

SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #231
ON DECEMBER 7, 2022

DATE OF REPORT: JANUARY 6, 2023

This report is in response to a complaint filed with our office by the parents on behalf of their son, the student. For the remainder of this report, the student will be referred to as "the student." The parents will be referred to as "the parents."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the parent on December 16, 2022. On December 9, 19, and 30, 2022, the investigator spoke by telephone with Shay Carter, Director of Special Education for the district. On January 4, 2023, the investigator again spoke by telephone with the director. Also participating in the call were Erin Nelson, case manager and special education teacher for the student during the first semester of the 2022-23 school year, and Kelly Edwards, Special Education Coordinator for the district.

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

- IEP for the student dated December 16, 2020
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change in Placement, and Request for Consent dated September 17, 2021
- Prior Written Notice for Evaluation or Reevaluation dated October 18, 2021
- Notice of Meeting dated December 6, 2021
- Notice of Meeting dated December 9, 2021
- Evaluation Team Report dated December 9, 2021
- Meeting Summary Report dated December 9, 2021
- IEP Agenda Guidance dated December 15, 2021
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement and Request for Consent dated December 15, 2021

- Notice of Meeting dated December 17, 2021
- IEP dated December 15, 2021
- Notice of Meeting dated January 24, 2022
- Notice of Meeting dated January 25, 2022
- Notice of Meeting dated April 21, 2022
- IEP Amendment Between Annual IEP Meetings dated May 4, 2022
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement and Request for Consent dated May 4, 2022
- Meeting Summary Report dated May 4, 2022
- Amended IEP for the student dated May 4, 2022
- Email dated December 1, 2022 from case manager to the parents
- Email dated December 6, 2022 from the building principal to the parents
- Email dated December 7, 2022 from the building principal to the parents
- Email dated December 7, 2022 from the student's father to the special education coordinator
- Email dated December 8, 2022 from the coordinator to the student's father
- Notice of Meeting dated December 8, 2022
- Email dated December 9, 2022 from the director of special education to the parents
- Bedford-Nelson Individual Educational Evaluation dated December 13, 2022
- Draft IEP dated December 15, 2022
- Parental Concerns dated December 15, 2022
- IEP notes dated December 15, 2022
- IEP Agenda Guidance for the December 15, 2022 IEP team meeting
- Term grades for the student for the first quarter of the 2022-23 school year
- Service Log for C and G service settings covering the period of August 10 through December 11, 2022
- Bell schedule for the student for the 2022-23 school year
- Sixth grade class schedule
- Daily log form

Background Information

This investigation involves a twelve-year-old boy who is enrolled in the sixth grade in his neighborhood middle school. The student has been enrolled in the district since Kindergarten. He was determined to be eligible for and in need of special education under the category of Learning Disability when he was in second grade. He was also diagnosed with ADHD in 2019.

The student has participated in twice weekly outside tutoring secured by the parents since second grade.

Issues

In their complaint, the parents identified two concerns.

Issue One: With limited communication with the IEP team, the parents cannot adequately monitor, remain informed about, or direct actions related to the student or his IEP.

Applicable Statutes and Regulations

Decisions regarding the provision of special education services to a student are made by an IEP team. To strengthen the role of parents in the special education process, Congress mandated that districts afford parents the opportunity be a part of the IEP team in making decisions regarding the development of an IEP for their child or the provision of a free appropriate public education to the child.

Special education statutes and regulations do not address the topic of communication between the parent and district staff outside of the IEP process. Those policies and practices are established by the district.

The Office of Special Education Programs (OSEP) – the office in the United States Department of Education that writes special education regulations – has provided guidance regarding whether a parent has a legal right to require an IEP Team member to participate in an IEP Team meeting. OSEP opines that it is important to emphasize that it is the local education agency (LEA) that determines the specific personnel to fill the roles for the public agency's required participants at the IEP Team meeting. A parent does not have a legal right to require other public agency personnel to attend an IEP Team meeting if they have not been designated by the LEA to be on the IEP Team. (See Federal Register, Authe studentt 14, 2006, on page 46674.)

Parents' Position

The parents contend that their ability to communicate with school staff regarding the implementation of the student's IEP has been impeded. Specifically, the parents assert that the building principal would not, during the 2022-23 school year, allow the student's father to speak by telephone with the student's IEP case manager for the 2021-22 school year. The parents state that the building principal directed staff to stop all email communication with the parents regarding the student and the IEP paperwork associated with the student's annual IEP review. It is the position of the student's father that if he is not allowed to speak by telephone with the previous case manager, he would "have no choice but to ask that she attend the IEP meeting to answer questions."

Investigative Findings

On December 1, 2022, the IEP case manager for the student sent the parents a notice of meeting proposing an IEP Team meeting on December 12, 2022. The case manager noted that after progress monitoring was completed on December 2, 2022, the parents would be sent digital and hard copies of the monitoring report. Additionally, a draft copy of an IEP would be sent to the parents on December 5, 2022.

On December 6, 2022, the building principal sent an email to the student's father stating,

"I did speak with [the student's 5th grade special education teacher] regarding your request for a phone call. She is currently not [the student's] case manager and does not directly work with [the student.]. Please submit any specific questions and we will be glad to respond."

On December 7, 2022, the building principal sent an email to the student's father stating,

"I am directing all [middle school] staff to stop any email dialog regarding [the student] and his IEP paperwork. On November 29, 2022, [the case manager] started the process to complete this annual IEP process and related paperwork. Little progress using email has been made related to setting a meeting date.

I am making time available on Friday, Dec. 9, 2022, from 8:30 – 10 or 1 – 2:30 to meet in person...at [the middle school]. [The school psychologist] and I will be present. Our goal is to move the IEP paperwork process forward and set a meeting date. If you are unable to attend, please direct all communication to...[the] sped coordinator and she will be your contact moving forward.

[The middle school] is committed to daily instruction and full implementation of [the student's] IEP. We are achieving success in this area but we are not successful in completing the related IEP paperwork and setting a meeting date."

In response, the parent sent an email to the special education coordinator, writing

"We received the last data requested only this a.m. from the case manager; our internal review should be done within the next couple days. Please prepare a 10 day notice dated today; we have availability to attend on the following dates:

12/15, between noon and 3 pm (we'd waive our 10 day)

12/16, between noon and 3 pm (we'd waive our 10 day)

12/19 or 12/20, between 10 am and 3 pm
We will require the meeting be held via zoom so that our advocate may attend as well.

In addition to our current "team," I request the following personnel attend. I would hope to knock out any input required of these additional attendees first thing – so I wouldn't expect that part to take too long.

- *[special education coordinator]*
- *[case manager for the student for the 2021-22 school year]*
- *[school psychologist for the 2021-22 school year]*
- *[general education teacher for the student during the 2021-22 school year]*
- *[current general education teacher for the student]"*

On December 8, 2022, the special education coordinator sent an email to the student's father, writing

"This morning, I have sent an invitation to [the fifth-grade resource room teacher], [the school psychologist serving the middle school during the 2021-22 school year], and [the student's fifth grade general education teacher] to attend the IEP meeting for [the student]. I will also invite...the [student's current] General Education Teacher to attend the meeting. Per your dates, I have it scheduled for December 15, 2022 at 12:00 at [the middle school]. I have included a Notice of Meeting for you at the bottom of this email. In your previous email, you indicated you would be willing to waive your 10 days notice.

Currently, our zoom meetings are only for 40 minutes, so we may need to restart the zoom meeting, if we run longer than 40 minutes.

I have also included, in this email, a Release of Information. Please fill out the attached release for the advocate you are bringing with you to the meeting. We will need this back prior to the start of the IEP meeting, for your advocate to attend.

...After you have had the opportunity to review the draft IEP, please let me know if there are questions you have prior to the meeting so we can work to have answers for you at the meeting."

In preparation for the December 15, 2022 IEP team meeting, the parents submitted a written statement outlining their concerns.

Both parents participated in the December 15, 2022 IEP team meeting via Zoom as did the individual who recently conducted an outside evaluation of the student. That individual reported on her evaluation and acted in the role of advocate for the student and parents. Also participating in the meeting were the following:

- the seventh-grade special education teacher who would begin serving as case manager for the student;
- the sixth-grade special education teacher who had been serving as case manager and who has also been providing special education services to the student;
- the building principal;
- the school psychologist assigned to the building for the 2022-23 school year;
- three of the student's sixth grade general education teachers; and
- the middle school special education coordinator.

Neither the student's fifth grade teacher, the school psychologist who served the school during the 2021-22 school year, nor the student's fifth grade case manager were present for the meeting, but all provided written statements which had been sent to the parents prior to the IEP meeting. The student's current sixth grade social studies teacher did not attend the meeting but did submit a written statement which was provided to the parents prior to the meeting.

In a telephone call with the investigator on December 19, 2022, the student's father confirmed that he and the student's mother participated in the December 15, 2022 IEP team meeting and acknowledged that written statements were provided by members of the student's 2021-22 IEP team who did not attend in person.

In a telephone call with the investigator on December 19, 2022, the special education director stated that the flow of email and written correspondence between the parent and staff has been reinstated. The building principal and special education coordinator are to be copied on all emails between the parties. Telephone calls are to be scheduled at a time that will allow the building principal to be present.

A second IEP team meeting has been scheduled for January 19, 2023.

Summary and Conclusions

While the building principal did, on December 7, 2022, place boundaries on email communication between the parents and building staff, special education statutes and regulations do not prohibit the imposition of such limits so long as they do not keep parents from having the opportunity be a part of the IEP team in making decisions regarding the development of an IEP for their child or the provision of a free appropriate public education to the child.

Special education statutes and regulations establish the required members of a student's IEP team but allow districts – not parents – to determine who will fill the roles for the public agency's required participants at the IEP Team meeting. The district determined who would attend the December 15, 2022 IEP team meeting and fill the required school district roles for that meeting. All required roles were filled. Input was solicited from other individuals identified by the parents, and written comments from those parties were provided to the parents prior to the meeting.

Because the imposition of constraints on email communication between the parent and school staff did not impede the parents' participation in the student's December 15, 2022 IEP team meeting, a violation of special education statutes and regulations is *not* established on this issue.

Issue Two: The district has failed to implement 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 parents state that the district has failed to provide a 20-minute block of special education services at the time of day previously agreed to by the IEP team. Specifically, the parents contend that the district agreed to provide services to the student at the beginning of his school day, during announcements rather than disrupting the student's core instruction time. It is the position of the parents that there have been several weeks during the 2022-23 school year when these 20 minutes of service were not provided at all or were delivered during a time that required the student to be removed from core instruction.

District's Position

It is the position of the district that no accurate accounting of the provision of services to the student is available, and that the data developed by staff to reflect these services is of questionable accuracy. The district acknowledges that some of the services identified by the parents in their complaint have not been provided.

Investigative Findings

The IEP for the student which was in place at the time this complaint was filed was developed over two meetings on December 15, 2021 and January 27, 2022. According to meeting notes from the December 15, 2021 meeting, the student's father "asked for clarification about service minutes and asked about increase in service minutes. [The student's case manager] shared that [the student] is making progress in his IEP goals with the current service minutes and is in the least restrictive environment. Parents requested an increase of service minutes to meet [the student's] needs."

Under his December 16, 2020 IEP, the student had been receiving the following services.

- 90 minutes of special education services in the general education classroom, five days a week;
- 30 minutes of special education services in the special education classroom 4 days per week, and an additional
- 30 minutes of special education services in the special education classroom 5 days a week.

At the December 2021/January 2022 annual review meetings, the IEP team determined that special education services for the student should be increased to

- 90 minutes of direct special education services in a regular education classroom for five days a week; and
- 80 minutes of direct special education services outside the regular education classroom for 5 days a week.

According to the "Service Delivery Statement" of the student's December 15, 2021 IEP, the student would receive

"90 minutes, 5 days a week, every week of in class support in the general education classroom for reading and math support [and] 80 minutes, 5 days a week, every week of specialized instruction in math and reading in the special education classroom..."

According to a prior written notice form signed electronically by the student's father on February 11, 2022,

"For the duration of the IEP while school is in session, the student will receive special education services as a student with a specific learning disability in reading. The student will receive 80 minutes a day, 5 days a week of specialized instruction in the special education classroom for reading and math. The student will receive 90 minutes a day, 5 days a week of general education support in the area of reading and math..."

Special education services will be provided away from general education peers in order to learn and practice skills in a small group away from distractions...”

In response to this complaint, the district provided the investigator with a daily schedule for sixth grade students and a summative service log which reflects the provision of special education services to the student from the beginning of the school year through December 12, 2022. No raw data or working records regarding the delivery of services was provided by the district.

In a written position statement and in verbal remarks to the parent and the investigator, the district has indicated that it has questions regarding the accuracy of the service log and no way to accurately determine when services were provided to the student. The parents also did not keep a formal record of the student’s reports of missed services.

According to the service log, the student has received 30 minutes twice a day of special education service in a special education setting. These two blocks were provided at the following times:

- 9:10 to 9:40 AM – After core instruction in math has been provided to the class as a whole, students are provided with a variety of individualized instructional opportunities during the first “Tier” time of their school day. Some students remain in the classroom for that instruction. Others, including this student, move to other locations for targeted instruction. During this time period, the student moved to the special education setting where he worked on his math goal.
- 1:05 to 1:35 PM – During the second classroom “Tier” period – this one following whole group classroom instruction in reading – the student again moved to the special education classroom where he worked on reading goals.

For each of these sessions, the student was to come to the resource room on his own. If he did not come at the scheduled time, staff would go to his classroom to get him.

According to the service log, the student has received another 20 minutes of direct special education services in a special education setting at a variety of other times during the 2022-23 school year. In a telephone conference call with the investigator on January 4, 2023, the first semester case manager stated that, from the start of the school year until October 17, 2022, these additional minutes of service were delivered at the start of the school day during the time that announcements were read and the class settled in for the day. The case manager told the investigator that the student sometimes arrived at school early and came to the resource room before school started in order to begin his work there.

Beginning October 17, 2022, additional service delivery time options were identified during the school day for the student's 20-minute sessions. Those options included the following:

- 9:40 to 10:00 AM, during classroom science instruction;
- coming 5 minutes early to the 1:05 pull-out session; or
- 12:20 to 12:40 PM, during a core instruction period.

If any of these time slots were to be used on a given day, the case manager or a paraeducator would go to the student's classroom to get him.

These additional sessions were generally provided by the case manager in her special education resource room, though some sessions were led by a paraeducator. According to the case manager, there were occasions when neither she nor her classroom were available, and a paraeducator would take the student to an alternate location for his 20-minute session.

The student was absent 4 days between the start of the 2022-23 school year and December 12, 2022. According to the summative service log, the required minutes of special education services in special education settings were provided every day that the student was in school during that period except for one day when the student was on a field trip (October 6, 2022) and one day (October 11, 2022) when the 20-minute block of resource services was not provided.

As stated in the student's December 15, 2022 IEP,

The school is unable to provide regularly scheduled special education and/or related services in the following situations: inclement weather closures, scheduled school closures, unforeseen emergencies, student absences, school field trips..."

On 10 days, the student was involved in testing during his time in the resource room. Six of these 10 testing days were for scheduled MAP testing. The student was involved in math testing on three other days. On one other day, two of the student's service blocks were used to provide accommodations for a classroom test.

The "Program Modifications and Supports" section of the student's December 15, 2021 IEP states that "for all district, state, and classroom assessments," the student is to be allowed to go to an alternate setting where additional accommodations such as reading the text aloud can be provided.

In addition to the delivery of special education services in a special education setting, the student also received a total of 90 minutes of special education services in the general education setting in two separate 45-minute blocks during the school day:

- 8:25 to 9:10 AM, during core math instruction; and

- 10:30 to 11:15 AM, during a core reading instruction period.

These services were provided by either the case manager or a paraeducator.

The summative service delivery log provided by the district shows that only 60 minutes of special education support in the general education setting was provided on 6 days between the start of the school year and December 12, 2022 – a loss of 180 minutes of services. Additionally, on three days, the student was unavailable to receive general education classroom support because he was taking a test outside of the classroom.

Summary and Conclusions

At the annual IEP review for the student completed on January 27, 2022, special education services to the student were increased from a total of 720 minutes per week to a total of 850 minutes per week (an increase of approximately 18%). The parents were provided with prior written notice of this change in services.

The student's December 15, 2021 IEP (finalized in January 2022) did not specify when during the school day these services were to be provided, but required only that the student receive 90 minutes per day of special education service in the general education setting and 80 minutes per day of special education services in a special education setting.

Because the student's December 15, 2021 IEP did not require that the student be provided with a 20-minute block of direct special education services either before the school day or during the initial portion of the school day outside of core instruction time, a violation of special education statutes and laws is not substantiated on that aspect of this issue.

The district considers the summative service log which it provided to document the provision of special education services to this student to be of questionable accuracy. The district acknowledges that it failed to provide some of the special education services that are required by the student's IEP but did not provide any alternative means for the investigator to use when considering the district's provision of services to the student. While the parents assert that the student was not provided with all of his services on a number of days, they too provided no record of those missed services for the investigator to consider.

It is clear from the summative service log that on October 11, 2022, the 20-minute service block was not provided.

The summative service log shows that the student received only 60 minutes of special education services in the general education setting on 6 days rather than the 90 minutes required by the student's December 15, 2021 IEP.

On 10 days, at least part of the student's direct service time was focused on the provision of testing accommodations required by the student's December 15, 2021 IEP. Six of these 10 testing days were for scheduled MAP testing. Math testing occurred on three days. On one other day, two of the student's service blocks were used to provide accommodations for a classroom test.

The student's December 15, 2021 IEP does not explain how the implementation of testing accommodations will be operationalized. The IEP does not explicitly state whether or not special education service time in the special education setting will be used to provide such accommodations or whether time spent on the delivery of a testing accommodation will or will not be in addition to direct instructional time. However, the provision of an accommodation is the provision of a special education service.

Because the student was not provided with all of the required special education services outlined in his December 5, 2021 IEP, a violation of special education statutes and regulations is substantiated on this aspect of this issue.

Therefore, a total of 290 minutes of compensatory special education services will be required:

- 20 minutes for the failure to deliver that block of special education services in the special education setting on October 11, 2022;
- 180 minutes for the failure on 6 days to deliver 30 of the 90 minutes of special education services in the general education setting; and
- an additional 90 minutes of compensatory service to address other lapses in service acknowledged by the district.

Additional Comments

According to notes from the December 15, 2022 IEP team meeting, the district shared with the parents a sample "communication log" which the district proposed to send home to the parents on a daily basis. The form would document the delivery of special education services to the student and would reflect when special education services were delivered, who delivered the service, and a description of the service.

According to the director of special education, staff would begin using the aforementioned form at the start of the second semester.

Additionally, the director told the investigator that the student's special education services will be scheduled and provided at consistent times for the second semester.

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 #231 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 290 minutes of compensatory special education services to this student.
 - a) Within 5 days of receipt of approval for the plan described under Corrective Action 1, the district shall schedule a meeting with the parents to present the plan.
 - b) The parents shall have the option of accepting all or part of the proposed plan and shall notify the district in writing of their decision within 5 calendar days of the meeting described above under Corrective Action 2) a).
 - c) The district shall notify SETS of the parents' decision no later than 5 calendar days after receipt of the parents' written response.
- 3) By no later than the 5th of each remaining month in the 2022-23 school year, USD #231 shall submit to SETS a summative report regarding the provision of special education services to the student.
- 4) If at any point prior to the end of the 2022-3 school year, changes are made to the services contained in the student's IEP, USD #231 shall notify SETS of those changes and alter monthly reporting of service delivery to comport with those changes.
- 5) Further, USD #231 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)