

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. 340  
Jefferson West Public Schools: 25FC340-001

## DECISION OF THE APPEAL COMMITTEE

### **Background**

This matter commenced with the filing of a complaint on November 13, 2024, by -----, on behalf of his child, ----- . In the remainder of this decision, ----- will be referred to as "the complainant," and ----- 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 allegations, was issued on December 13, 2024. 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, the Complaint Report, and the district's notice of 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.

### **Discussion of Issues on Appeal**

#### **From Complainant**

The district appeals two issues:

## **Issue One**

**Did the district implement the student's IEP, specifically to provide special education, related services, attendant care, and placement as identified in the IEP?**

In its appeal, the district states that the two missed speech language therapy services “do not rise to a level of substantive educational impact on the educational performance of the student” to require compensatory education.

The IEP for this student specified that speech services were to be provided for “20 minutes – three times per week (Report, p. 7).” The report described the delivery of this service as follows: “For the 12 weeks reported, the student received speech language services three times a week 5 times, two times a week 4 times (4 missed sessions) and one time a week 3 times (6 missed sessions). Student absences or no school days accounted for 8 of the 10 missed sessions.”

In short, when the student was in school, he received all but two twenty-minute sessions over a twelve week period.

When asked about this very question, regarding the need to schedule **make-up sessions** when speech-language pathology sessions are missed due to a child's absence from school cancellation for a class or school activity, or absence of the speech language pathologist, the Office of Special Education Programs (OSEP) said that the:

*“IDEA and the regulations do not address these issues. States and local educational agencies (LEAs) are required to ensure that all children with disabilities have available to them FAPE (Free Appropriate Public Education), consistent with the child's individualized education program (IEP) (see 34 CFR ? 300.101). We encourage public agencies to **consider the impact** of a provider's absence or a child's absence on the child's **progress and performance** and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. **Whether an interruption in services constitutes a denial of FAPE is an individual determination that must be made on a case-by-case basis.**” See Letter to Clarke, 48 IDELR 77, (OSEP 2007).*

\*OSEP is the office within the United States Department of Education that writes and enforces the federal special education regulations.

Courts have ruled in a substantially similarly manner, saying that, “a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities **failed to implement substantial or significant provisions of the IEP**. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for **material failures** and for providing the disabled child a meaningful educational benefit (emphasis added). See, Houston Indep. Schl Dist. v. Bobby R, 200 F.3d 341, 31 IDELR 185 (5th Cir. 2000).

While the Appeal Committee does not minimize the importance of implementing an IEP as written, OSEP clarifies that perfection is not the legal standard. The Appeal Committee finds that speech language services for this student were in substantial conformance with this student's IEP, and there was no evidence in the report that the investigator made an individual determination that the failure to provide two twenty-minute speech sessions in a twelve week period (where the IEP specified three sessions per week) adversely impacted the student's educational progress or performance. Therefore, the Appeal Committee finds that the investigator's conclusion on this part of issue one should be overturned.

The district also appeals the finding and conclusion in Issue one that the district failed to provide Occupational Therapy (OT) in accordance with the IEP.

The IEP requires that OT be provided two times per week for twenty minutes per session (Report, p. 7). The investigator found that, OT "was provided one time a week for 10 of the 14 weeks reported. Student absences accounted for three missed sessions and staff unavailability for one missed session (Report, p. 9)."

Counting the session where staff were unavailable, 15 sessions were missed over the 14-week period. In its appeal the district submitted written documentation (COTA Daily Treatment & Goal Progress Monitoring log) confirming that in addition to the above services that were provided by the OT, the Certified Occupational Therapist Assistant (COTA) also provided OT services to the student on 8/23/24, 8/30/24, 9/6/24, 9/13/24, 9/20/24, 9/27/24, 10/9/24, 10/16/24, 10/23/24, 11/1/24, 11/8/24 and 11/22/24. The COTA provided these services with twelve sessions over the 14 week period. The student was absent for two sessions.

With this documented additional information, the Appeal Committee finds that the district substantially complied with the OT services component of the student's IEP.

For Issue 1, the Appeal Committee finds that the investigators conclusions that the district failed to implement the occupational therapy and speech therapy services in the student's IEP should be overturned. The remainder of the findings and conclusions regarding Issue 1 remain.

### **Issue Three**

**Did the district develop an IEP designed to meet the needs of the student in light of their disabilities?**

Districts are required by law to provide a Free Appropriate Public Education (FAPE). FAPE has been defined by the United States Supreme Court to mean that schools must offer an **IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**" See, Endrew F. v. Douglas County School District, 117 LRP 9767, 137 S.Ct. 988 (2017).

For the purpose of analyzing the school's FAPE requirement for this student the Appeal Committee notes that this student's circumstances are significant. The student "was rated as having the most significant cognitive limitations in every category of the Kansas Alternate Assessment (DLM) for Students with the Most Significant Disabilities (Report, p. 7)."

The investigator concluded that the district failed to provide a FAPE for this student (Report, p. 21)

In its appeal of this issue, the district describes this conclusion to be "Monday Morning Quarterbacking," and cites two U.S. Circuit Court of Appeals as authority, including,

O'Toole v. Olathe USD 233, 144 F.3d 962, 28 IDELR 177 (10th Cir. 1998). As indicated above, the O'Toole v. Olathe case is a Tenth Circuit case, and its rulings are binding in Tenth Circuit states, such as Kansas.

In O'Toole, the 10th Circuit said:

*"...if we are evaluating an IEP prospectively only, we agree with the Third Circuit...that the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.' However, an IEP **is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such. Thus, we do not hold that a school district can ignore the fact that an IEP is clearly failing.**"* (citations omitted and emphasis added with bold/underlined print)."

In the cited case, the Tenth Circuit is saying that courts should not "Monday Morning Quarterback" or otherwise use the benefit of hindsight to second guess the judgement of an IEP team, when the team makes reasonable decisions based on what the team knows at the time it develops the IEP. However, the court is also saying that the IEP teams work is not done when the IEP team meeting ends. The team must also track the student's expected progress. An IEP team cannot continue to idly sit by when it becomes evident that a student is not progressing. Hence, when looking over an extended time, an investigator has a duty to distinguish between a reasonably developed IEP and a later unreasonable failure to address a failing IEP.

For this student, a shortened school day was included in both the 2/6/23 and 1/31/24 IEPs (Report p. 18). The students mother gave written consent for both IEPs (Report p. 2).

The report states that the district and the parent agreed that the student's behavior, including reluctance to attend school or activities within school, was a concern through the past 12 months, and that the IEP team determined the student would have a shortened school day to address the student's behavior such as meltdowns at school (Report p. 18).

The report included this comment:

*In its response to the complaint, the district acknowledged that no data were kept monitoring the student's absences from all or parts of school days or specific activities due to behavioral refusals or other indications of protest. The parent expressed concern about the student's reluctance to attend school and "meltdowns" at the IEP meeting on January 31, 2024, and these meltdowns were reported by both parties to be a continuing feature of the student's behavior at school. Both the parent and the school reported the use of informal removals (such as calling parent to pick up student, excusing student absences when the student refused to enter the building, or student refusal to follow his schedule at school) which were not systematically tracked by either party.*

Noticeably missing from the report is reference to data/information occurring after development of the January 31, 2024 IEP. The few references are:

April 25, 2024 – IEP amended to include Extended School Year (ESY) services (p. 7)

August 13, 2024 – IEP Amendment – to review criteria to qualify for alternate Assessment (p. 7)

August 16, 2024 – Service times changed according to January 31, 2024 IEP (p.8)

March 2024 – Reported on only one goal (goal 6): Adequate progress (p. 9)

May 2024 – Progress reports for all 7 goals: Adequate progress (p. 9), including engaging with peers in parallel play (p. 20)

November 12, 2024 – Parents reported an undisclosed injury to the student at school, after which parents withheld student from school for 5 days (p. 19-20)

None of these references (with the possible exception of the November 12, 2024 injury) indicate a lack of appropriate progress for this student since his January 31, 2024 IEP was initiated. Further, the report added:

*It is noted that the IEP team determined the shortened school day and the mother participated in the development of both IEPs that required the shortened school day, and that the father relayed the parents' concern regarding the student's tolerance for a full day of school. It is noted that, although no IEP team meeting has been held following the November 12, 2024, incident, the school district has attempted to address the parent's concerns and that the parent has reported improved communication regarding the student's educational program from the school.*

However, the investigator concluded that the IEP was insufficient because it "did not address the student's behavior through a goal, service, assessment, or intervention plan included in the student's IEP."

In its appeal, the district states that the student's diagnosis of autism and his demonstrated needs are addressed through materials and strategies that are in the student's IEP goals and in

accommodations in the IEP. That is, his entire program is based on the structured teaching model designed for students with autism and for these reasons the IEP team did not feel that it was necessary to add an additional behavior plan as all behavioral needs were being addressed within a structured teaching program which included: the LAMP app on his iPad to access “his voice,” a visual schedule in all settings, a visual timer during transitions throughout the school day, sensory breaks scheduled before instruction time and whenever he needs a break throughout the day, and sensory needs met before instruction time (a proactive strategy to ensure that he has the best chance possible to tolerate non preferred tasks).

In the conclusion portion of the report on this issue, the investigator said: “the students IEP team used a shortened school day as a solution to the student’s unique behavior at school described by the parent as meltdowns.” The Appeal Committee disagrees with this description.

While a behavior intervention plan (BIP) targeting specific behaviors might be advisable in this situation, the law does not require that the district’s strategies for addressing behaviors include developing a BIP. A BIP is required by law in the single situation where a student has been suspended and relevant members of the student’s IEP team determine that the student’s conduct was a manifestation of the student’s disability (34 C.F.R. 300.530(f)(1)). That situation did not arise with this student.

The Appeal Committee finds that, during the time period for this complaint, the evidence supports the following: (1) the parents and other members of the IEP team fully participated in the development of both of this student’s IEPs; (2) the parents agreed and gave consent for each of the IEPs, including the provision for a shortened school day; (3) the student’s IEPs included strategies to address the student’s behavior; (4) the student’s progress reports indicated the student is making adequate progress, and (5) the district was gradually increasing the student’s time at school (Report p. 18).

## **Conclusion**

With these findings on Issue 1, the Appeal Committee concludes that both Speech and Occupational Therapy services were substantially provided in accordance with this student’s IEP and, on Issue 3 the district, in cooperation with the parents, developed an IEP that was reasonably calculated to meet the needs of this student in light of his significant disabilities.

The Appeal Committee further concludes that the Corrective action in the report for Issue 1 is amended to remove the requirement to calculate and provide 40 minutes of speech language therapy and 300 minutes of occupational therapy. The remainder of the corrective action on Issue 1 remains in force.

Corrective action for Issue 3 in the report is removed in its entirety.

Nothing in this decision should be construed to limit any future review of this student's IEP by his IEP team. The IEP team has a continuing responsibility to afford this student's parents the right to participate in the decision making process and to make a FAPE available to this student.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 16th day of January, 2025.

### **Appeal Committee**

Crista Grimwood

Brian Dempsey

Mark Ward