

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #500
ON JULY 22, 2024

DATE OF REPORT: AUGUST 9, 2024

This report is in response to a complaint ----- filed with our office, on behalf of their child, -----
---. For the remainder of this report ----- will be referred to as “the student.” ----- will be
referred to as “the parent.”

Investigation of Complaint

K.A.R. § 91-40-5(c)(5) requires that the complaint investigation include “[a] discussion with the complainant during which additional information may be gathered and specific allegations of noncompliance identified, verified, and recorded.” Laura Jurgensen, complaint investigator, held this discussion with the parent through a phone call with a translator on July 24, gathering additional information and verifying the specific allegations to be investigated. Laura Jurgensen provided the specific allegation to be investigated to the parent (in Spanish) and the district (in English) via email on July 24. The parent did not dispute how the complaint investigator framed the issue to be investigated. The parent and investigator also exchanged multiple emails in Spanish. The district special education director provided the investigator with a response to the issue the investigator identified, as well as all documentation and data the investigator requested.

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

- Student 2023–24 Behavior Detail Report Screenshot, Aug. 7, 2024.
- District’s Response to the Complaint, Aug. 6, 2024.
- Student 2023–24 Attendance Summary, Aug. 5, 2024.
- Student 2023–24 Attendance Detail, Aug. 5, 2024.
- Parent’s Complaint, Jul. 12, 2024.
- Prior Written Notice and Request for Consent for the Initial Provision of Services on the Student’s IEP, Apr. 8, 2024.
- Student IEP, Apr. 8, 2024.
- Student Evaluation/Eligibility Report, Feb. 2, 2024.
- Student Occupational Therapy Evaluation, Nov. 7, 2023.

Background Information

This complaint focuses on a student in first grade during the time period covered by the complaint investigation. The student's IEP describes her as "kind and outgoing." The student's IEP also indicates that she exhibits needs in math and speech-language.

Issues

In the written complaint and the complaint investigator's discussion with the complainant, the parent alleges one issues upon which this investigation will focus:

Did USD 500 ensure that the student's IEP Team determined whether the student needed Applied Behavior Analysis (ABA) therapy to receive a free appropriate public education? (34 C.F.R. §§ 300.101, .320(a)(4); K.S.A. § 72-3410(a)(2); K.A.R. § 91-40-2.)

Issue

ABA Therapy through the IEP

Applicable Law

State and federal special education legal requirements obligate a district to make a free appropriate public education to a child identified with a disability through an IEP. (34 C.F.R. § 300.101; K.S.A. § 72-3410(a)(2); K.A.R. § 91-40-2.) Each child's IEP must include the:

special education and related services and supplementary aids and services . . . to enable the child . . . [t]o advance appropriately toward attaining [their] annual goals; [t]o be involved in and make progress in the general education curriculum in accordance with [the child's present levels of academic achievement and functional performance], and to participate in extracurricular and other nonacademic activities; and [t]o be educated and participate with other children with disabilities and nondisabled children in the activities described in this section

(34 C.F.R. § 300.320(a)(4).)

In the comments to the 2006 regulations implementing the Individuals with Disabilities Education Act, the United States Department of Education weighed in on who decides whether a child with a disability needs a specific instructional methodology. "The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP." (71 Fed. Reg. 46,665 (2006).)

Analysis: Findings of Fact

In the complaint and the initial discussion with the complaint investigator the parent maintains that the district is not addressing the student's behavior needs and the parent must obtain outside therapy. The parent has secured applied behavior analysis (ABA) therapy for the

student through KinCare. (Parent's Complaint, Jul. 12, 2024.) The parent maintains that she made a request to school staff that the student be permitted to leave school to participate in ABA therapy and school staff indicated that if the student left early once a week or once a month, the school would excuse the absence, but if the student leaves early each school day, then school staff will mark the student absent for the entire school day. (Complaint Investigator and Parent Phone Call, July 24, 2024.) The district maintains the school has not received a request from the parent for the student to be absent to receive outside therapy. (District's Response to the Complaint, Aug. 6, 2024.) The complaint investigator's initial understanding of the parent's concern is that staff at the student's school was marking the student absent each time the student left early for therapy so in the district's response it provided the student's attendance records showing the student was not leaving school early. (District's Response to the Complaint, Aug. 6, 2024; Student 2023–24 Attendance Summary, Aug. 5, 2024; Student 2023–24 Attendance Detail, Aug. 5, 2024.) The parent later clarified that the student was not leaving school early for ABA therapy because the parent believed school staff would mark the student absent for the entire school day. (Email from Parent to Complaint Investigator, Aug. 6, 2024.) The parent did not respond to the investigator's request for more detail around the parent's perception that school staff would mark the student absent if the student left school early to participate in ABA therapy. (Email from Complaint Investigator to Parent, Aug. 7, 2024.)

The focus of the parent's concern in this complaint is whether the district ensured that the IEP Team determined whether the student needed ABA therapy to receive a free appropriate public education (FAPE). (Complaint Investigator and Parent Phone Call, July 24, 2024.) The role of the IEP Team is to determine what the student needs to receive FAPE. (71 Fed. Reg. 46,665 (2006).) This investigation will focus on the student's needs and the IEP Team's discussion and decisions about how to meet those needs to provide the student with FAPE. (71 Fed. Reg. 46,665 (2006).)

The parent indicates that the district is not meeting the student's behavior needs, forcing the parent to obtain outside ABA therapy to meet the student's needs. (Email from Parent to Complaint Investigator, Aug. 6, 2024.) The district maintains that the parent did not request that the district provide ABA therapy through the student's IEP. (District's Response to the Complaint, Aug. 6, 2024.) KinCare provides information on its website on the types of needs that it can treat with ABA therapy "that will bring several benefits to a learner's life." (<https://www.kincarebh.com/aba-frequently-asked-questions/>) "Examples of benefits include increasing social skills, increasing requesting, improving and developing daily living skills, communication, toilet training, bedtime routines, feeding, and self-management. ABA can also be used to address repetitive and interfering behaviors." (<https://www.kincarebh.com/aba-frequently-asked-questions/>)

The student's evaluation/eligibility report includes several needs that align with ABA therapy, as KinCare offers. (Student Evaluation/Eligibility Report, Feb. 2, 2024;

<https://www.kincarebh.com/aba-frequently-asked-questions/>.) In the area of Social/Emotional, the evaluation indicates that the student “has difficulty using verbal and non-verbal communication appropriately to initiate, engage in, and maintain social contact with peers and adults. She has trouble tolerating changes in routine, engages in apparently purposeless, stereotypical behaviors, and overreacts to certain sensory experiences. She also has deficits in attention and/or motor/impulse control.” (Student Evaluation/Eligibility Report, p. 4, Feb. 2, 2024.) The student’s needs articulated here could, theoretically, be supported through KinCare’s ABA therapy with a focus on “increasing social skills,” “communication,” and “self-management.” (<https://www.kincarebh.com/aba-frequently-asked-questions/>) In the area of Speech- Language, the evaluation indicates that “the student showed delays in her core language, and language content and use, due to lack of vocabulary for her age, difficulty constructing sentences to communicate a message, understanding information that is being said, giving questions-related answers, and staying on topic during an interaction.” (Student Evaluation/Eligibility Report, p. 11, Feb. 2, 2024.) The student’s needs articulated here could, theoretically, be supported through KinCare’s ABA therapy with a focus on “communication.” (<https://www.kincarebh.com/aba-frequently-asked-questions/>) In the area of behavior:

Clinically Significant concerns were reported in the areas of Atypicality and Functional Communication . . . [meaning that the student] . . . engages in behaviors that are considered strange or odd . . . [and] . . . At-Risk to Clinically Significant concerns were reported in the areas of Hyperactivity, Withdrawal, and Leadership Communication . . . [meaning that the student]

. . . displays a moderately high number of disruptive, impulsive, and uncontrolled behaviors, has difficulty making and maintaining friendships, and may have some difficulty making decisions.

The student’s needs articulated here could, theoretically, be supported through KinCare’s ABA therapy with a focus on “communication.” (<https://www.kincarebh.com/aba-frequently-asked-questions/>) Speaking to the district’s understanding of the student’s needs, the district also submitted the student’s occupational therapy evaluation, a component of the student’s overall evaluation, that concluded that the student did not display needs in this area that impacted her educational performance. (Student Occupational Therapy Evaluation, Nov. 7, 2023.) The district also submitted a screenshot of the behavior detail report for the student for the 2023–24 school year showing that the district did not log any behavior related incidents for this student. (Student 2023–24 Behavior Detail Report Screenshot, Aug. 7, 2024.)

Following the student’s evaluation, the student’s IEP Team developed an IEP for the student. (Student IEP, Apr. 8, 2024.) The evaluation report identified three need areas that correspond with ABA therapy, as offered by KinCare. (Student Evaluation/Eligibility Report, Feb. 2, 2024; <https://www.kincarebh.com/aba-frequently-asked-questions/>) Stated generically these three need areas are: (1) Using verbal and non-verbal communication appropriately to initiate,

engage in, and maintain social contact with peers and adults; (2) Vocabulary; and (3) Disruptive, impulsive, and uncontrolled behaviors. (Student Evaluation/Eligibility Report, Feb. 2, 2024.) The student's IEP Team has the responsibility of putting together an IEP that provides the student with FAPE. (34 C.F.R. § 300.101; K.S.A. § 72-3410(a)(2); K.A.R. § 91-40-2.) The student's IEP Team must determine which special education and related services and supplementary aids and services the student needs to

advance appropriately toward attaining [their] annual goals; [t]o be involved in and make progress in the general education curriculum in accordance with [the child's present levels of academic achievement and functional performance], and to participate in extracurricular and other nonacademic activities; and [t]o be educated and participate with other children with disabilities and nondisabled children in the activities described in this section

(34 C.F.R. § 300.320(a)(4).)

To do this, the IEP Team may choose to select a specific instructional methodology to include in the IEP, such as ABA therapy. The United States Department of Education, through its Office of Special Education Programs (OSEP), included a comment in the federal special education regulations, explaining: "There is nothing in the [Individuals with Disabilities Education Act (IDEA)] that requires an IEP to include specific instructional methodologies. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP." (71 Fed. Reg. 46,665 (2006).) For this student, the IEP Team chose to address the student's vocabulary needs through a vocabulary goal. (Student IEP, Apr. 8, 2024.) Without explanation, this student's IEP Team, including the parent, did not address the student's needs in the areas of using verbal and non-verbal communication appropriately to initiate, engage in, and maintain social contact with peers and adults and disruptive, impulsive, and uncontrolled behaviors. (Student IEP, Apr. 8, 2024.) There is no explanation in the student's evaluation report, IEP, or the Prior Written Notice the district provided to the parent requesting her consent for the initial provision of special education services of why the student does not need support through her IEP in these areas. (Student Evaluation/Eligibility Report, Feb. 2, 2024; Student IEP, Apr. 8, 2024; Prior Written Notice and Request for Consent for the Initial Provision of Services on the Student's IEP, Apr. 8, 2024.) Additionally, the parent did not provide any information or documentation showing that she requested that the district meet the identified needs through the student's IEP.

Federal and state special education legal requirements indicate that a parent must provide consent for the initial provision of special education services. (34 C.F.R. § 300.300(b); K.A.R. § 91-40-27(a)(2)). The parent provided consent for the initial provision of special education services for this student despite the student's IEP not including services in areas where the parent remains concerned about the student's needs. (Prior Written Notice and Request for

Consent for the Initial Provision of Services on the Student's IEP, Apr. 8, 2024.) The parent did not provide information to explain this decision nor did the parent provide any documentation to show the parent had voiced the concerns in this complaint to the district prior to filing this complaint.

The district certainly has access to information about the student's social/emotional, communication, and behavior needs, but the IEP Team, including the parent, chose not to address those needs within the student's IEP and the parent consented to the initial provision of services. The IEP Team, including the parent, decided on the initial provision of services approximately a month before the school year ended and neither the district nor the parent presented any information during the investigation that showed that the IEP Team should consider a different decision.

Conclusion

As a member of the IEP Team, the parent participated in creating an IEP to provide the student with FAPE and consented to the initial provision of services. (Student IEP, Apr. 8, 2024; Prior Written Notice and Request for Consent for the Initial Provision of Services on the Student's IEP, Apr. 8, 2024.) The IEP Team could have chosen to put a specific instructional methodology into the student's IEP to meet her needs, but it did not, choosing to meet the student's needs through the goals and services articulated in the IEP. (Student IEP, Apr. 8, 2024; 71 Fed. Reg. 46,665 (2006).) Therefore, this investigation concludes that USD 500 met its obligation to ensure that the student's IEP Team determined whether the student needed Applied Behavior Analysis (ABA) therapy to receive a free appropriate public education. 34 C.F.R. §§ [300.101](#), [.320\(a\)\(4\)](#); [K.S.A. § 72-3410\(a\)\(2\)](#); [K.A.R. § 91-40-2](#). As there is no violation, no corrective action is needed. The parent and district could choose to address the concern in this complaint by convening an IEP Team meeting.

Investigator

Laura N. Jurgensen

Laura N. Jurgensen Complaint Investigator

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)