

**BEFORE THE KANSAS
STATE DEPARTMENT OF EDUCATION**

In the Matter of the Due Process Review Hearing for
U.S.D. 305 and Central Kansas Cooperative in Education,
Petitioner

v.

Case No. 24DP305-001/002

_____)

REVIEW DECISION

(Pursuant to K.S.A. 72-3418)

This matter comes before the Special Education Due Process Review Officer (RO), Jennifer D. Barton, for a review of the decision issued by the original Hearing Officer (HO) on November 8, 2024, in accordance with 20 U.S.C. 1415(g)(2), 34 C.F.R. 300.514(b), and K.S.A. 72-3418(b).

STATEMENT OF THE CASE

----- is a 13-year-old boy who was medically diagnosed with autism spectrum disorder at the age of three. After his diagnosis, was enrolled in early childhood special education programming with U.S.D. 305 and Central Kansas Cooperative in Education (CKCIE). The initial evaluation for special education services designated -----'s Primary Disability as Autism. When he was four years old, occupational therapy (OT) services were added to -----'s special education curriculum.

At the time of the HO's decision, ----- had completed the 5th grade at Heusner Elementary School in Salina, Kansas, and was receiving all reading, math, and written language instruction in the special education classroom.

In early 2022, the U.S.D. 305 and CKCIE (Districts) began recommending the removal of school-based OT services from -----'s special education curriculum. When -----'s parents, ----- (Parents), did not consent to the termination of their son's OT services, the Districts ultimately filed a Request for a Special Education Due Process Hearing. In the request, filed September 14, 2023, the Districts sought to end school-based OT services for -----, claiming ----- no longer required such services.

On September 21, 2023, Parents submitted a Response to the Districts' Due Process Complaint, objecting to the removal of -----'s OT services and alleging OT services are necessary for ----- to receive a Free and Public Education (FAPE), as required by the Individuals with Disabilities Education Act (IDEA).

On October 5, 2023, Parents filed their own Request for Special Education Due Process Hearing. In the request, Parents alleged -----'s Individualized Education Plan (IEP) was

inadequate in that it was not reasonably calculated to enable ----- to make progress appropriate in light of the circumstances, and that -----'s IEP was incorrect in that it did not find ----- needs special education services in Adaptive Behavior/Daily Living.

During the proceedings conducted by the HO, Parents were allowed to add two more claims. The HO found Parents did not meet their burden of proof regarding the first additional claim and as such it is not involved in the Districts' appeal and need not be addressed here. The final claim by Parents is that ----- should receive compensatory education as a result of missed time with a para-educator.

Identified Issues

The issues on review are:

1. Were due process requirements met in this case?
2. Should ----- be exited from OT services?
3. Is ----- entitled to compensatory education due to missed time with a para-educator?
4. Was ----- denied a FAPE due to his IEPs not being reasonably calculated to allow him to make progress appropriate in light of his circumstances?

Scope of the Review Officer's Review

In compliance with K.S.A. 72-3418(b)(1)(a), the review officer shall: (A) examine the record of the hearing; (B) determine whether the procedures at the hearing were in accordance with the requirements of due process; (C) at the discretion of the review officer, allow the opportunity for oral or written arguments, or both; (D) seek additional evidence if necessary; (E) render an independent decision; and (F) send the decision on any such appeal to the parties and state board.

Due process requires that a person be afforded a right to be heard in a meaningful way. It includes notification to an individual of the intended action and a right to be heard in a meaningful manner. *Taylor v. Kansas Dept of Health and Environment*, 49 Kan. App. 2d 233,240,305 P.3d 729,735-36 (2003).

Specific due process requirements of the Board are found at K.S.A. 72-3416(b). They are as follows:

- (1) The right of the parties to be accompanied and advised by counsel and by individuals with respect to the problems of children with disabilities;
- (2) the right of the parties to be present at the hearing;
- (3) the right of the parties to confront and cross-examine witnesses who appear in person at the hearing, whether voluntarily or as a result of the issuance of a subpoena;
- (4) the right of the parties to present witnesses in person or their testimony by affidavit, including expert medical, psychological, or educational testimony;
- (5) the right of the parties to prohibit the presentation of any evidence at the

hearing which has not been disclosed to the opposite party at least five days prior to the hearing, including any evaluations completed by that date and recommendations based on such evaluations;

- (6) the right to prohibit the other party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing;
- (7) the right of the parties to have a written or, at the option of the parent, an electronic, verbatim record of the hearing; and
- (8) the right to a written or, at the option of the parent, an electronic decision, including findings of fact and conclusion.

PROCEDURAL BACKGROUND

Between the District's Request for Due Process Hearing on September 14, 2023, and the HO's Decision, dated November 8, 2024, the HO conducted a pre-hearing conference, several status conferences, a seven day in-person due process hearing, and oral arguments. The HO's Decision is extensive and comprehensive at 160 pages.

Professional and Expert Witnesses

Nikki Goertzen Ms. Goertzen is employed by Learning Cooperative of North Central Kansas as an occupational therapist and a structural specialist. She has a Bachelor of Arts in biology and a master's degree in occupational therapy. She is a licensed occupational therapist with the Kansas State Board of Healing Arts. Ms. Goertzen has worked as an occupational therapist for 25 years with various educational organizations.

Kristin Prophet Ms. Prophet is employed by CKCIE as an occupational therapist. She has two bachelor's degrees- one in kinesiology and another in occupational therapy. She is licensed through the Kansas Department of Health. Ms. Prophet has worked as an occupational therapist for 22 years, and has spent the entirety of that time employed by CKCIE.

Kourtney Kincaid Ms. Kincaid is employed by Revive Integrative Health in Salina, Kansas, as an occupational therapist. She has a bachelor's degree in psychology, a master's degree in occupational therapy, and is currently working toward her doctorate in occupational therapy. She has been licensed as an occupational therapist by the Kansas State Board of Healing Arts since 2020. She has worked in medical outpatient occupational therapy settings for the entirety of her career and has no experience with school-based occupational therapy.

Marissa Koerperich Ms. Koerperich is a special education teacher with CKCIE. She has a bachelor's degree in physical education. In January of 2022, she began working as a special education teacher while earning her certification in special education, which she completed in the summer of 2023.

Mary Gardner Ms. Gardner is currently the Special Education Coordinator for CKCIE. She has worked as a special education teacher in the past. She earned her master's degree in special education in 2001. She also has her master's degree in educational leadership at the

building level. She is in the process of completing her doctorate degree.

Tiffany Lee Dr. Lee is employed by Heartland Pediatric Therapy. She has her doctorate in occupational therapy and is a registered and licensed occupational therapist.

Sharon Klose Ms. Klose is currently a special education parent advocate. She has a Bachelor of Science in special education as well as a master's degree in behavior disorders. She worked for 28 years in the Shawnee Mission, Kansas, School District as a Behavioral Specialist. She also served for four years on the State Standards Board for the Kansas State Department of Education (KSDE) as a representative for special education.

Lindsey Sandquist Ms. Sandquist is an in-home daycare provider in Salina, Kansas. She has a bachelor's degree in family studies and human services, as well as a master's degree in family studies, human services, and early childhood education unified. She is licensed to teach both general and special education children from birth to kindergarten age.

Erica Moyer Ms. Moyer is currently employed as a social worker for CKCIE. She has a bachelor's degree and a master's degree in social work. She has been a licensed social worker since 2010.

Conclusions of Law

1. The Individuals with Disabilities Act (IDEA), 20 U.S.C. §1400 et seq. establishes a right to a free appropriate public education (FAPE) for children with disabilities.
2. A FAPE requires that an Individualized Education Plan (IEP) be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas County School District*, 137 S. Ct. 988-1001, 580 U.S. 386, 392-95 (2017).
3. Deference is given to school officials. However, they must be able to provide a cogent and responsive explanation for IEP decisions that show it is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Id* at 1001-02.
4. It is the function of the administrative hearing body [hearing officer] to determine the weight or credibility of the testimony of witnesses. *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1047-48 (2002) citing *Swezey v. State Department of Social & Rehabilitation Services*, 1 Kan. App. 2d 94, 562 P.2d 117 (1977).
5. Substantial evidence possesses both relevance and substance and furnishes a substantial basis of fact from which issues can reasonably be resolved. *Cresto v. Cresto*, 302 Kan. 820,358 P.3d 831 (2015). Substantial evidence has long been accepted to be evidence that a reasonable person might accept as being sufficient to support a conclusion. *Board of City. Comm. Of Cherokee County v. Kansas Racing And Gaming Comm.*,306 Kan. 298,393 P.3d 601 (2017).

REVIEW OFFICER'S FINDINGS

1. ----- is a child with the exceptionality of Autism Spectrum Disorder, who by reason thereof, needs special education and related services. Accordingly, ----- qualifies for benefits under the IDEA, and the Districts are obligated to provide a FAPE to -----

2. The RO has examined the hearing transcript, the exhibits, the HO's decision, and the arguments submitted by both parties. This matter has been thoroughly litigated. The parties have been well represented by zealous advocates. Further written or oral arguments would not aid the RO in completing this review.
3. The record reflects that the requirements of due process have been afforded to ----- and the Districts. The Summary of Procedural Background in the HO's decision explicitly sets out the procedures and processes employed to meet the demands of due process for both parties.
4. The RO has closely examined the testimony of all professional and expert witnesses, the HO's findings and impressions regarding such testimony, and HO's assessment of credibility when noted. Each person who testified contributed, in varying degrees, to RO's understanding of the issues presented, depending on their level of relevant education, amount of vocational experience in occupational therapy and special education, and the extent of their interactions with -----
5. The RO has also given close attention to the testimony of -----'s parents, as parental observations and impressions have significant value in these matters.
6. The Districts claim they can provide a FAPE to ----- without providing specially designed instruction (SDI) in the related service of OT. The HO disagreed, finding that the Districts have not met their burden to exit ----- from OT services at this time.¹ The Districts presented the findings of two experts in support of their position, Kristin Prophet and Nikki Goertzen. Ms. Prophet is employed by the Districts and Ms. Goertzen was retained as an independent evaluator after the parties completed mediation. The Districts claim the HO's decision shows he failed to review, ignored, or failed to give proper weight to these professionals' findings, and that the HO has substituted his own judgment for that of the experts. This, however, does not appear to be the case. The HO clearly did review Ms. Prophet's and Ms. Goertzen's evaluations and testimony, as shown by the detailed account of each expert's presentation in the HO decision. And, the HO did not ignore the opinions of the District's experts, as he cited numerous specific facts from their testimony in support of his findings. And, rather than substituting his own judgment for that of the professionals in this matter, the HO instead found that the evaluation done by Ms. Goertzen, which was central to the Districts' efforts to remove OT services from -----, simply lacked credibility and was therefore inadequate to meet the Districts' burden.
7. It is the function of the trier of fact to determine witness credibility. The role to weigh credibility and evaluate the veracity of witnesses is solely with the HO. Deference must be made to the HO's findings in this area. In this case, the HO did not find Ms. Goertzen's evaluation credible. The HO based this finding, first, on the fact that Ms. Goertzen's initial source of information regarding ----- was a report by Ms. Prophet which was "clearly provided for the purpose of seeking to exit ----- from occupational therapy services."

¹ This is the functional equivalent of the HO finding that ----- continues to require SDI in OT to access or benefit from his education

Second, though Ms. Goertzen did observe ----- in the classroom and review some of -----'s handwriting, the HO expressed concern that Ms. Goertzen did not review other readily available sources of information about ----- including past IEPs, progress reports, and service logs. The HO noted that Ms. Goertzen also did not speak to -----'s parents. Because Ms. Prophet's report was so central to Ms. Goertzen's understanding of -----'s abilities, and Ms. Prophet's point of view regarding the necessity of OT services for ----- was clearly evident in her evaluation, it was reasonable for the HO to find Ms. Goertzen's evaluation lacked the weight and credibility required to support the Districts' effort to remove OT services from -----

8. In an effort to resolve this matter, the HO has ordered the Districts to conduct a second independent evaluation, and directed that it be done by a person with specific credentials.² The Districts have argued that such a person will be difficult, if not impossible, to find. The Districts have not, however, presented any evidence indicating what actions they have actually taken to locate a professional with the specified credentials, making this "argument" sound more like a complaint. If the Districts believe it will be too difficult to find an evaluator with the qualifications specified by the HO, they are of course free to abandon their attempts to terminate -----'s OT services.
9. The Districts argue the HO's request for a second independent assessment is error as an Independent Educational Evaluation (IEE) must be requested by a child's parents. This argument is not supported by K.A.R. 91-40-12(f) and 34 C.F.R. 300.502(d), both of which specifically anticipate requests for IEEs by HOs.
10. The HO has not determined whether or not ----- is entitled to compensatory educational time from the Districts, but he has authorized the OT evaluator to calculate the number of missing minutes, and recommend to -----'s IEP Team whether compensatory time should be ordered. The Districts argue this plan is not acceptable because "an outside evaluator is not authorized to commit resources for a school district." This argument has no merit as it misstates the HO's order, which does not authorize the evaluator to commit resources, only to calculate missing time and make a recommendation to -----'s IEP Team.
11. The Parents claim ----- was denied a FAPE because the current and proposed IEPs are not reasonably calculated to enable ----- to make progress appropriate in light of his circumstances. The HO agreed, and articulated a list of substantive defects with the IEPs in question in support of his finding that Parents have met their burden. These cited defects include, but are not limited to, the written language goal in -----'s January 2023 IEP failing the "stranger test,"³ the January 2023 IEP baseline section being improper due to omitted data, legally insufficient 2023 Progress Reports, an unlawful written language section goal

² The HO has ordered that the occupational therapy evaluator possess an active Kansas Certified Special Education Teaching License in Good Standing, no less than five years of special education occupational therapy evaluation experience, and no less than three years of previous experience working in a school setting with students with Autism Spectrum Disorder.

³ The "stranger test" refers to the idea that an IEP goal should be written so clearly that a person unfamiliar with the student can understand what the goal is and how to measure its achievement.

in the November 2023 IEP, and "thoroughly insufficient, vague, cryptic, and entirely subjective" Present Levels of Academic Achievement and Functional Performance (PLAAFPs) in -----'s November 2023 IEP. In addition, the HO found the Districts omitted any Social Emotional Goals from -----'s January IEP, and then determined, without explanation, by the November 2023 IEP, that ----- did not require any special education in Social Emotional. Finally, the HO found that the Districts ignored their "own data and voluminous evidence that ----- needed and needs special education in the Area of Adaptive Behavior and Daily Living."

12. The Districts argue that the long list of problems with -----'s IEPs cited by the HO are either not actual problems or simply failures by the HO to understand this complex subject matter. This is not supported by the evidence in the record. For example, the HO identifies the written language goal of the January 25, 2023, IEP as particularly problematic. The goal reads, "When given wide ruled lined paper, ----- will compose and legibly write three full sentences with one or more detailed words, with correct capitalization and punctuation, without having it written before him 80% of the time." There is nothing in the hearing transcript or the documents submitted by the parties that helps clarify how -----'s educators were monitoring -----'s progress toward this goal, and nothing to indicate how educators would ultimately know he had achieved the goal. When asked the question, "So you're saying that every time he is writing a sentence you're keeping track of this or are there different designated times where you are doing an assessment, okay, now is when we're going to see if he is meeting this goal 80 percent of the time?" Ms. Koerperich stated, "There will be different times I'll take it for that progress report, but overall when he's writing a sentence, I am continually looking for when he is using those correctly, but normally I will select a few samples."

If there is a way to understand the meaning of this response, it is not only lost on the HO. The HO appropriately cited *Escambia County Bd. Of Educ. v. Benton*, which perfectly applies to this exchange when the Court found, "Vague and unmeasurable objectives are the handmaiden of stagnation, as a program cannot possibly confer an educational benefit to [student] if his teachers and parents do not know where they are trying to take [student] and how they will know when he has arrived." 406 F.Supp.2d 1248, 1255-56 (S.D. Ala 2005).

13. 13. Deference is to be given to school officials. However, they must be able to provide a cogent and responsive explanation for IEP decisions and show how it is reasonably calculated to enable the child. The record shows that -----'s educators sincerely care for ----- and know him well after many years of working with him. However, the record also shows that this familiarity has bred complacency. For example, during the Districts' campaign to end OT services for -----, Ms. Prophet made a progress note on August 23, 2022, which read in part, "-----'s 1st page illegible. He could not read it to me. Letters were on top of each other and letters were all the same size/not sitting on the lines." This note was written after the summer break, during which ----- did not receive direct school-based OT services. The record reflects this performance constituted a

significant regression in skills for ----- Yet, on the progress note for the interaction, Ms. Prophet indicated ----- had "maintained." This calls into question the Districts' credibility and whether they are acting in good faith in navigating their obligation to provide a FAPE for ----- Though ----- is growing up and has made progress ,he continues to deserve the same rigor in his educational programming as that

APPEAL RIGHT AND OTHER ADMINISTRATIVE RELIEF

Pursuant to K.S.A. 72-3418, this decision is subject to review in accordance with the Kansas Judicial Review Act or to an action in federal court as allowed by the federal law. Consistent with state court actions, any action in federal court shall be filed within 30 days after service of the review of the officer's decision.

CERTIFICATE OF SERVICE

On, _____, 2025, I certify that a copy of the foregoing was placed in the 'United States first class mail, postage prepaid, addressed to:

Attorney for the District, Attorney for the Parent, KSDE