

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #385  
ON SEPTEMBER 20, 2024

DATE OF REPORT: OCTOBER 16, 2024

This report is in response to a complaint filed with the Kansas State Department of Education on behalf of ----- by her parent, ----- . In the remainder of the report, ----- will be referred to as "the student." ----- will be referred to as "the complainant" or "the parent". ----- is -----'s father and will be referred to as "the father." Together, ----- and ----- will be referred to as "the parents."

The complaint is against USD #385 Andover Public Schools. In the remainder of the report, USD #385 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 September 20, 2024, and the 30-day timeline for the complaint investigation ends with the publication of this report.

### **Evidence Reviewed**

During the investigation, the Complaint Investigator, Gwen Beegle, reviewed all evidence and documentation, which was provided by both the district and the complainant(s). Interviews with district staff on October 4, 2024 included the following individuals: Brianna Oglesby (Kindergarten Teacher), Nicole Nickel (Speech Pathologist), Stacy Austin (Paraeducator), Joli Skaer (Teacher of the Visually Impaired), Shelly Jonas (Assistant Special Education Director), and April Hilyard (Special Education Director). Follow up questions and emails were exchanged with district administrators between September 20, 2024 and October 14, 2024. Dawn Shannon (Health Assistant) was interviewed on October 11, 2024. The parent was interviewed to clarify the issues in the complaint on September 23, 2024 and the parents were interviewed with follow up questions on October 12, 2024. Emails were exchanged with the parents between September 9, 2024 and October 9, 2024.

One person, a former employee of the district, was asked for an interview but did not respond to the investigator's requests.

Along with the interviews, the following documentation and information were used in consideration of the issue(s):

1. Certification of Eligibility for Vision Impairment for the student dated September 9, 2022
2. Evaluation and Eligibility Report for the student dated September 9, 2022
3. IEP Meeting Notes dated March 22, 2024
4. Prior Written Notice for Change in Services Including a Material Change in Services, Change of Placement, and Other Changes to the IEP dated May 10, 2024 signed by the parent giving consent on the same day
5. Progress Report for the student for the 2023-24 school year
6. Progress Report for the student dated May 17, 2024
7. Text exchange among the parents, Jacqulean Kearns (former paraprofessional), Joli Skaer (Vision Teacher) beginning August 13, 2024 at 2:38 p.m. and ending at 5:55 p.m.
8. Speech Language Data and Attendance Chart for the student with entries dated August 14, 2024 to September 25, 2024
9. Text communication between Joli Skaer (Visually Impaired Teacher) and the parent transcribed, with entries beginning August 19, 2024 to September 17, 2024
10. Break Logs for the student with entries dated August 19 to September 13, 2024
11. Nursing Log for the student, dated August 27, 2024 to September 17, 2024 provided by the district
12. [The student's] bathroom logs from nurse (provided by the parent) with entries dated August 22, 2024 to September 17, 2024.
13. Nurse Notes for Bathroom Visits (provided by the parent) with entries dated September 9, September 13, September 16 and September 17, 2024
14. Physical Therapy Notes for the student with entries dated August 27, 2024 to September 17, 2024
15. Email exchange between Shanda Siebel (Prairie Creek Elementary School Principal), Brett White (Superintendent, USD#385 Andover Public Schools) and the parents beginning September 17, 2024 at 4:19 p.m. and ending on September 24, 2024 at 10:12 a.m.
16. Texts between the parent and Jacqulean Kearns (former paraprofessional) undated "Wednesday, 10:06 a.m."
17. Letter from parent to Brianna Oglesby (Kindergarten Teacher) dated September 20, 2024 and undated reply to parent
18. Speech Therapy Schedule for the student, 2024-25
19. Paraprofessional Schedule, 2024-25
20. Classroom Schedule 2024-25
21. Paraprofessional Schedule 2024-25
22. Andover USD 385 District Calendar
23. District response to the complaint, received XXX
24. Timeline of events prepared by the district

25. Email from the parent to the investigator dated September 30, 2024 at 11:00 a.m.
26. Email exchange between the parents and (Special Education Director) copied to the investigator, beginning October 4, 2024 at 10:16 a.m. to October 9, 2024 at 7:19 a.m.

## **Background Information**

The 5 year old student attends kindergarten at an elementary school in USD #385. The student was medically diagnosed with Leber's Congenital Amaurosis (LCA9), a rare eye condition likely to worsen over time, with retinal degeneration, nystagmus, and hyperopia. The student attended the district's early childhood program and qualified for special education due to vision impairment and speech language delay. The student's evaluation dated September 9, 2022 noted difficulty in getting the student to complete the diagnostic assessments and therefore used existing testing data from an outside agency from 2021. For the evaluation, the student was observed in the school environment and the assessor noted when frustrated during the assessment, the student would yell, cry, kick and hit. The student used a cane and wore glasses. The evaluation also found the student eligible for speech language services due to language delays along with occupational therapy and physical therapy services. At the time of the complaint, the student was receiving indirect occupational therapy services, direct and indirect speech/language services, physical therapy, special education services in the regular kindergarten classroom, attendant care, and special education (vision) services.

## **Issues Investigated**

1. **ISSUE ONE**: Did USD #385 implement the student's IEP, specifically by providing the amount and type of special education, related services (including attendant care) and accommodations required by the student's IEP?
2. **ISSUE TWO**: Did the district's attendants follow the written procedures and regular classroom and/or individual student toileting schedule with the child?

## **Issue One**

**Did USD #385 implement the student's IEP, specifically by providing the amount and type of special education, related services (including attendant care) and accommodations required by the student's IEP?**

## **Applicable Law**

Federal/State statutes and regulations at 34 CFR 300.39 defines special education as specially designed instruction at no cost to the parent to meet the unique needs of a child with a disability. Further 34 CFR 300.320(a)(4) requires that the IEP include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will

be provided to enable the child: (i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum. . . and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children “

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP. Federal regulations at 34 C.F.R. 300.503(a) require school districts to provide parents with prior written notice a reasonable time before they propose or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE (free appropriate public education) to a child who has or is suspected of having a disability. State regulations at K.A.R. 91-40-27(a)(3) require school districts to obtain parent consent before making a material change in services or a substantial change in placement. The Kansas Special Education Process Handbook clarifies a material change in services: “A change in the instructional methodology used to provide a service, even if the methodology is specified in an IEP, is not a material change in services. For example, a change to a strategy within a behavior intervention plan is a change in the instructional methodology, not a material change in services” (p.8).

### **Analysis: Findings of Fact**

In the written complaint and interview to clarify the issues of the complaint, the parent alleged that the student’s IEP had not been followed. The parent alleged that the staff removed the student from the general education classroom for unwarranted lengths of time for breaks, including for playing with a flashlight in a darkened room that the parent believed was leading to behavioral problems with the student who then demanded more of these play opportunities. The parent alleged that the staff were not providing the attendant care and intimate care policy written in the IEP and alleged that the student had not had adequate bathroom breaks each day resulting in wet or soiled diapers that were left unchanged for long periods of time. The parent alleged that she alerted the district staff to the student’s current bathroom needs prior to the beginning of kindergarten.

The district responded (in brief) that the student’s IEP dated May 10, 2024 required services (Speech/Language, Physical Therapy, Special Education) outside the classroom and the student “receives most special education services (335 x 1 and 305 x 4) in the general education classroom plus attendant care services (95x1 and 105 x 4). Additionally, per [the student]’s IEP, [the student] may be out of the general education classroom for: ‘Frequent breaks when [the student] has reached a level of frustration’, ‘until [the student] is ready to continue learning’. [and] ‘Separate testing location on all assessments’ ‘until all assessments are completed.’”

The district responded that administrator interviews with staff showed no evidence that the student spent time outside the general education classroom for anything not listed in the IEP

such as special education or related services and breaks; breaks associated with escalated behavior have included calming activities in the special education classroom or the school psychologist's office. The district further responded that the student had meltdowns in the classroom that included screaming, kicking and hitting, and the adults have usually been able to return to working, but if not either paraprofessionals or the VI Teacher removed her from the classroom for a break.

The district's response concluded: "Since all of [the student's] time out of the classroom is associated with time in service listed on the IEP or in association with a break that is listed as an accommodation, there is no evidence that the district is in violation of IDEA nor is it a failure to provide FAPE."

### **Findings**

The IEP team including the parent met on May 10, 2024; the IEP team directed no change to the student's current early childhood program and proposed services for the student's kindergarten program. The district provided Prior Written Notice (PWN) of services to occur at the outset of the students kindergarten year, beginning August, 2024, to include: special education support in the general education classroom 305 minutes 4 days a week and 335 minutes 1 day a week, 105 minutes of attendant care 4 days a week and 95 minutes one day a week; that Speech Language (SPL) services would shift to a blended approach both in and out of the general education classroom, that Occupational Therapy (OT) services would be consultation only, and direct Physical Therapy (PT) 20 minutes one time a week. The parent signed giving consent for the material change in services in the PWN.

The present levels of functional and academic performance in student's IEP dated May 10, 2024 found that the student was exploring tactilely, experiencing anxiety over new things including food, and lacking in social skills. Quiet voices and using musical instruments were recommended as strategies to assist the student when needed. The student's IEP dated May 10, 2024 stated that the student's health strengths and needs included vision limitations, using a cane, transitioning from a visual to tactile learner, braille readiness and sensory training. The parent's additions related to the vision conditions of retinitis pigmentosa, macular degeneration, optic atrophy, nystagmus, and hyperopia. There was no health plan included in the IEP.

The IEP dated May 20, 2024 found that the student had needs in the social emotional area that required special education, including voicing her social emotional needs with support and that when her needs are anticipated "staff can usually guide [the student] to communicate needs in a more effective manner, calming [the student] down. [The student] will generally repeat speech models provided in these moments." Parental input noted anxiety about new things and tantrums due to being frightened of new things including food; the parent also noted difficulty introducing new activities and the need to communicate and socially interact with

children. Because the student would scream, hit, bite and kick when overstimulated, the IEP recommended that the student be introduced to things slowly by staff trained to do so and to be assisted in transitions. The parent asked that the student's speech language needs be prioritized due to her delayed language. The student's fine motor skills had improved to allow discontinuation of OT but her motor needs indicated the continued need for PT services.

The student's IEP dated May 10, 2024 had the following goals (in brief)

1. Listen to a social or perspective story, understand, comment and answer questions
2. Participate in conversations and play routines with peers and adults, sharing thoughts and feelings, taking turns, commenting and requesting
3. Improve listening, language understanding and expressive speech by responding to questions, indicating understanding, using personal pronouns, and identifying sounds
4. Use a cane to improve functional mobility, playground exploration, safety awareness, and participation
5. Open interior school doors and travel through
6. Discriminate shapes (preacademic)
7. Set, clear and read numbers on an abacus
8. Braille name

Services on the IEP dated May 10, 2024 were listed as: Speech Language (SPL) in special education room - 15 minutes one day a week, SPL indirect services - consultation 10 minutes one day a week, OT indirect services - consultation 10 minutes one day a week, PT 20 minutes one day a week, special education in the special education classroom for vision 20 minutes 4 times a week, special education support in the general education classroom for academics 305 minutes four days a week and 335 minutes one day a week, Special education support in the general classroom for nonacademics 105 minutes four days a week, and attendant care 95 minutes one day a week.

Notes following the listing of services stated "325 minutes four days per week support in the general education setting - 105 minutes four days per week attendant care support [and] 335 minutes one day per week support in the general education setting - 95 minutes attendant care support. General education support includes ELA. . . , math, science, social studies, AMP. . . , social development, class meeting/calendar, story time, and library. Attendant care support includes bathroom, lunch, recess, car rider pick up, and dismissal."

Classroom accommodations listed on the student's IEP dated May 10, 2024 included: magnification devices, materials adapted to braille, auditory instruction to supplement visual instruction, additional time to complete assignments, frequent breaks "when [the student] has reached a level of frustration in all academic and nonacademic settings until [the student] is ready to continue learning," modified physical education activities, on task supports-audio

input timer, use of a scribe, separate testing location, manipulatives and concrete objects to assist in understanding, tasks broken into smaller increments, alternative seating/fidgets for hands, and verbal cues and countdowns for transitions.

The IEP dated May 10, 2024 included the following: "Intimate Care Policy: "[The student] is currently not potty trained and needs assistance in the bathroom. Staff will assist in removal of clothing and helping with cleaning [the student's] body as needed. We will work on assisting [the student] in managing her own clothing and communicating when needing to use the restroom. When [the student] needs help in the bathroom, there is one staff member in the class bathroom with the door only partially closed and another staff member standing nearby on the other side of the door. Gloves are to be worn by staff during any changing or assisting the student in using the restroom."

### **Special education services**

The first day of school for Kindergarten students according to the district calendar was August 19, 2024.

The speech language schedule for the student showed SPL services on Wednesdays 9:05 am-9:20 a.m., and Wednesdays and Thursdays at 2:05-2:20 p.m. Speech language attendance and data provided by the district showed that the student had speech language services on the following dates: August 21 (Indirect), August 22, August 28 (2 times), August 29, September 4 (3 times), September 11, and September 12, 2024. The notes say the student was absent at the time of therapy on September 18, 2024. An interview with the Speech Language Therapist stated that she provided additional support to the student and the classroom due to the new classroom for the student, whom she knew from the preschool setting, as shown in the schedule.

PT data and schedule showed that the student received PT services for 20 minutes on the following dates: August 27, September 3, September 10, and September 17, 2024.

The VI Teacher stated in an interview that she did not take the student out of kindergarten but provided direct services there, during language arts or math time; the VI Teacher's service log also stated that she did not remove the student from general education to provide direct services and listed the following service dates: August 19, 20, 22, 23, 26, 27, 28, 29, and 30, 2024; September 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, and 17, 2024. The VI Teacher stated that she provided training support for some but not every para on the student's language, braille, using materials, talking to the student before doing things, giving wait time, limiting competing voices, and helping the student in the classroom.

The paraprofessional schedule provided by the district showed that the student had paraprofessionals or a special education teacher or therapist present from the beginning of the school day through dismissal. Two paraprofessionals, Para JK (who has since left the district) and Para S were considered to be the student's "regular" paras. The district provided

two staff schedules, Schedule 1 showing when the former paraprofessional (Para JK) was present and Schedule 2 showing two days when Para JK was absent (September 16 and September 17, 2024). Schedule 1 showed that Para JK was assigned to be with the student from arrival (8:35 a.m. to 12:35 p.m.) when Para JK had lunch. Para V was also present on Fridays during the lunch period. The schedule showed that Para S was assigned to be with the student from 12:35 p.m. to 2:45 p.m., and that Para V was present in the classroom but not specifically assigned to the student (2:45-3:00 p.m.) and that Para V was assigned to the student from 3:00-3:30 p.m. at dismissal.

Schedule 2 showed that on September 16 and 17, 2024: Para V was assigned to be with the student from arrival at 8:30 to 10:30 a.m., Para D was assigned to be with the student at 10:30 through 11:55 a.m., Para V was assigned from 12:00-1:15 p.m., Para D was assigned 1:10-2:20 p.m., Para S was assigned 2:20 - 2:45 p.m., and Para V was assigned from 3:00-3:35 dismissal. Para V was present in the classroom but not assigned to the student from 2:45-3:00.

Interviews with and statements from district staff members show that the student was assisted by paraprofessionals in the general education classroom with accommodated lessons and materials, and that the student had an alternative to the “brain break” activity in the kindergarten classroom, due to student preference. An interview with the VI Teacher showed that she provided braille lessons when kindergarten activities were not easily accommodated. Examples of accommodations provided in the classroom according to interviews were: talking to prepare for an activity, math workbook (tactile) adaptations, using the abacus, tallies and dots for math, braille reading and writing.

## **Breaks**

The parent reported that the former paraprofessional told them that some school staff were concerned about the student being removed for breaks that were too long and that the long breaks were due to socializing among staff while allowing the student to play with a flashlight. Interviews with the district staff indicated that student breaks were frequently given each day. The student was removed from the classroom at signs of frustration (screaming, hitting toward adults) and during activities like the brain break when an alternative break was provided. Breaks were also used to assist with difficult transitions (after lunch when paraprofessionals changed) or as a positive reinforcer in a “first/then” option after completion of work. In an interview, the kindergarten teacher said the breaks occurred two to four times a day, more often at the beginning and end of the day when the student was frustrated with being asked to do things she found difficult and that the regular paras took her to the resource room next door for 5-10 minutes. The paraprofessional said she used a 5 minute timer for the break period. The VI teacher said, 5 or 10, or 20 minute breaks occurred depending on the student’s level of frustration. The district reported that the VI teacher used the flashlight activity for breaks in the school psychologist’s office. The VI teacher reported flashlight play as a student preferred activity.



In a timeline prepared by the district, the kindergarten teacher reported that on 3 occasions the student was out of the room when not her normal break time or when escalated; most breaks are scheduled or due to being escalated, usually at the beginning of the day transition and during whole group reading. In the timeline, the district reported that the school psychologist stated that breaks in her office were timed at 10 minutes and didn't last longer than 20 minutes. In the timeline the district stated that the VI teacher stated that one break in the school psychologist's office lasted 20-30 minutes due to the student's level of escalation.

The district provided a break log by the VI Teacher which provided dates and times of breaks, as follows: August 19, 9:16 a.m. piano (in resource room) 12:24 p.m. piano and afternoon piano; August 20, 1:17 Theresa's room (school psychologist's office), afternoon Theresa's room, and 3:18 p.m. Theresa's room; August 22, 1:22 p.m. piano, August 23 Theresa's room, August 26 Theresa's room (flashlights as a reward), August 30, 2:00 p.m. piano, September 5, 2:40 p.m. violin (in resource room), September 6, 1:11 p.m., violin, September 9, Theresa's room, September 10, 10:15 a.m., Theresa's room (piano), September 13, 3:19p.m., piano in resource room.

Breaks were not always logged, according to staff interviews. Staff interviews also indicated that the student's escalated behavior was not being recorded or charted.

### Attendant care

Kindergarten schedule provided by the district showed:

*8:35-8:55: Greetings, attendance taking, lunch count	12:50-1:20: Phonics/Phonemic Awareness Math Brain break
8:55-9:10: Morning meeting/calendar	1:20-1:45: Whole Group Math (iReady)
9:10-10:00: Whole group reading (CKLA)	1:45-2:20: Math centers
10:00-10:30: Panther Time	2:20-2:50 S.S/Science/Writing
*10:35-10:50: Recess	*Library on Thursdays 2:20-3:00/ Counselor every other Tuesday 2:20-2:40
*10:50-11:10: Snack & Story	2:50-3:10: Developmental Play & Pack up
*11:10-11:55: AMP [Specials]	*3:10-3:25: Recess
11:55-12:05: Lunch procedures	3:30-3:40: Good things/rater for social contract/line up for dismissal (launch)
*12:05-12:35: Lunch	3:40- Dismiss
*12:35-12:50: Rest time	*bathroom opportunities scheduled

The kindergarten schedule and interviews with the kindergarten teacher showed that, in addition to going upon request, kindergarteners were taken to or "welcome to use the bathroom" in the morning upon arrival, at the scheduled break/snack time (around 10:50),

after rest time (around 12:55 p.m.), each time the class left the classroom [lunch, AMP, library/counselor], and before the last recess of the day. These opportunities are noted on the class schedule table above with an asterisk (\*).

Text message exchanges dated August 13, 2024 between the parents, Para JK and the VI teacher showed that the parent stated, "I wanted to talk with you two about [the student's] potty training. [The student] still requires a diaper although much more eager to use a toilet, but the issue remains that [the student] is not fully potty trained. In that case, I wanted to know if she would be allowed frequent bathroom breaks to help encourage her to use the toilet rather than waiting until her pullups are full and needing changed." The reply from Para JK showed her support for the idea and the VI teacher suggested going every 45 minutes at natural breaks in the kindergarten classroom schedule.

The student's first day of school was August 19, 2024. The parents reported that the student returned home with "pee soaked clothes" on August 19 and August 20, 2024. School records show the student was absent on August 21, 2024 for illness.

According to district staff interviews, the district purchased a child-size potty seat to go over the regular sized toilet and the Health Office allowed for privacy to assist the student with using the toilet and changing her pull up. According to an interview with the nursing assistant, it was an established practice to log each time the student used the bathroom in the Health Office, including noting which staff person brought her to the office and the witness. The nursing assistant stated that each time she was present in the building, the intimate care procedure for changing and witnessing was followed and logged. The nursing assistant stated that on one occasion, (September 16, 2024) around 1:00 p.m. or after, paraprofessionals who did not usually work with the student brought the student to the Health Office with a bowel movement in her pull up that had dried, indicating to her that it had not been immediately changed despite the evident smell. The nursing assistant and the nursing log showed that the nursing assistant instructed the paraprofessionals that paras were capable and responsible for the student's toileting needs and changing, and that the nursing assistant notified her supervisor (the nurse) of the situation so that administration could respond.

The nursing logs provided by the district and the parent showed the following documentation of toileting using the intimate care policy on the IEP by date, number of visits to the Health Office, and visit start times as recorded for each day.

Date (visits)	Times	Date (visits)	Times
August 27 (3)	9:43 am, 11:49 am and 2:22 pm	August 28 (2)	11:13 am, 2:30 pm
August 29 (3)	10:10 am, 11:08 am, 2:40 pm	August:30 (4)	9:13 am,10:45 am, 11:05 am, 3:03 pm
September 3 (3)	10:00 pm, 11:00pm, 1:30 pm	September 4 (3)	9:30 am, 11:01am, 1:35 pm
September 5 (3)	9:43 am, 11:10 am, 2:00 am	September 6 (2)	10:00 am, 11:15 am

Date (visits)	Times	Date (visits)	Times
September 9 (1)	2:34 pm	September 10 (2)	9:50 am, 1:40 pm
September 11 (2)	10:39 am, 1:40 pm	September 12 (3)	9:19 am, 10:45 am, 1:50 pm
September 13 (2)	10:04 am, 11:30 am	September 16 (1)	1:10 pm
September 17 (1)	10:30 am		

The nursing logs show that the student was assisted in toileting as per the intimate care policy three or four times on 7 days, two times on 5 days, and one time on three days, for a total of 15 days logged. The student was in attendance at the school for a total of 20 days beginning August 19, 2024 and ending September 17, 2024, according to the school calendar and student record of attendance provided by the principal.

According to the parents, the district and the nursing logs, the nurse called the parents to alert them to the bathroom incidents on September 16 and 17, 2024, when she called the parents to discuss the lack of bathroom visits to the Health Office, specifying that on September 9, 2024, the student was not brought until 14:33; on September 16, 2024 the student was not brought to change until 13:20 when the student was “caked in BM, dried to skin, diaper rash noted;” and on September 17, 2024 when the student was brought only at 10:30 am.

### **Conclusion**

The student’s IEP required that she receive special education and related services, and the district provided the requisite amount of services, with discrepancy in location from the IEP, with the VI Teacher providing special education services in the general classroom rather than in the special education room as stated in the IEP.

The district was correct in its response that the student was not removed from the classroom for any purpose not stated in the IEP. The district has the authority to choose the instructional methods used at school, which would include the flashlight play in this instance.

The IEP specifies frequent breaks “when she has reached a level of frustration in all academic and nonacademic settings until she is ready to continue learning;” and the IEP does not specify the frequency, duration, or activity of the breaks. District staff used breaks for this purpose and also as reinforcement in a “first/then” instructional strategy. Breaks were not routinely logged nor escalated behavior charted.

The Kansas Special Education Policy Manual (p. 108) states: “Sometimes it is difficult to be precise in determining just how much service will be required throughout the year. Sometimes services are provided on a situational basis, such as ‘reading the math test to the child.’ The IEP should not indicate these services are ‘as needed.’ The IEP has to describe when and how the service will be provided throughout the year”. In this situation, the district is directed to use existing data to estimate the amount of service to be provided. In addition, “the amount of services to be provided must be stated in the IEP so that the level of the school’s commitment of resources will be clear to parents and other IEP team members. The amount of time to be

committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP (Federal Register, August 14, 2006, p. 46667)."

In this case, the accommodation of "frequent breaks 'when [the student] has reached a level of frustration in all academic and nonacademic settings until [the student] is ready to continue learning" was not logged or otherwise measured, precluding an estimation of how much time the student was being removed from required services in the general education classroom. In addition, the IEP does not specify the amount of time committed to the breaks in a manner clear to those implementing the IEP. It is noted that this is a kindergarten child during the first weeks of her kindergarten year, and thus a period of adjustment may have been expected.

At the time of the IEP (May 10, 2024), the district was aware that the student was not potty trained and made a plan known as an intimate care policy by which she could have her toileting needs met in kindergarten. The IEP's intimate care policy implied that incidental teaching related to toileting would occur, stating, "We will work on assisting [the student] in managing her own clothing and communicating when needing to use the restroom," as well as helping with cleaning her body. Attendant care was specified in the IEP as a service requiring either 95 or 105 minutes per day. "Attendant care involves providing assistance for people with disabilities to perform tasks they would normally be doing for themselves" in order to maximize independence across settings and situations (KSDE (2017)).

The kindergarten schedule and interview with the kindergarten teacher showed ample opportunities offered to kindergarteners to go to the bathroom, either as part of the group, individually, or by request at any time. In a text prior to the beginning of school, the parent asked and was assured that the student would be toileted at naturally occurring opportunities in the kindergarten schedule, as frequently as every 45 minutes. The district is correct in that the frequency of toileting is not specified in the IEP. However, attendant care for "bathroom" is specified. It is a reasonable assumption that the adult assigned to provide attendant care would provide the structure and assistance needed for the visually impaired and language-delayed 5-year-old to use the toilet at least as often as the sighted kindergarteners with typical language and more often if individually needed.

Based on the foregoing, *it is substantiated* that USD #385 did not implement the student's IEP, specifically by providing the amount and type of special education, related services (including attendant care) and accommodations required by the student's IEP.

## **Issue Two**

Did the district's attendants follow the written procedures and regular classroom and/or individual student toileting schedule with the child?

### **Applicable Law**

Each IEP for a child with an exceptionality must include a statement of: the special education services; related services; supplementary aids and services (including accommodations), based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child; a statement of the program modifications; and supports for school personnel that will be provided for the child to: advance appropriately toward attaining the annual goals; be involved in and make progress in the general education curriculum, and participate in extracurricular and other nonacademic activities; and be educated and participate with other children with exceptionalities and nonexceptional children in these activities (K.S.A. 72-3429(c)(4)).

The IEP team must determine whether the child requires supplementary aids and services, that are appropriate and necessary, to afford the child an equal opportunity for participation in nonacademic and extracurricular services and activities. K.A.R. 91-40-3(b)(1) states: "Each agency shall provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities, including the provision of supplementary aids and services as determined to be necessary by the child's IEP team." Federal regulations at 34 C.F.R. 300.117 states that "The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings."

### **Analysis: Findings of Fact**

The parent alleged that the student's attendant care for toileting was not carried out frequently enough. The parent alleged that not all days of attendant care for toileting were logged in the nurse's bathroom, indicating that the student either did not go to the bathroom on those days or the intimate care policy was not followed. Further, the parent alleged that she had alerted the student's teacher of the need to frequently assist the student in the bathroom, and she alleged she had been assured that the student would be assisted in this manner. The parent alleged that the student's toileting needs were neglected by the district.

The district responded (in full): "For the last two IEPs, including the current IEP (Dated 5/10/24), there has been no reference to an individual toileting schedule. The only reference to needing support for toileting is in the special considerations section of the IEP, it reads:

Intimate Care Policy: [the student] is currently not potty trained and needs assistance in the bathroom. Staff will assist in removal of clothing and helping with cleaning her body

as needed. We will work on assisting [the student] in managing her own clothing and communicating when needing to use the restroom. When [the student] needs help in the bathroom, there is one staff member in the class bathroom with the door only partially closed and another staff member standing nearby on the other side of the door. Gloves are to be worn by staff during any changing or assisting the student in using the restroom.

Per interviews, there is no evidence that the intimate care policy was not followed as there was never a time two people were not present when [the student] needed help in the bathroom or with help cleaning her body.

While there is no reference in the IEP to a toileting schedule, the staff did work to provide consistent bathroom opportunities. Per interviews with staff, these normally occurred at 9:30am, 11:30am and 2:30am. There is evidence that on 9/9, 9/16 and 9/17 [the student] only went to the nurse's office one time for a bathroom break. On these days, she was found to have urinated in her diaper (9/9), had a bowel movement (9/16) and there is no documentation of either urine or a bowel movement on the 9/17 date. The district acknowledges that on these days [the student] should have had more frequent restroom opportunities based on her normal routine. On each of these days, the paraeducator assigned to [the student] was different from her normally assigned staff and unfamiliar with the bathroom expectations. On 9/16, per interviews, the paraeducator assigned to [the student] from 12:35-1:00 was new and under the assumption that it was not her responsibility to take [the student] to have her pullup changed when she became aware that [the student] had had a bowel movement in her pullup. [The student] was then taken to the nurse's office at 1:10 when the paraeducators were directed to do so. It should be noted that staff indicate that [the student] usually lets them know if she needs to go to the bathroom or if she has had an accident by saying 'You need potty?' or 'You poopy?'

The district acknowledges these missed bathroom opportunities need to be addressed and did so to staff in an email on 12:13 pm on 9/17 as soon as the principal was made aware of the situation. Additionally, on 9/18/24 at 8:17am, an email was sent to parents by the principal with a plan for implementation and letting them know that personnel matters would also be addressed.

While these issues do need to be addressed and have been per email documentation, the district does not believe these three missed bathroom [times] are a violation of IDEA nor is it a failure to provide FAPE."

## Findings

Findings of Issue One are incorporated herein by reference.

The nurse's log reported that the student had at least three bathroom breaks as specified in the district's response, approximating the schedule given (9:30am, 11:30am and 2:30am.) on 7 of the 20 days when the student attended school.

## Conclusion

In this case, the student's IEP included an intimate care policy that focused on a two-person procedure and stated that staff would assist the student in requesting and using the bathroom. The district was aware that the student was not potty trained and established an intimate care policy to assure that the student's toileting could be done in privacy, supported by two adults. The district's response to the complaint showed that the minimum number of toileting opportunities to be offered by staff was three times a day. The district failed to assure that the student had the opportunity to go to the bathroom each day at this rate, as often as the child needed, or as often as other kindergarten children could within the classroom schedule. It is noted that nursing logs and interviews indicated that when the student was taken to the Health Office, the two-person procedure was followed. Based on the foregoing, *it is substantiated* that USD 385 district's attendants did not follow the written procedures and regular classroom toileting schedule with the child.

## **Summary of Conclusions/Corrective Action**

1. **ISSUE ONE:** A violation of 34 C.F.R. 300.323(c)(2) was found, based on the facts above. Corrective action is required (as follows):
  - a. **CORRECTIVE ACTION:**
    - i. By November 19, 2024, USD #385 shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will comply with federal regulations 34 C.F.R. 300.323(c)(2) which require that school districts ensure special education and related services are made available to the child in accordance with the child's IEP.
    - ii. By November 19, 2024, if the student returns to school, the district will provide service logs to be shared with the IEP team showing the amount, frequency and duration of breaks and logs of attendant care from the time the student returns to school to the time of the IEP meeting referenced in CA a(iii).
    - iii. By November 19, 2024, the district must reconvene the Student's IEP Team and clarify the frequency, location, and duration of services (including accommodations) for special education and related services and include discussion of special education services and support in general education settings, breaks and attendant care so that the level of

the schools commitment is stated in a manner that is clear to all who are involved in both the development and implementation of the IEP. By November 8, 2024, the district will demonstrate that it has worked with the parents to set an IEP date and offered 10-day notice of an IEP meeting. The district will provide PWN to the parents and seek parental consent for a material change in services or substantial change in placement (K.A.R. 91-40-27(a)(3)).

- iv. By December 5, the district will provide evidence of completion of 1(a)ii and 1(a)iii to SETS.

2. **ISSUE TWO:** A violation of 34 C.F.R. 300.117, K.S.A. 72-3429(c)(4) and K.A.R. 91-40-3(b)(1) was found based on facts listed above. Corrective action is required (as follows):

a. **CORRECTIVE ACTION:**

- i. By November 19, 2024, USD #385 shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will comply with federal and state regulations 4 C.F.R. 300.117, K.S.A. 72-3429(c)(4) and K.A.R. 91-40-3(b)(1) which require that school districts ensure special education and related services are determined and provided as required in nonacademic settings.
- ii. By November 19, 2024, the District must reconvene the Student's IEP Team and clarify the frequency, location, and duration of services of special education and related services including attendant care, accommodations and services required by the student in nonacademic settings. By November 8, 2024, the District will demonstrate that it has worked with the parents to set an IEP date and offered 10-day notice of an IEP meeting.
- iii. By December 5, the district will provide evidence of completion of 2(a)ii to SETS.



## **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](mailto: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)