

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES
REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #453 LEAVENWORTH PUBLIC SCHOOLS
ON FEBRUARY 14, 2024
DATE OF REPORT MARCH 18, 2024

This report is in response to a complaint filed with the Kansas State Department of Education on behalf of -----, by a former district employee of USD #453, ----- . In the remainder of the report, ----- will be referred to as “the student.” ----- will be referred to as “the complainant” or “the former district employee”. -----’s parent, -----, will be referred to as “the parent”.

The complaint is against USD #453. In the remainder of the report, USD #453 will be referred to as “the district”, “the local education agency (LEA)”, or “the school”.

The Kansas State Department of Education (KSDE) allows for a 30-day timeline to investigate a complaint from the date in which it was filed. A complaint is considered filed on the date in which it was received by KSDE. In this case, the KSDE initially received the complaint on February 14, 2024, and the 30-day timeline ends on March 15, 2024. An extension was granted until March 22, 2024.

Evidence Reviewed

During the investigation, the Complaint Investigator, Ashley Niedzwiecki reviewed all evidence and documentation, which was provided by both the district and the complainant(s). The following documentation and information were used in consideration of the issue(s):

1. The district’s response to the allegations.
2. Interview with the parent.
3. Interview with the district.
4. The student’s current IEP and amendments.
5. Emails between the district and the parent.
6. Occupational Therapy Schedule for 2023/2024 school year.
7. Para support and pull-out schedule for 2023/2024 school year.
8. Vision and Orientation & Mobility pull-out schedule/notes dated 10/5/2023 to 2/20/2024.
9. Occupational Therapy Documentation of service minute logs dated 1/11/2023 to 5/22/2023 and 8/16/2023 to 2/8/2024.
10. Direct Specialized Instruction and Inclusion logs dated 2/1/2023 to 6/30/2023 and 8/15/2023 to 2/28/2024.

11. TSVI log dated 1/11/2023 to 8/2023.
12. Incident Report and suspension log for the 2023/2024 school year.
13. Student Attendance record for 2023/2024 school year.
14. Student behavior observation notes dated 1/2023 to 2/2024.
15. Para attendance log for the 2023/2024 school year.
16. District calendars for 2022-2023 and 2023-2024.

Background Information

The student is an elementary aged student, in attendance at USD #453. The student has been identified as a student with an exceptionality, specifically visual Impairment and Autism. The student's IEP is implemented through push-in and pull-out services, namely behavior and vision para support in the classroom and pull-out occupational therapy, vision, orientation & mobility, and behavior support.

Issues Investigated

1. **ISSUE ONE:** Whether USD #453, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP as written, specifically by failing to provide the required number of push-in and pull-out minutes.
2. **ISSUE TWO:** Whether USD #453, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP as written, specifically by failing to provide services during out-of-school suspension.

Issue One

Whether USD #453, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP as written, specifically by failing to provide the required number of push-in and pull-out minutes.

Applicable Law

Under federal and state law, a district must ensure that an IEP is in effect for each exceptional child at the beginning of the school year. (34 C.F.R. 300.323(a) & (c); K.S.A. 72-3429(a)(1); K.A.R. 91-40-16(b)(3)). The district must ensure that, as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. (34 C.F.R. 300.323(c)(2)). Those services to which a parent has granted written consent must be implemented no later than 10 school days after consent was granted unless reasonable justification for the delay can be shown. (K.A.R.91-40-16(b)(2)).

Additionally, while IDEA does not specifically speak to provider absences, in Letter to Clarke, The Office of Special Education Programs (OSEP) encourages public agencies to consider the impact of provider's absence or a child's absence on the child's progress and performance. The IEP Team is responsible for determining the anticipated frequency, location, and duration of services (34 CFR 300.320(a)(7)).

Findings of Fact & Analysis

The complainant argues the district failed to provide staff sufficient to accommodate all service minutes required in the student's IEP. According to the complainant the district is "not following the minutes in [the student's] IEP for push in and pull-out minutes". During an interview with the parent, the parent stated she did express a concern to the district about whether the student was receiving all required minutes following the filing of this complaint. Emails provided by the district confirm the parent spoke to the district by phone on 2/15/2024 and that she requested the student's service minute schedule. In an email dated 2/16/2024, the district assured the parent the IEP was being implemented as written, and also provided the parent with the student's push-in and pull-out services schedule. The email also stated the student failed to receive services with Ms. Penny, the vision and Orientation & Mobility provider from Kansas State School for the Blind (KSSB), on "one day" due to the student being in the recovery room. The district notes they will work with KSSB to make up the services. Both the district and the parent agree that following the introduction of a new general education teacher, the student's behavior has begun to improve and the student's time in the recovery room has decreased. Finally, the period investigated during this complaint will be from 2/14/2023 to 2/28/2024.

Records show that on December 12, 2023, the IEP Team met and amended the student's IEP. Prior to this amendment the IEP (dated 4/24/2023 -1/10/2024) required the following services:

- 15 minutes of indirect consultation services for vision 1x every 4 weeks.
- 60 minutes/5x a week of behavior related services in the regular education setting.
- 30 minutes/5x a week of direct services for behavior, in a special education setting.
- 30 minutes/5x a week of transportation services related to behavior in an "extracurricular setting". (transportation to and from school)
- 15 minutes/1x a week of OT services in a special education setting. (4/24/2023 – 6/30/2023)
- 5 minutes/1x a week of consultation indirect OT services (4/24/2023 – 6/30/2023.)
- Following the amendment on December 12, 2023, the student's current IEP includes the following direct and indirect services:
 - 30 minutes/1x a week of direct services for vision, in a special education setting.
 - 105 minutes/5x a week of behavior related services in the regular education setting, amended to increase minutes on January 3, 2024. (amended on 12/12/23 to 75 minutes/5x a week & then on 1/3/2024 to 105 minutes/5x a week).

- 45 minutes/5x a week of direct services for behavior, in a special education setting.
- 30 minutes/5x a week of transportation services related to behavior in an “extracurricular setting”. (transportation to and from school)
- 30 minutes/1x a week of direct services for Orientation and Mobility, in a special education setting.
- 15 minutes/1x a week of OT services in a special education setting.

Each area of service, for both the previous IEP and the current IEP, will be examined separately.

1. 15 minutes of indirect vision consultation services 1x every 4 weeks. (IEP dated 4/24/2023 – 1/10/2024)

According to the district, vision consultation services were provided by Kansas State School for the Blind (KSSB). The district acknowledged a delay in services due to availability of the provider at the start of the 2023/2024 school year. The district also calculated that, at the time of the December 12, 2023, meeting 60 minutes of consultation services had been missed. A PWN, dated 8/21/2023, states “the annual IEP dated 01.11.2023 indicated that consultative vision services 15 minutes a day, once every four weeks in GenEd classroom would end on 06.30.2023. This service is to carry over for the 2023-2024 school year to start 08.15.2023.” The PWN notes this was a clerical error. A log, titled, Teacher of Student for Vision Impaired (TSVI) , dated January 2023 - August 2023, confirm an IEP Team meeting was held 1/11/2023, and “consult services for student with visual impairments” was added. Although the IEP provided by the district is dated 4/24/2023 – 1/10/2024, documents (8/21/2023 PWN, district notes, and service logs) clearly indicate the student was to receive vision consultation services from 2/14/2023 to 12/12/2023.

IEP dated 4/24/2023 – 1/10/2024:

In review of the TSVI log, consultation services were provided in February 2023, March 2023, April 2023, and May 2023. In August 2023 the service log indicates that the previous provider was no longer with USD 453. A new log dated 10/5/2023 – 2/20/2024, indicates vision consultation services were missed in the months of August 2023/September 2023, October 2023, at the beginning of November 2023, and in December 2023, for a total of 60 minutes. While the service log shows the provider met with the student in October 2023, notes reveal that this was a “1st meeting with [the student]”. Since a meeting with the student is not a consultation with the general education teacher, these minutes do not satisfy the IEP requirements and thus the October 2023 consultation was missed.

Additionally, provider notes indicate a student evaluation, completed on 12/6/2023, and an in-service demo, done on 12/8/2023, (for a total of 180 minutes), were counted

toward the overall consultation and direct service minutes required in both the 4/24/2023 -1/1/2024 IEP and the current IEP. This calculation is not accurate. Evaluations and demos are neither direct service minutes nor consultation minutes. Furthermore, minutes previously provided in one context cannot count toward future minutes required in a future IEP. (In this case the evaluation and demo occurred on 12/6/2023 and 12/8/2023, and, even if they were considered direct services, those minutes would not apply to any minutes required in the amended IEP dated 12/12/2023). Also, documents indicate the provider delivered a consult for 30 minutes on 11/30/2023 and counted this toward the overall consult minutes required. While this consult did last longer than the required 15 minutes, it does not negate the missed future consultation minutes. This is because the IEP specifically states that a consult is to occur for 15 minutes every 4 weeks. Doubling the amount of consult time one month does not excuse the consultation required in following months.

Based on the information above, 60 vision consultation minutes were missed between 4/2023 and 12/12/2023.

Current IEP:

The student's IEP was again amended on 12/12/2023. The signed PWN, dated 12/12/2023, states, "It is proposed to initiate specialized instruction in the are[a] of vision 30 minutes a day, once a week. This is a change from consultation services in the previous IEP." Records indicate that following this amendment, vision consultation services did cease, and 30 minutes of direct vision services began. Since vision consultation was no longer required, no minutes were missed between 12/12/2023 to 2/28/2024.

Conclusion:

Therefore, based on the information above, the district is in violation of failing to implement the IEP as written, specifically by failing to provide 60 vision consultation minutes between 2/14/2023 and 2/28/2024.

2. 30 minutes/1x a week of direct services for vision, in a special education setting. (Current IEP)

As stated above, following the 12/12/2023 amendment, vision consultation services ceased, and 30 minutes of direct special education vision services began. According to the district, these services were provided by Kansas School for the Blind teacher, Penny Kimberling. The district acknowledges a "slight delay in starting the service due to the winter break holiday, student unavailability due to road closures, and school closures." As of the filing of this complaint, the district states that 35 minutes of direct vision special education services are owed to the student.

IEP dated 4/24/2023 – 1/10/2024:

Direct special education vision services were not required in the IEP dated 4/24/2023 – 1/10/2024.

Current IEP:

As stated previously, provider notes indicate a student evaluation, completed on 12/6/2023, and an in-service demo, done on 12/8/2023, (for a total of 180 minutes) were counted toward the direct service minutes required in the amended IEP. However, this is an erroneous calculation. Neither an evaluation nor an in-service demo will satisfy required direct service minutes. Regardless, even if they had been direct service time, time spent with a student prior to an IEP service being consented to, in writing, by the parent, does not count toward future services.

In a review of provider service logs, beginning 12/12/2023, the student was required to receive 240 total direct services minutes between 12/12/2023 to 2/20/2024. As stated by the district, the student's services were delayed slightly due to winter break. Also, Kansas law requires districts to implement services consented to by the parent within 10 days. (K.A.R.91-40-16(b)(2)). In this case, the IEP was amended on 12/12/2023. This required the district to implement the service by 12/22/23. According to the district calendar, winter break was from 12/22/2023 to 1/3/2024. This means the district was not obligated to start services until the student returned from winter break. Records show the provider was working with the student initially on Thursdays and then switching to Tuesdays after February 8, 2024. Cross referencing the school calendar with provider notes and the student's attendance records show the student missed services on, 1/4/2024, 1/11/2024, 1/18/2024, 1/25/2024, and 2/8/2024.

Provider notes list winter break as occurring from 12/21/2023 – 1/8/2024, however these dates conflict with the district's school calendar and the student's attendance records. Following the established pattern of services, the student should have first received services on 1/4/2024. Since there is nothing in the record to indicate why the student missed, this is a missed service date. On 1/11/2024 provider records say, "Emailed ahead Ms. Cook explained student were not available due to bad roads." However, student attendance records and other service records indicate the student was at school and should have been available. Given the lack of reliability of the provider's records and considering the amount of conflicting documentation showing the student was at school, it is determined the student did miss services on 1/11/2024 due to provider availability, not student availability. On 1/18/2024 the student missed because the student was in the Recovery Room. Since another part of the student's IEP was being implemented, these service minutes do not need to be made up. On 1/25/2024 provider notes indicate the provider was at a celebration and therefore unavailable for services. Provider availability is not an acceptable reason missed

services. Finally, on 2/8/2024, provider notes state the student was “in group” and that services would be switched to Tuesdays. There is nothing to indicate that services were provided on this date, or that they could not have been provided. As such, services were missed on 2/8/2024. Additionally, notes suggest the provider added an additional 50-minutes total (vision and/or O&M) on 2/1/2024 and 30 minutes (vision and/or O&M) on 2/20/2024. However, because there is no documentation in the provider’s notes, or otherwise, to indicate that this was agreed upon, with the parent, as compensatory time for missed minutes, nor is there anything in the notes to indicate specifically which skills were worked on, the overage cannot arbitrarily be applied as compensatory services.

Conclusion:

Therefore, based on the information above, the district is in violation by failing to implement the IEP as written, specifically by failing to provide 120 vision direct special education minutes related to vision between 12/12/2023 and 2/20/2024.

3. 60 minutes/5x a week of behavior related services in the regular education setting. (IEP dated 4/24/2023 – 1/10/2024)

105 minutes/5x a week of behavior related services in the regular education setting, (current IEP amended to increase minutes on January 3, 2024, from 75 to 105 minutes).

According to documents, the IEP dated 4/24/2023 to 12/12/2023, requires 60 minutes of indirect special education services related to behavior, provided 5x a week in the general education classroom through para support. Following an amendment on 12/12/2023 the minutes were increased to 75 indirect special education minutes and then amended again on 1/3/2024 to include an additional 30 minutes of indirect service minutes specific to vision, bringing the total number of push-in minutes to 105 minutes 5x a week.

IEP dated 4/24/2023 – 1/10/2024:

The IEP required 60 minutes of indirect special education service minutes, related to behavior, provided to the student in the general education setting through para support. Service logs dated 2/1/2023 – 6/30/2023, indicate the student missed indirect service minutes on 15 days. Of these 15 days, 12 were related to student excused absences and are not required to be made up. For three of the missed indirect service days, occurring on 6/5/2023, 6/7/2023, and 6/21/2023, the service log confirms services were missed, but does not indicate why they were missed. Furthermore, records do not show the student as marked absent. Consequently, the district missed 120 minutes total of push in behavior support services minutes between 2/14/2023 and 12/12/2023.

Current IEP:

According to the district 75 minutes (between 12/12/2023 and 1/2/2024), and then 105 minutes (beginning 1/3/2024) of indirect special education services were required 5x a week in the general education classroom through para support. The record shows these minutes were provided from 8:30-9:00 am, 9:00 – 9:15 am, 1:00-1:15 pm, 12:30-12:45 pm, and 3:00-3:30 pm. Service logs dated 8/15/2023 – 2/28/2023 indicate the student missed 10 days of services. Of those missed days, 8 were due to student absences and 2 were due to out-of-school suspensions (OSS). Student absences and OSS days, which have not reached an accumulated 11 days, do not require the district to make-up minutes. Consequently, no indirect behavior support service minutes were missed between 12/12/2023 and 2/28/2024.

Conclusion:

Therefore, based on the information above, the district is in violation of failing to implement the IEP as written, specifically by failing to provide 120 indirect service minutes between 2/14/2023 and 2/28/2024.

4. 30 minutes/5x a week of direct services for behavior, in a special education setting. (IEP dated 4/24/2023 – 1/10/2024)

45 minutes/5x a week of direct services for behavior, in a special education setting. (current IEP).

IEP dated 4/24/2023 – 1/10/2024:

According to the district, 30 minutes of direct special education services were provided 5x a week in the special education setting by special education teacher Jayme Temple. Records show the student missed 23 sessions between 2/14/2023 and 12/12/2023. Of these 23 missed direct service minutes, 10 sessions were missed due to provider absences, mostly because the provider was attending an IEP meeting. Another 8 sessions were missed due to student absences, and 3 were missed because the student was with the nurse. Finally, 2 sessions were missed without any explanation attached. In some instances, records reveal conflicting evidence as to whether the student received direct services or not. For example, a printout of the student's progress report notes the student was absent on 5 days between 2/14/2023 and 6/26/2023, however, according to district service minute logs, the student *did* receive services on 3 of those days and was in the nurse's station the other 2 days. Finally, according to a progress report, dated 10/10/2023, the student was not making progress "adequate to achieve goals" on either of the student's behavior goals.

Missed services because of student absence from school are generally excused, and the district is generally not required to offer compensatory minutes. However, missed

minutes because of provider absences, regardless of the reason, generally require the district to make-up the minutes, notify the parent of the missed minutes, and possibly consider whether the missed minutes are interfering with the student's ability to receive FAPE, especially if the student is missing a significant number of minutes due to provider availability. Additionally, when a student misses service minutes because the student is in another area of the school, not related to the student's IEP, the district should attempt to make-up those minutes. Since the IEP Team is responsible for determining the frequency, location, and duration of services (34 CFR 300.320(a)(7)), it is inappropriate to disregard missed services simply because the student is utilizing another service provided by the district to all students (i.e. the school nurse). Also, if such absences become chronic, a district is obligated to consider how these missed minutes are affecting the student's ability to receive FAPE (See OSEP *Letter to Clarke*).

In this investigation, using the guidance in OSEP's *Letter to Clarke*, it is found that the failure of the district to provide services to this student due to the absence of service providers reached the level of a chronic failure. Accordingly, the bulk of these missed services should have been made up. This finding will be reflected in the conclusion and corrective action portions of this report.

Here, the student missed a total of 15 direct special education service sessions for behavior because of provider absences, student absences (with the nurse), and because of unexplained misses. Consequently, the district missed a total of 450 minutes of direct service minutes between 2/14/2023 and 12/12/2023.

Current IEP:

According to the district, under the current IEP, 45 minutes of direct special education services were provided 5x a week, in the special education setting, by special education teacher Jayme Temple. Records indicate the student missed 13 direct special education service sessions between 12/12/2023 and 2/28/2024. Of the sessions missed, 11 were because of student excused absences and 2 were because the student was in OSS. As previously stated, services are not required during OSS until the 11th cumulated day. In this case, the student was in OSS for a total of two days, and student absences account for the remaining nine missed days of services, therefore, the district is not required to offer compensatory services for any of the missed minutes.

Conclusion:

Based on the information above, the district is in violation of failing to implement the IEP as written, specifically by failing to provide 450 (15 x 30) minutes of direct service minutes between 2/14/2023 and 2/28/2024.

5. 30 minutes/5x a week of transportation services related to behavior in an “extracurricular setting”. (transportation to and from school) (same for both the previous and the current IEP)

There is nothing in the record or the complaint to indicate that the student missed transportation services. Therefore, there is no violation of failing to implement the IEP as written, specifically by failing to provide transportation services to the student.

6. 15 minutes/1x a week of OT services in a special education setting. (4/24/2023 – 6/30/2023).

According to the district, 15 minutes of special education services for occupational therapy (OT) is required 1x a week. This is currently provided by occupational therapist Shawna Dobbe. The district does acknowledge that USD #453 was unable to secure a qualified OT from 8/15/2023 – 10/2/2023. In an interview with the Director of Special Education, Dr. Cathy Redelberger, she confirmed the student failed to receive any OT services during this time. Also, according to the student’s progress report dated 10/10/2023, the parent was informed of the lapse in services due to provider availability and the possibility of compensatory services was addressed. Finally, a signed PWN, dated 12/12/2023, states, “It is proposed to *continue* pull-out occupational therapy 15 minutes a day (direct services), once a week”.

Further, although the previous IEP shows direct OT services stopping on 6/30/2023 the district provided documentation to show this was a clerical error and that direct OT services were meant to continue, and in fact did continue, for the 2023-2024 school year. Continuation of services is evidenced by the student’s OT service logs, parent interview, and the student’s progress report, which states “...skills were not addressed though OT this past quarter”, followed by an offer to discuss compensatory services. In recognition of this clerical error, the district submitted an unsigned PWN, dated 12/12/2023, noting the clerical error. The PWN stated OT services resumed on 10/17/2023 (after hiring the OT) to present day. It is worth noting however, that although the unsigned PWN states OT services *resumed* from “10/17/2023 to present”, conversations with the district, the parent, and documentation, support the student was intended to receive direct OT services from 8/15/2023 to present. Additionally, the student’s progress report (10/10/2023) still contained the same OT goals from the 2022/2023 IEP. These goals include:

- Goal 1 – By January of 2024, [the student] will improve [the student’s] bilateral coordination and cutting skills by being able to cut within ¼ inch of the line on 3 of 4 basic shapes.

- Goal 2 – By January of 2024, [the student] will improve [the student's] fine motor and writing skills by being able to write [the student's] name legibly and copy 9 of 9 basic shapes essential to letter and number formation.

For both goals, as of 10/10/2023, the student is reported as not having made “adequate progress to achieve goal”. Comments on the report also state, “Leavenworth USD 453 was unable to secure a qualified Occupational Therapist from 8/15/23 – 10/2/23. The district is prepared to offer compensatory services for the loss of instructional time for your student. Moving forward, when your child’s annual IEP meeting is held, the team will discuss compensatory services and develop a plan to ensure those services are provided”. No documentation was provided to show compensatory services, yet, have been offered, or have occurred. It is also relevant to note that nothing in the record indicates the student has made progress toward either OT goal.

Whether the district properly provided a PWN is not an issue in this case, and therefore no finding will be made. However, a district must provide a PWN whenever a change to the IEP occurs. Failure to do so is possibly a violation of IDEA. Here, the district failed to properly record the continuation of direct OT services or OT consultation services when the IEP was amended on 8/15/2023. Following this amendment, a PWN was sent to the parent on 8/21/2023 discussing a different clerical error of removing vision consultation services. This was addressed to the parent and signed by the parent. The IEP was again amended at that time to include vision; however, nothing was mentioned about discontinuing or continuing direct OT services or OT consultation services. Even so, documentation evidence and discussions with the parent and district reveal these services were meant to continue into the 2023/2024 school year and therefore a PWN addressing this was likely required following the 8/15/2023 amendment. As stated previously, the district did provide an unsigned PWN, dated 12/12/2023, stating that OT direct services were to *resume* on 10/17/2023 to present. However, this PWN does not align with other documents in the record, nor was it signed by the parent, or even addressed to the parent.

IEP dated 4/24/2023 – 1/10/2024:

Considering the information above, and accounting for the district’s admission of a clerical error, documentation will be reviewed from 2/14/2023 to 12/12/2023. During the above-mentioned period, services were required to be delivered an estimated 30 times. Records confirm the student missed direct special education OT services 10 times between 2/14/2023 and 12/12/2023. Specifically, the student missed one direct OT special education session during the week of 3/20/2023, and nine sessions between 8/15/2023 and 10/23/2023. District records note the week of 3/20/2023 was missed because of spring break, however, according to the district calendar, spring

break ended on March 17, 2023. Therefore, OT services should have been delivered the week of March 20, 2023. The next nine sessions were missed due to provider availability, which the district acknowledges.

An additional three sessions were missed between 2/14/2023 and 12/12/2023, but these sessions do not require compensatory services. Services were missed on 11/14/2023 due to provider availability, however the record indicates the session was made up that week on 11/17/2023. The student again missed on 11/29/2023 due to a student excused absence, therefore not requiring compensatory services. On 12/6/2023 services were missed because the student was in the Recovery Room. As stated previously, when another section of the IEP is being implemented the district is not required to offer compensatory services for those missed minutes.

Therefore, based on the information above, between 2/14/2023 and 12/12/2023, the student missed a total of ten OT direct special education service sessions for a total of 150 minutes.

Current IEP:

According to the current IEP, the student is required to receive 15 minutes/1x a week of OT services in the special education setting. Between 12/12/2023 and 2/8/2024, services were required a total of seven times. A review of the OT service log shows services were missed on five occasions, specifically, 12/15/2023, 1/5/2024, 1/12/2024, 1/19/2024, and 2/8/2024. Of these missed sessions, one was missed because the student was in the Recovery Room (1/5/2024) and one was missed because of an excused student absence (1/12/2024). These do not require the district to offer compensatory minutes. Again, it is worth noting however, that if such absences become chronic, a district has an obligation to consider how the missed minutes are affecting the student's ability to receive FAPE. (See *Letter to Clarke*)

Two missed sessions, on 12/15/2023 and 2/8/2024, are the result of student availability. On 12/15/2023, records indicate the student was with the nurse and a make-up session would occur the following week, but there is nothing in the log to indicate the required make-up session occurred. On 2/8/2024 the service log lists the student as unavailable but does not indicate why the student was unavailable. A cross-reference of the student's direct behavior service log, attendance record, and progress report all list the student as in school and receiving other services on 2/8/2023. Since there is no indication these missed service minutes were due to an excused student absence, the minutes are considered missed. Finally, the student missed services on 1/19/2024 due to the in-person facilitator being unavailable. Service provider availability does not excuse required minutes listed in an IEP.

Based on the information above, between 12/12/2023 and 2/8/2024, the student missed a total of three OT direct service sessions (on 12/15/2023, 1/19/2024, and 2/8/2024) for a total of 45 minutes.

Conclusion:

Therefore, the district is in violation of failing to implement the IEP as written, specifically by failing to provide direct OT special education services 13 times between 2/14/2023 and 2/8/2024 for a total of 195 minutes.

7. 5 minutes/1x a week of consultation indirect OT services (4/24/2023 – 6/30/2023.)

The student's IEP specifies that OT consultation services are provided 5 minutes, 1x a week. As discussed above, OT consultation was listed in the student's IEP from 4/24/2023 to 6/30/2023. However, interviews, documentation, and service logs indicate services were in place 1/11/2023 onward and were meant to continue in the 2023/2024 school year. Specifically, the progress report, dated 10/10/2023, states, "[The student] will resume consultative OT services the week of 10/9 at which time progress toward this goal is expected to resume." This statement is noted under each of the student's OT goals. Furthermore, the district confirmed in interviews that the student failed to receive *any* OT services due to provider availability prior to hiring an OT in October 2023. Finally, a signed PWN, dated 12/12/2023, (discussed under #5), states, "It is proposed to continue pull-out occupational therapy 15 minutes a day (direct services), once a week". This record seems to indicate that OT consultation services were to cease following the 12/12/2023 amendment. This is confirmed by service logs. Therefore, records will be reviewed for the time between 2/14/2023 – 6/30/2023 and from 8/15/2023 – 12/12/2023.

IEP dated 4/24/2023 – 1/10/2024:

Between 2/14/2023 and 6/30/2023, OT consultation services were required a total of 26 times. Of these 26 required consultation sessions, records show 23 were missed. OT service logs show consultation was missed the weeks of February 20th, February 27th, March 6th, March 20th, March 27th, April 4th, April 10th, May 1st, May 8th, May 15th, and May 22nd. Also, the eight weeks between 8/15/2023 and 10/17/2023 when the district was without an OT, and the weeks of November 20th, November 27th, December 4th, and December 11th.

Consequently, based on the information above, between 2/14/2023 - 6/30/2024 and 8/15/2023 – 12/12/2023 a total of 23 OT consultation service sessions were missed for a total of 115 consult minutes.

Current IEP:

As stated above, it does not seem that OT consultation was intended to continue beyond 12/12/2023. The signed PWN, dated 12/12/2023, (discussed under #5) only mentions OT direct services, stating, "It is proposed to continue pull-out occupational therapy 15 minutes a day (direct services), once a week". Further, between 12/12/2023 and 2/8/2024, only one OT consult is recorded on 1/19/2023. Therefore, because there is not enough evidence to show that OT consultation was required under the current IEP, a finding will not be made as to missed services from 12/12/2023 – current.

Conclusion:

Therefore, the district is in violation of failing to implement the IEP as written, specifically by failing to provide direct OT consultation special education services 23 times between 2/14/2023 and 2/8/2024 for a total of 115 OT consultation minutes.

8. 30 minutes/1x a week of direct services for Orientation and Mobility, in a special education setting. (current IEP)

A PWN, dated 12/12/2023, states, "It is proposed to initiate specialized instruction in the area of orientation and mobility 30 minutes a day, once a week." According to the district, these services were provided by Kansas School for the Blind teacher, Penny Kimberling. Documents show Ms. Kimberling provided both Orientation & Mobility special education services (30 minutes a week) and direct vision special education services (30 minutes a week).

IEP dated 4/24/2023 – 1/10/2024:

Orientation & Mobility (O&M) was not included in the IEP prior to 12/12/2023.

Current IEP:

As stated under section #2, the law requires services, which the parent has consented to, to be implemented no later than 10 days following written consent. In this case, the IEP was amended and the PWN signed on 12/12/2023, meaning orientation & mobility services needed to be implemented by 12/22/2023. However, the district was on winter break between 12/22/2023 and 1/3/2024, therefore, service did not need to begin until 1/4/2023. Also as noted under section #2, provider notes indicate services were provided on Thursdays and then switched to Tuesdays on 2/8/2024. After reviewing documents, including provider notes, district calendars, student attendance records, and other service records, it is determined the student missed services on 1/4/2024, 1/11/2024, 1/18/2024, 1/25/2024, 2/8/2024.

Since the same provider, KSSB teacher, Penny Kimberling, provides both direct vision services, and O&M services, a similar analysis applies to these dates as under section #2. On 1/4/2024, services were missed without explanation. On 1/11/2024, services

were missed presumably due to lack of provider availability since other documents indicate the student was in attendance that day. On 1/18/2024, the missed services were due to implementing another part of the student's IEP. On 1/25/2024, services were missed because of lack of provider availability, and 2/8/2024, services were missed because the student was in group (not a student availability issue).

Additionally, as discussed above, notes suggest the provider added 50-minute (vision and/or O&M) on 2/1/2024 and 30 minutes (vision and/or O&M) on 2/20/2024.

However, because there is no documentation in provider notes, or otherwise, to indicate this was agreed upon compensatory time for missed minutes (with the parent), nor is there anything in the record to indicate which skills were worked on, the overage does not apply to compensatory services. Consequently, the district missed four O&M sessions, for a total of 120 minutes.

Conclusion

Therefore, the district is in violation of failing to implement the IEP as written, specifically by failing to provide direct special education services related to Orientation and Mobility for a total of 120 minutes between 12/12/2023 and 2/20/2024.

Conclusion

Therefore, based on the foregoing, a violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDE/A), by failing to implement the IEP as written, specifically by failing to provide the required number of push-in and pull-out minutes *is substantiated*.

In total the district failed to provide, 60 minutes of vision consultation services, 120 minutes of direct (pull-out) vision special education services, 120 minutes of indirect (push-in) behavior support special education services, 450 minutes of direct (pull-out) behavior support special education services, 195 minutes of direct (pull-out) occupational therapy special education services, 115 minutes of occupational therapy consultation services, and 120 minutes of direct (pull-out) orientation and mobility services.

Issue Two

Whether USD #453, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the IEP as written, specifically by failing to provide services during out-of-school suspension.

Applicable Law

Students with disabilities may be disciplined using traditional forms of discipline, such as suspensions, detention, or restriction of privileges as long as those forms of discipline are used with nondisabled students in the same manner and do not violate the provisions of the

student's IEP or the student's right to a free appropriate public education (FAPE). If a student, identified as a student with a disability, is disciplined and that discipline results in a change of placement the student is entitled to procedural protections under the IDEA. (34 C.F.R. §§ 300.530, 300.536). A disciplinary change of placement occurs if: (1) a student has been removed from his or her current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of removals that total more than 10 school days and those removals constitute a pattern of misconduct that involves substantially the same behavior. 34 C.F.R. § 300.536(a); K.A.R. 91-40-33(a)(1)). A district is not required to provide special education or related services to a student who has been suspended from school for 10 or fewer school days during a school year. (K.A.R. 91-40-35(a)).

Findings of Fact & Analysis

Documents show the student was subject to an out-of-school suspension (OSS), on 12/19/2023 and 12/20/2023. Attendance records also show the student was absent during the afternoon on 12/18/2023 for a medical absence (MED). An interview with the parent clarified that she was called because of the incident occurring on 12/18/2023 and asked to take the student home, which she did. There is no other indication in the record that the student was disciplined with any other in-school-suspensions (ISS) or an additional OSS during the school year. That said, interviews with the parent revealed the district does call her sometimes "to calm down [the student] so [the student] can go back to class". According to the parent, sometimes this works, but often she would choose to take the student home because once the student sees her, "[the student] won't go back to class."

In this case, the district states the student was suspended for a total of 2 days of OSS, therefore the district was not obligated to provide services during the time of suspension. The district is correct. Since the student has not accumulated more than 10 OSS or ISS days in the school year, services are not required. However, in this case, the district miscalculates the total number of OSS days the student has accumulated. A suspension occurs when the student is removed for any part of the school day. Here, the district called the parent to come and pick the student up following the incident occurring on 12/18/2023. That day, (12/18/2023), also counts as an OSS since the student was removed. Therefore, at the time of this report, the student had reached three days of OSS, not two. Since the total number of OSS days is still less than ten, the district is not obligation to provide services during OSS.

That said, while records do not provide enough evidence to make a finding, it is worth noting that each time the parent is called to "calm down" the student, resulting in the student's removal from school, these situations would count toward the total number of OSS removals. Calling this a "parent choice" is inappropriate and would not negate the fact that the district called the parent due to student behavior. Depending on how many days this has occurred this year (and the parent could not verify when or how often, nor do records provide clarity), the student could potentially have already accumulated more than ten OSS days. Especially,

since in a review of attendance records, the student was marked absent for MED for all or part of the day on nine additional occasions (not counting the 12/18/2023 date which is a known OSS day). Regardless, in this situation, with the evidence available, the district was not obligated to offer special education services to the student during OSS on 12/18/2023, 12/19/2023, or 12/20/2023.

Conclusion

Therefore, based on the foregoing, a violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), specifically by failing to provide services during out-of-school suspension *is not substantiated*.

Summary of Conclusions/Corrective Action

ISSUE ONE: A violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), by failing to provide the required number of push-in and pull-out minutes is substantiated.

a) **CORRECTIVE ACTION:**

i) Draft a proposal to the parent offering the specified number of compensatory services in the following areas:

- 1) 60 minutes of consultation services related to vision.*
- 2) 120 minutes of direct special education service minutes related to vision.*
- 3) 120 minutes of indirect special education service minutes related to behavior.*
- 4) 450 minutes of direct special education service minutes related to behavior.*
- 5) 195 minutes of direct special education service minutes related to OT.*
- 6) 115 minutes of consultation service minutes related to OT.*
- 7) 120 minutes of special education service minutes related to Orientation and Mobility.*

(a) Date due: May 1, 2024

ii) *The parent may accept, some, all, or none of the specified minutes.

iii) Provide a copy of the offer to KSDE along with the parent's response.

(a) Due date: May 1, 2024

iv) Provide training to all staff on proper IEP implementation procedures.

(a) Due date: May 1, 2024

v) Provide a letter to KDSE confirming the training was completed.

(a) Due date: May 10, 2024

vi) Reconvene an IEP team meeting to consider the impact of service provider's absence or the student's absence on the student's progress and performance.

(a) Due date: May 1, 2024

vii) Provide a letter to KSDE confirming the IEP meeting and the outcome.

(a) Due date: May 10, 2024

ISSUE TWO: A violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), by failing to provide services during out-of-school suspension is not substantiated.

b. No corrective action required.

Investigator

Complaint Investigator:

Ashley Niedzwiecki

Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, KS 66612-1212. The notice of appeal may also be filed by email to formalcomplaints@ksde.org. The 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).

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)