlying facts, and that the dispute is about what the law requires. I agree to the proposed stipulated facts, with two clarifications: (1) this student received two detentions as a result of the incident, and (2) the September 21, 2022 letter also requested "a time for [this student's parents] to view the requested video." *See exhibit 2: Parent's Stipulation.

This correspondence, in which the parent's attorney did provide additional clarification, satisfies the requirement of K.A.R 91-40-51(c) that the investigation include: (1) A discussion with the complainant during which additional information may be gathered and specific allegations of noncompliance identified, verified, and recorded.

In the final preliminary matter, on page two of the parents' Notice of Appeal, the parents state that because they were not provided with a copy of the district's response to the complaint, they were "deprived of an opportunity to dispute the facts alleged by the District." The appeal Committee first notes that the investigator did not base his decision on any disputed fact.

Second, K.A.R. 91-40-5(f)(1) says that any agency or complainant may file an appeal within 10 days of the date of the report and that "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Thus, the burden to provide the basis for alleging that the report is incorrect is on the party filing the appeal and doing so within the time period allotted for such filing. There is nothing in

this regulation that requires the Kansas State Department of Education to provide the appealing party an opportunity to respond to the response of the non-appealing party.

Moreover, there is an important distinction between the processes used in a special education complaint investigation as opposed to the more formal due process hearing. The United States Department of Education explained that "The SEA may, in its effort to resolve a complaint, determine that interviews with appropriate individuals are necessary for the SEA to obtain the relevant information needed to make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of part 300. However, such interviews conducted by the SEA, as part of its effort to resolve a State Complaint, are not intended to be comparable to the requirement in section 615(h)(2) of the Act, which provides any party to a due process hearing the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." Federal Register, August 14, 2006, p. 46601).

Accordingly, when a complaint is filed, the State Department of Education conducts an investigation and issues a decision. When a complaint investigator requests information from both parties, as the investigator did in this complaint, the investigator is not required to provide copies of the information received from each party to the other party. The same principal applies when one party has submitted an appeal. When the complaint process has been completed, either party to the complaint may request a copy of the other party's responses, and those requests will ordinarily be approved.

DISCUSSION OF ISSUES ON APPEAL

This complaint involved a single issue:

The school district refused parental access to student records, including: (1) video recording(s) depicting a reported incident between [this student] and another student that the district relied upon in disciplining [this student] and (2) statements, emails, text messages, etc. regarding the alleged incident.

The essential facts of this complaint are uncontested. Both the complaint and the district's response to the complaint, state that: (a) the student who is the subject of this complaint got into a physical altercation with another student at school; (b) the altercation was caught on a surveillance video tape; (c) the student's parents requested that they be given a copy of the tape, or to be able to view the tape; (d) the district refused to do either; and (e) school personnel provided a verbal explanation of the incident to the parents.

In their appeal, the complainants assert that the information in the video was related to special education because the information in the video was related to the child's

disability and its content was important to the parent's right to participate in the IEP process. Therefore, because that information is related to special education, the parents have a right to access it under 34 C.F.R. 300.612.

Even assuming that the information in the video and other information related to the incident may be related to the child's disability and would have been important for the parent's participation in the IEP process, that is not the standard for access under 34 C.F.R. 300.613. For access under 34 C.F.R. 300.613, the information must be in an education record that is "collected, maintained, or used by the agency under this part (emphasis added)." In other words, the analysis does not involve the content of the information, the relationship of the information to the child's disability, or the value of the information to the parents right to participate in the IEP process. Rather, the analysis involves the intention of the public agency for collecting or maintaining the information, and/or how the public agency eventually uses the information. If the reason for the district to collect, maintain, or use information is for a special education purpose, then 34 C.F.R. 300.613 applies. Even if the reason for the district in collecting, maintaining or using information is not for a special education purpose, but the information is eventually used by the district for a special education purpose, under Part B of the IDEA, 34 C.F.R. 300.613 would apply. Conversely, if the reason the district collected, maintained, or used the information is not for a special education purpose under Part B, and the information is never used by the district for a special education purpose, then the access provisions of 34 C.F.R. 300.613 do not apply. In short, what brings student information into the requirements of 34 C.F.R. 300.613 is the manner in which the information is treated by the district. Information does not become subject to the requirements of 34 C.F.R. 300.613 merely because a parent or a district "could" use the information for special education purposes.

The Committee finds that no facts were presented in either the original complaint, or in this appeal, to support a conclusion that information regarding the August 23, 2022, incident was collected, maintained, or used by the district for special education purposes.

On page 7, the Notice of Appeal, states:

"As [parent's] above statement reflects, District and parent IEP Team members have reviewed and discussed surveillance video recordings of behavioral incidents involving [the student] in developing [the student's] IEP and special education services. The August 23, 2022, video is no different and parental access to the August 23, 2022, video is vital to the [parents'] ability to meaningfully participate in that process."

The Appeal Committee recognizes that these parents may have a legitimate special education interest in viewing the content of the August 23, 2022 video. However, the

parents did not provide evidence to the investigator or to this Appeal Committee to support a finding that the August 23, 2022 video, or any other information regarding the August 23, 2022 incident, was collected, maintained, or used by the agency (by USD 229) for discussions at an IEP team meeting, or for any other special education purpose.

CONCLUSION

The Appeal Committee concludes that the complaint report should be, and is, sustained. This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 19th day of January, 2023.

APPEAL COMMITTEE:

Crista Grimwood: Education Program Consultant,
Ashley Niedzwiecki: Attorney,
Brian Dempsey: Assistant Director of Early Childhood, Special Education and Title Services.