In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. 437
Auburn Washburn Public Schools: 23FC437-005

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on March 15, 2023, by the parent, on behalf of her child, The student. In the remainder of this decision, the parent will be referred to as "the parent," and the student will be referred to as "the student." An investigation of the complaint was undertaken by complaint investigators on behalf of the Special Education and Title Services team at the Kansas State Department of Education. Following the investigation, a Complaint Report, addressing the parent's allegations, was issued on April 14, 2023. That Complaint Report concluded that there were violations of special education statutes and regulations.

Thereafter, the district filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed, and it reviewed the original complaint filed by the district, the complaint report, the district's appeal and supporting documents, and the parent's response to the appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

PRELIMINARY MATTERS

A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Complaint Report. That regulation states, in part, that: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Committee does not attempt to locate the missing support.

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

1. “The behavioral supports in the IEP are inappropriate for the child. The frequency, scope or duration of the behavioral supports has proven insufficient to prevent behaviors that impede the learning of the child or others, and the consistent application of the child’s behavioral supports has not accomplished positive changes in behavior based on the lack of anticipated progress on the 10/14/2022 and 1/2/2023 progress reports, but instead has resulted in behavior that continues to impede, or further impeded, learning for the child or others.”

2. “Based on the district’s lack of response to repeated documentation of insufficient progress by the child and the procedural error that denied the parent 24 hours’ notice for a Manifestation Determination Review, a violation of special education statutes and regulations is substantiated for failing to implement the IEP based on lack of expected progress towards the annual goals in the child’s IEP and in the general education curriculum.”

**ISSUE #1** – The district disagrees with the investigators finding that “the behavioral supports in the IEP are inappropriate for the child. The frequency, scope or duration of the behavioral supports has proven insufficient to prevent behaviors that impede the learning of the child or others, and the consistent application of the child’s behavioral supports has not accomplished positive changes in behavior based on the lack of anticipated progress on the 10/14/2022 and 1/2/2023 progress reports, but instead has resulted in behavior that continues to impede, or further impeded, learning for the child or others.”

The district disagrees with the investigator’s finding for two reasons. First, the district cites chronic absenteeism for the student's lack of progress. Second, the district argues that the frequency, scope, and duration of the behavioral supports was appropriate and sufficient based on the needs of the student.

1. The district argues that chronic absenteeism is the predominant factor for “lack of progress on the student’s IEP goals”, not the district’s failure to implement the student’s IEP.

The district states that it “did not have the opportunity to provide the designed frequency, scope, or duration of behavioral supports nor the opportunity to
The district contends, and the record confirms, that the student missed 49% percent of total available instructional days between 10/1/2022 and 1/3/2023. The record indicates that a total of excused and unexcused absences, voluntarily accrued by the student, totaled 22 days and 5 hours. This left only 25 days and 1 hour of instructional time in which to assess the student’s progress.

While the committee agrees that chronic absenteeism may be a factor contributing to the student’s lack of progress, that alone does not excuse a district’s responsibility to provide FAPE. In such as case, the district may have a duty to address the absences in the student’s IEP if truancy has become a factor that is adversely affecting learning. As noted by the investigator, 34 C.F.R. 300.324(a)(2)(i) requires a district, in the case of a child whose behavior impedes the child’s learning or that of others, to “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” Interviews with the investigator, and documents in the record, show that, although the district did reach out to the parent on October 26, 2022, with a “Fall Snapshot”, including attendance concerns, an actual meeting to amend the IEP did not occur between 9/29/2022 and 2/9/2023. Additionally, the committee notes that the district, by its own admission, was aware of the student’s chronic absenteeism and its possible effect on the student’s learning, supported by the record, that showed the student missed almost half of their instructional time during Quarter 1 and Quarter 2 of the school year. However, it is relevant, and the committee does acknowledge, that at the time of the “Fall Snapshot”, the student had missed only 2 days and 2 hours of instructional time (since the implementation of the student’s IEP on 9/29/2022). Due to the district’s awareness of the student’s absenteeism, and its possible effect on the student’s progress, the committee notes that the district may have had a responsibility to consider including strategies related to attendance in the student’s IEP given the number of days the student missed.

However, failing to address the possible effect of truancy is not the same as failing to implement an IEP. To that end, the committee finds no indication, in the record, that the district failed to implement the student’s IEP, or failed to provide services at any time in which the student was in attendance. On the contrary, the investigator found, and the record confirms that the district was implementing the IEP as written, as is indicated by the investigators finding that, “services were put in place as soon as the
child was re-enrolled. Each previous instance of service at JDC indicated re-enrollment upon return suggesting that this was the standard practice of the district.”

In conclusion, the committee agrees with the district that the student’s absences almost certainly led to a lack of progress toward the student’s IEP goals, not the district’s failure to implement the student’s IEP. However, as stated above, the committee notes that, in such a case, a district may need to consider including strategies related to truancy in an IEP. Whether the district was required to consider strategies related to truancy in this student’s IEP was not an issue in this complaint and was not addressed by the investigator. As a result, it is not subject to appeal. Therefore, the committee reverses investigator’s finding that the student’s lack of progress was due to a failure to implement the student’s IEP.

2. The district argues that the investigator’s finding that the frequency, scope, and duration of the behavioral supports was inappropriate and insufficient based on the needs of the student and that they impeded the learning of the child or others resulting in behavior that continues to impede, or further impeded, learning for the child or others.

In support of their argument, the district notes that “the 11th day placement or setting matched the level of service delivery and behavioral supports available in [the student’s] designed IEP placement of a special day school.” Further, the district states that, this placement “supported the information from the MDR and the conclusions of the multidisciplinary team when the IEP was developed, that was, the behavioral supports, accommodations, goals and resulting specialized instruction, and services were designed with the intent to ensure the student had the chance to meet challenging objectives.” The district argues that with continuum of services and resources available in the student’s community, the only more-restrictive placement would have been a home-based setting, which the district felt would have “only perpetuated chronic absenteeism.” Finally, the district points to the Supreme Court case *Endrew F.*, noting that a school must offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in the light of the child's circumstances”. The district argues that it followed *Endrew F.* by offering the student “reasonably calculated goal(s) with the services, accommodations, considerations, and setting that would give the student the chance to meet challenging objective(s)” and that “in order for the student to respond to specialized instruction and behavioral supports achieving increased on task behavior and participation in planned activities…the student would need to be in attendance.”

In the appeal, the district states that the student’s IEP goals were designed with the student’s needs and circumstances in mind, specifically “built to have high expectations in the special day setting, with transferable skills if met to a larger setting such as a public high school.”
Additionally, the committee notes, and the record confirms, that the student's IEP did include numerous behavioral supports, which the school did utilize.

The committee acknowledges that the district failed to amend the student's IEP after "documentation of insufficient progress by the child." However, the committee also notes that the student's current IEP had been in place only since 9/29/2022, a total of 5.5 months at the time of this complaint, and that during that 5.5 months the student had voluntarily been absent 49% of the time. While there is nothing in the law that requires adherence to a specific timeline for when a district must review an IEP based on lack of progress, an IEP should be revised, "as appropriate, to address any lack of expected progress toward the annual goals described in §300.320(a)(2), and in the general education curriculum, if appropriate." (34 C.F.R. 300.324(b)(ii)). Under Endrew F., "the adequacy of a given IEP turns on the unique circumstances of the child from whom it was created". Endrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017).

In this case, the committee finds, and the record confirms, that the district, as "standard practice", provided services to the student, as indicated in the student's IEP, upon the student's return to the district from the Juvenile facility, and that those services were based on the needs of the student. The district states that the services in the IEP were specifically created to allow the student to re-enter a more inclusive high-school setting, indicating that the IEP was indeed based on the needs of the student. Further, given that the student was in and out of the district, as indicated in the record, and that the student was often absent from school, also as indicated in the record, the committee finds that it may not have been appropriate to adjust the student's IEP at this time. Whether the district, given the student's unique circumstances, failed to provide the student with appropriate and sufficient behavioral supports, is subjective. The committee finds that it is just as likely that the student's lack of progress was due to the student's voluntary lack of participation in instructional time as a failure in the behavioral supports included in the IEP. Finally, nothing in the record demonstrates that the behavioral supports and goals in the student's IEP resulted in behavior that "continues to impede, or further impeded, learning for the child or others". As such, the committee will not make a determination that the district was required to amend the IEP based on "appropriateness". As addressed by the investigator, under Endrew F., "the IEP is not a guarantee of a specific educational or functional result for a child."

Therefore, based on the lack of evidence in the record that the district failed to implement the student's IEP, or that the district failed to reasonably calculate the student's IEP to enable a child to make progress appropriate in the light of the child's circumstances, the committee
reverses the investigators finding that the behavioral supports were inappropriate or insufficient or that they impeded the earning of the student or others.

**ISSUE #2** – The district disagrees with the investigator’s finding that “Based on the districts lack of response to repeated documentation of insufficient progress by the child and the procedural error that denied the parent 24 hours’ notice for a Manifestation Determination Review, a violation of special education statutes and regulations is substantiated for failing to implement the IEP based on lack of expected progress towards the annual goals in the child's IEP and in the general education curriculum.”

In the appeal, the district argues that it has “shown the reason for the insufficient progress, [and therefore the insufficient progress] cannot be determined to be a result of the failure of the IEP or provision of FAPE but instead chronic absenteeism for which the district has minimal control over”. Further, the district contends that “it should be noted that while the long-term hearing did modify the suspension of 186 days, an educational placement that aligns with the current IEP was offered and is currently being provided to the student during the removal”. Therefore, “despite the result of the manifestation determination, the obligation to provide services has been upheld and an actual removal is not in place.” Whether the result of the manifestation determination is relevant, at this point, due to the student's current placement, is not an issue identified in the original complaint and will not be addressed by the committee. However, the committee will address whether the district's “lack of response to repeated documentation of insufficient progress” and the “procedural error that denied the parent 24 hours’ notice for a Manifestation Determination Review” violated special education statutes and regulations.

As stated above, for the reasons previously discussed, the committee does not find that the district failed to implement the IEP based on a lack of expected progress toward IEP annual goals described in the student’s IEP or in the general education curriculum.

Regarding the procedural violation, the investigator found that the district failed to “provide parents with prior written notice of meeting before convening meetings regarding the manifestation determination and the services to be provided during disciplinary removals.” (K.A.R. 91-40-25). The committee agrees, the record confirms, and the district acknowledges, that the district *did fail* to provide the parent with 24 hours' prior written notice of the Manifestation Determination Hearing. However, a procedural violation, by itself, does not create a denial of FAPE and will not overturn a Manifestation Determination Review. Under IDEA, a procedural violation denies a student FAPE only if a) the violation impeded the child's
right to receive FAPE, b) significantly impedes the parent's opportunity to participate in the
decision-making process, or c) causes a deprivation of educational benefits. (20 U.S.C.
1415(f)(3)(E)). The committee does not find that any of these situations occurred. First, the
failure to provide notice did not prevent the student from receiving FAPE or cause a
deprivation of educational benefits since the record shows that the student was still receiving
services from the district whenever the student was in attendance. Second, the parent was not
denied an opportunity to participate in the decision-making process due to the shortened
notification time. In the record, the investigator notes that on:

Feb 7, 2023, the School Psychologist for the district called the parent to inform
the parent of scheduled MDR. No answer (voice)Mailbox was full.

Feb 8, 2023, at 2:11 pm a Notice of Meeting was emailed to the parent from the
district. K.A.R. 91-40-38(d) refers to "24-hour prior notice of a meeting..." So, only
a NOM is needed. The first written notice was an e-mail at 2:11 pm on Feb. 8 and
the MDR was held on Feb. 9 at an unspecified time. Presumably, the MDR was
held prior to 2:11 pm on Feb 9.

Feb 9, 2023, the district attempted to call the parent and allow the parent to
participate in the MDR meeting by phone. No answer (voice)mailbox was full.

Since the district failed to provide 24-hour notice in writing the investigator correctly found that
a procedural violation did occur. However, the record also shows that the district continuously
attempted to contact the parent without success. The committee also found, and the record
confirms, that the e-mail address used to send the MDR notification was the same email
address the district routinely communicated with the parent through. Therefore, due to the
repeated attempts by the district to contact the parent, the parent was not denied an
opportunity to participate in the decision-making process. Based on the reasons listed above,
the committee reverses the investigator's finding that "based on the districts lack of response
to repeated documentation of insufficient progress by the child and the procedural error that
denied the parent 24 hours’ notice for a Manifestation Determination Review, a violation of
special education statutes and regulations" occurred.
CONCLUSION

The Appeal Committee concludes that the investigator erred in finding, “the behavioral supports in the IEP are inappropriate for the child. The frequency, scope or duration of the behavioral supports has proven insufficient to prevent behaviors that impede the learning of the child or others, and the consistent application of the child's behavioral supports has not accomplished positive changes in behavior based on the lack of anticipated progress on the 10/14/2022 and 1/2/2023 progress reports, but instead has resulted in behavior that continues to impede, or further impeded, learning for the child or others.”

The Appeal Committee concludes that the investigator erred in finding, that “based on the districts lack of response to repeated documentation of insufficient progress by the child and the procedural error that denied the parent 24 hours' notice for a Manifestation Determination Review, a violation of special education statutes and regulations is substantiated for failing to implement the IEP based on lack of expected progress towards the annual goals in the child's IEP and in the general education curriculum.”

For the reasons stated above, the committee overturns the investigators following conclusion, that “the district did not reconvene the IEP team to review and revise the student's IEP, as appropriate” and removes the requirements in the report for the following corrective action:

1. Requirement for the district to “comply with federal regulations at 34 C.F.R.300.324(b)(1)(i) and (ii)(A) which require school districts to review a student's IEP periodically, but at least annually to determine whether the annual goals for the student are being achieved and revise the IEP, if appropriate, in order to address any lack of expected progress toward those annual goals”.

2. Requirement that the district must “amend the Manifestation Determination Review to indicate that the behavior in question was a failure of USD437 to implement the IEP based on the students identified lack of progress in the general educational curriculum and lack of progress on academic and behavioral goals specified in the IEP”.

3. Requirement that the district “rescind the Extended Term Suspension assigned to the student per (34 C.F.R. 300.530(e)) and State statute (K.S.A. 72-3433(e))”.

4. Requirement that “no later than 15 School days after the date of this report USD 437 will reconvene the IEP team, including the parents, and seek parental consent to maintain the current placement of the student.

5. Requirement of the district to “provide the parent and SETS with a copy of the resulting IEP and any appropriate prior written notice provided to the parent within 10 business days following the IEP team meeting.”
The Appeal Committee sustains the corrective action requiring the district to submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

1. Comply with the school’s requirement to give 24 hours prior (written) notice of a meeting to the child’s parents (K.A.R. 91-40-38(d)).

In all other respects, the report is sustained.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 14th day in May, 2023.

APPEAL COMMITTEE:

Brian Dempsey: Assistant Director of Early Childhood, Special Education and Title Services,

Ashley Niedzwiecki: Attorney, Special Education and Title Services,

Mark Ward: Attorney, Special Education and Title Services,

Crista Grimwood: Education Program Consultant.