

Special Education Formal Complaint Decisions 2015 Fiscal Year

Each decision has been redacted to remove the identification of the school district and any personally identifiable information of the student or the student's parents. The initial file number represents the fiscal year in which the case was filed and the letters immediately following the initial file number represent the kind of hearing held. Accordingly 15FC01 signifies a Formal Complaint filed in the 2015 fiscal year (July 1, 2014 to June 30, 2015). The case citation of 15FC03 Appeal Review signifies the decision of the state appeal committee for case number 15FC03. All files are PDF.

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Kansas State Department
of Education

Early Childhood, Special Education
and Title Services

Complaint Investigation Report

Complaint Investigator (CI):	Richard J. Whelan
Complaint Filed:	August 18, 2014
Report Completed:	September 8, 2014
Complaint Number:	15 FC -001

This report is in response to a complaint of noncompliance filed under K.A.R. 91-40-51. [redacted], a resident of [redacted], Colorado, filed the complaint on behalf of his son, [redacted] [DOB: [redacted]]. [redacted] and his mother, [redacted], are residents of [redacted]; Kansas USD [redacted]. USD [redacted] is a member district of the Kansas Special Education Cooperative # [redacted] which is located in [redacted], Kansas. The student's primary special education classification is "Developmental delay" [K.A.R. 91-40-1 (q)].

Background

During the 2013-2014 school, the student was in a USD [redacted] integrated special education preschool setting for three hours per day, four days per week, and an early childhood program without special education services four hours per day Monday through Thursday and seven hours on Friday.

For the 2014-2015 school year, the student is in a full-day kindergarten setting. He is receiving 150 minutes per day of special education services in a resource room, five days per week, for instruction in arithmetic and reading. He is also receiving speech/language related services twice a week for 20 minutes per session. Additionally, the student receives paraeducator support in the kindergarten classroom for 60 minutes per day, five days per week, for instruction in science and social studies. He spends approximately three hours per day in the kindergarten classroom for general education instruction and supports.

Complaint Allegations

The **first allegation** was that the student was placed in special education services even though his test scores were comparable to same-age peers. Therefore, he should be in a general education setting.

The student's initial evaluation and placement in special education occurred on May 20 2013. The parent's written formal complaint was received on August 18, 2014.

Based upon federal [34 CFR 300.153 (c)] and Kansas special education regulations [K.A.R. 91-40-51 (b)], a formal complaint must allege that a violation of special

education laws and/or regulations occurred not more than one year prior to the date that the complaint is received by the Kansas Commissioner of Education. Therefore, the CI did not investigate this allegation because the one year timeline for filing a complaint was exceeded. However, if the parent has continuing concerns regarding this matter, he may make them known prior to a proposed reevaluation of his son.

The **second allegation** is that the student's IEP for the 2014-2015 school year should not include services in a special education class because his needs can be met in the all-day general education kindergarten classroom.

The student's parents are divorced, but the student resides in USD with his mother and stepfather.

The cooperative's director of special education submitted documentation that the father received notice of the student's May 7, 2014 IEP meeting and that he participated in that meeting, as did the student's mother.

Therefore, the district/cooperative fulfilled its obligation to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—(a) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (b) scheduling the meeting at a mutually agreed on time and place. [See 34 CFR 300.322 and K.A.R 91-40-17.]

On August 15, 2014, the student's mother gave written consent to implement the IEP that was proposed at the May 7, 2014 IEP meeting. On August 19, 2014, the cooperative's school psychologist notified the father of this action.

The cooperative provided Prior Written Notice of the student's May 7, 2014 IEP meeting and its proposal, including a request for written consent, to implement the IEP to both parents. However, consent from one parent is sufficient to implement an IEP, and the mother gave that on August 15, 2014. In the event that the school receives consent forms from both parents, with one parent providing consent for the action and the other denying consent, the school is deemed to have received consent and must fulfill its obligation to provide the IEP services to the student.

Even though the student's father did not respond to the request to give written consent for implementing the proposed IEP, he did make known his concern about the student's IEP services by filing a formal complaint on August 18, 2014.

The father participated in the IEP meeting and had an opportunity to communicate his concerns about the student's educational needs to other members of the IEP team. Subsequently, the IEP team, after consideration of the student's present levels of performance, decided to implement the IEP services described in the second paragraph of the background section of this report. And, the mother gave written consent to implement

those services. Therefore, based upon the facts stated above, the CI could not substantiate this allegation.

The **third allegation** is that the student did not need special education services during a 2014 summer ESY because he retains knowledge during extended time away from classroom instruction.

This allegation is based upon a statement in the present levels part of the IEP that the student has good rhyming abilities, knows colors, and counts orally to 21 (e.g. rote learning), and that these skills demonstrate capability of long term retention of information.

Under the heading of academic skills in the present levels section of the IEP proposed on May 7, 2014, there is a statement that extended school year (ESY) services should be discussed because of the student's academic needs and social challenges. After considering information in the present levels part of the IEP, especially the data regarding skills such as letter sounds, letter names, number identification, and counting with one-to-one correspondence (e.g. matching a number on a die by placing the same number of toy boats in a basin of water), and from standard scores related to receptive and expressive language, the IEP team decided that ESY services were not needed during the 2014 summer session.

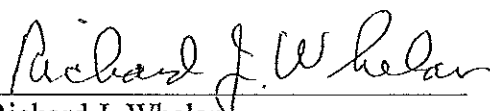
Because the IEP team, which included the father, decided not to provide the student with ESY services during the 2014 summer session, there is no conflict between the allegation and the facts related to it. That is, a compliance issue does not exist.

Corrective Action

Based upon the facts and conclusions described above, a corrective action is not required for the second and third allegations.

Right to Appeal

Either party may appeal the findings of this report by filing a written appeal with the State Commissioner of Education; 900 SW Jackson Street, Suite 620; Topeka, Kansas 66612-1212 within 10 calendar days from the date of this report. A full description of the appeal process is provided in Kansas Administrative Regulation K.A.R. 91-40-51(f). A copy of this regulation is attached to this report.



Richard J. Whelan
Complaint Investigator

K.A.R. 91-40-51. Filing complaints with the state department of education.

(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).

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION, AND TITLE SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # COMMUNITY SCHOOLS ON JANUARY 28, 2015

DATE OF REPORT: FEBRUARY 27, 2015

This report is in response to a complaint filed with our office by _____, the mother of _____ Ms. _____ will be referred to as "the parent" in the remainder of this report. _____ is identified as a child with an exceptionality and is the subject of this complaint. _____ will be referred to as "the student" in the remainder of this report. The complaint included eight allegations: (1) the student did not receive the special education services required by the IEP and was denied access to the general curriculum; (2) the student's transfer IEP that the district adopted is not the same as the IEP subsequently drafted by the district in its own system; (3) at an IEP team meeting in November 2014 the district changed the dates of the adopted transfer IEP to begin in November 2014; (4) at an IEP team meeting in November 2014 the district presented an IEP to the parent with IEP goals that had been significantly reduced without the parent's consent; (5) the district ignored or denied the parent's repeated requests for compensatory services; (6) the student did not receive the accommodations and modifications required by the IEP; (7) the parent's request for a new special education teacher for the student was denied; and (8) because of the lack of special education services the parent was forced to withdraw the student from the district.

Investigation of Complaint

The investigator reviewed the complaint submitted by the parent, the complaint response letter from the special education director for the district, the timeline of events from the special education director for the district, documents supporting the voluntary corrective action the district took regarding a procedural error that occurred with this student, the "IEP at a Glance" drafted by the student's special education teacher, plans created by general education staff members at the student's school to implement the accommodations and modifications required by the student's IEP, the student's IEP from Arizona (dated March 27, 2014) that the district adopted, an IEP the parent submitted that the Interlocal appears to have drafted based on the Arizona IEP (dated August 26, 2014), an IEP dated November 11, 2014, submitted by the Interlocal that is marked "DRAFT," an IEP dated November 11, 2014, submitted by the parent that is not marked "DRAFT," emails between the student's special education teacher and staff at

the student's school, emails between the student's special education teacher and the parent, emails between staff at the student's school and the parent, emails between the parent and Interlocal staff, responses from staff at the student's school to the formal complaint, documentation that the district adopted the student's IEP from Arizona, Prior Written Notice and Request for Consent for a change to the student's IEP that is dated August 26 2014, the student's current IEP (dated December 18, 2014), and the Student Exit Form (dated January 9, 2015). Additionally, the investigator interviewed the parent by telephone on February 23, 2015, and called the parent on February 24, 2015. The investigator also exchanged emails with the parent on February 23, 24, 25, and 26, 2015. The investigator also spoke with the special education director by telephone on February 3, 4, and 24 2015. The investigator exchanged emails with the special education director on February 2, 3, 4, 9, 18, 20, 24, and 25 2015. The investigator emailed the student's special education teacher on February 24, 2015, and spoke with the special education teacher by phone on February 25, 2015.

Background Information

The student is a seventeen-year-old boy who is in the eleventh grade and has been identified as an exceptional child. The parent stated in the formal complaint that the student's exceptionality is in the area of written expression. The student's IEP that was in effect during the events that gave rise to this complaint was initiated in Arizona on March 27, 2014. The student transferred into Unified School District # (the district) from Arizona at the beginning of the 2014–15 school year and the parent chose for the student to attend St. High, a private school, in the district. The parent informed the district that the student had an IEP in Arizona and requested special education services from the district. On August 26, 2014, the district agreed to adopt the student's Arizona IEP dated March 27, 2014, as written. Hereinafter the student's March 27, 2014, IEP will be referred to as the "Arizona IEP." Kansas Interlocal # (the Interlocal) provides special education services to students for which USD is responsible. In Kansas, when a public school district is serving a student in a private school the public school district, in consultation with the parent or guardian of the student and private school officials, determines the site for services. K.S.A. 72-5393. The Interlocal chose to provide the student with special education and related services at St. High (private school).

Issues and Conclusions

ISSUE ONE: THE STUDENT DID NOT RECEIVE THE SPECIAL EDUCATION SERVICES REQUIRED BY THE IEP AND WAS DENIED ACCESS TO THE GENERAL EDUCATION CURRICULUM.

Note: The parent alleges in issue eight that she was forced to withdraw the student from the district because the student was not provided with the special education services required by the IEP. This investigator interprets that concern to allege that the student was not provided with a free appropriate public education (FAPE). This investigator will

analyze issue eight within the analysis for issue one because the issues are so closely connected.

A. Student did not receive the special education services required by the IEP.

The Arizona IEP, which was adopted by the district, required that the student would receive 50 minutes of special education services every school day in the regular education classroom. On August 15, 2014, the special education teacher emailed the parent to introduce herself, inform the parent that the district intended to adopt the Arizona IEP, would be entering the Arizona IEP information onto the Interlocal's Kansas IEP forms, then hold a meeting to ensure the Kansas IEP forms were correct, and officially adopt the Arizona IEP. Additionally, the special education teacher informed the parent that she would begin providing special education services comparable to the Arizona IEP to the student on August 18, 2014, during the student's English class.

On August 20, 2014, the parent emailed the student's special education teacher and stated that the student was unhappy with how the student was receiving the special education services required by the IEP. The parent alleged in the formal complaint that the student "was upset and felt violated since [the special education teacher] sits next to [the student] during class." The parent goes on to state that the special education teacher "did not need to sit next to [the student] because [the student] does not require one-on-one services in [the student's] IEP."

In response to the parent's request to provide the student's special education services in a different format, on August 26, 2014, the Interlocal drafted a Prior Written Notice and Request for Consent to make a material change in services to the student's IEP. This change is described in the Prior Written Notice as "Beginning August 27, 2014 [the student] will receive 30 minutes of pullout service 3 days a week for the duration of the IEP." The Prior Written Notice states that it was hand delivered to the parent on August 26, 2014. The district failed to get consent for this material change in services and the parent does not mention this proposed amendment to the student's IEP in the formal complaint. The parent acknowledges in the formal complaint that she requested that the student's special education services be provided in a different format; however she alleges that the student was never informed of the new schedule or location for the student's special education services.

34 C.F.R. § 300.323(c)(2) requires the district to provide the student with the special education and related services stated in the student's IEP. This investigator finds no violation with how the student's special education teacher began to implement the student's IEP on August 18, 2014. The Arizona IEP stated that the student would receive special education services in the general education classroom. Additionally, the Arizona IEP states that a "[t]eam taught classroom with a special education teacher are needed [sic] in the area of English." The Arizona IEP does not contain any requirement that the student not be provided with one-on-one support as part of the student's special education services, or that the teacher was not to sit next to the student during class.

However, beginning on or about August 20, 2014, the special education teacher stopped providing the student with special education services in the regular education classroom at the request of the parent. On August 26, 2014, Interlocal staff, including the special education teacher, met with the parent to adopt the Arizona IEP. At this meeting the participants discussed providing services to the student in a different location to alleviate the concerns presented by the parent in her August 20 email. The district maintains that those present agreed that the special education teacher would provide the student with special education services during the student's study hall period three days a week for 30 minutes each time for a total of 90 minutes per week. This change in services was communicated to the parent through the Prior Written Notice that was never formally consented to by the parent, as noted previously. The special education teacher claims that this change in services was communicated to the student verbally by the principal. The principal taught the student's Psychology class that occurred immediately prior to the student's study hall. The special education teacher stated that the principal informed the student that the student was to go to study hall in the library to meet with the special education teacher to receive special education services. The principal does not mention this in his response to the formal complaint. Additionally, the special education teacher said that she twice created a calendar for the student regarding the student's special education services. The special education teacher said that both times she created the calendar the student's English teacher provided the student with the calendar. The English teacher stated in her response that she was aware of the change in location for the student's special education services and that to her knowledge the student never went to study hall to receive special education services.

The special education teacher also stated that she was not comfortable going to the student directly to request that the student attend special education services due to the concerns expressed previously by the parent, that the special education teacher's interactions with the student had caused the student to feel singled out and upset. The special education teacher stated that she wanted to be sensitive to the student's feelings and respectful of this request. On September 18, 2014, the parent emailed the special education teacher with concerns regarding the student's special education services. The special education teacher responded that she had been present at each of the student's study hall periods to offer special education services, but the student had never attended. The special education teacher went on to state that she "didn't want to make a big deal about going to get [the student] during study hall" in response to the parent's concern and also requested guidance from the parent on how to handle the student's lack of attendance at special education services. The parent responded to the special education teacher's email the next day, but did not provide any thoughts on the student's lack of attendance to special education services.

The special education teacher stated that once the district changed the location for the student's special education services the student accessed services one time. In addition to the previously noted efforts by the student's teachers to encourage the student to attend special education services, the student's IEP team also met in November to discuss the student's lack of attendance at special education services. At this meeting,

the district maintains that the parent agreed to permit the special education teacher to go into the student's English class and sit at the back of the room. The student could then use that time to access special education services. Because the proper procedures had not been followed to amend the student's IEP, the Arizona IEP, which was the IEP in effect at that time, stated that services would be provided in the general education classroom. Therefore, the special education teacher's offering of services in the general education classroom did not violate the student's IEP. The special education teacher and English teacher both state in the district's response that the student refused to participate in special education services and did not seek assistance from the special education teacher.

K.S.A. § 72-988(b)(6) requires the district to obtain parent consent for a material change in services. A material change in services is defined as an increase of 25% or more of the duration or frequency of a service. K.S.A. § 72-961(mm). The change proposed by the district in the August 26, 2014, Prior Written Notice and Request for Consent would have reduced the student's special education services from 250 minutes per week to 90 minutes per week, a reduction of 160 minutes per week or 64% of the service. This constituted a material change in services that required the parent's consent. This investigator substantiates a violation of § K.S.A. 72-988(b)(6). This violation is procedural in nature.

This investigator determines that the procedural violation of not obtaining the parent's consent for a material change in services does not result in a denial of FAPE to the student because the reduction of service time in the IEP did not result in a reduction of actual service time for the student. The student chose not to access any special education services. The district provided a great deal of information showing its reasonable efforts to encourage the student to participate in special education services. Additionally, the parent was aware of the student's lack of attendance at special education services as shown through her email exchange with the special education teacher on September 18, as well as her attendance at November and December IEP team meetings for the student where this issue was discussed. The district made special education services available to the student and repeatedly encouraged the student to attend as well as sought input from the parent on how to encourage the student to attend. This investigator determines that the district offered special education services to the student and that because the student refused to participate in special education services the district's procedural violation did not deny the student FAPE.

B. The student was denied access to support the general curriculum.

The parent alleges in the formal complaint that the student was denied access to the general curriculum. The parent provides no facts in the formal complaint to support that the student was denied access to the general curriculum. In its response the district provides extensive information from staff at the private school that shows the access to the general curriculum the student's teachers provided.

The district is required to provide specially designed instruction, in accordance with the student's IEP, to ensure the student's access to the general curriculum, so that the student can meet the educational standards within the district that apply to all students. K.A.R. § 91-40-1(III). In this case, the district made a good faith effort to provide those services, but the student declined to accept them. Because the parent has not presented any facts which show that the student was denied access to the general curriculum or that the student's IEP was not designed to permit the student access to the general education curriculum and the district has provided a great deal of information showing that the student was provided with access to the general education curriculum this investigator does not find a violation of special education law regarding this concern.

ISSUE TWO: THE STUDENT'S TRANSFER IEP THAT THE DISTRICT ADOPTED IS NOT THE SAME AS THE IEP SUBSEQUENTLY DRAFTED BY THE DISTRICT IN ITS OWN SYSTEM.

On August 26, 2014, the district adopted the student's Arizona IEP, dated March 27, 2014, "as it is written." This investigator requested a copy of the student's Arizona IEP during the investigation, which the Interlocal provided. An email from the student's special education teacher to the parent dated August 15, 2014, states that the school psychologist "will be entering the data into Kansas's IEP forms." Additionally, the special education teacher states that after the data are entered staff would like to meet with the parent to "make sure that everything is correct." This information lead this investigator to believe that the Interlocal took data from the Arizona IEP, entered it into the Interlocal's electronic system, thus creating an IEP for the student in the Kansas system. This investigator requested this "August Kansas IEP" from the Interlocal. The director stated in his response to this investigator that "[t]he Interlocal doesn't go back and embed the Az IEP with in [sic] the SEK Interlocal's IEP. The Az IEP is the SEK Interlocal IEP." This investigator requested a copy of the August Kansas IEP from the parent, which the parent provided. The August Kansas IEP is dated August 21, 2014 and is not marked as a draft anywhere on the document.

This investigator carefully reviewed the August Kansas IEP and compared it to the Arizona IEP to determine whether all of the information from the Arizona IEP was accurately reflected in the August Kansas IEP. This investigator's comparison of the August Kansas IEP and the Arizona IEP was limited only to the areas that the parent expressed concern about in the formal complaint: Goals, Special Education Services, Related Services, Program Modifications, Participation with Non-Disabled Students in the Regular Education Environment, Participation in District-wide Assessments, Participation in State Assessments, and Progress Report. These subject headings are taken from the August Kansas IEP and then the relevant information from the Arizona IEP was compared to the August Kansas IEP.

This investigator found a number of discrepancies between the Arizona IEP and the August Kansas IEP. Each of the student's goals is worded differently in the student's August Kansas IEP than the goal was worded in the Arizona IEP. This investigator did

not determine whether the rewording of the goal would potentially create a different outcome. This investigator is simply stating that the wording of the goals changed from the Arizona IEP to the August Kansas IEP. The August Kansas IEP, in the section for Special Education Services, appears to include form information that must be filled in by staff. This information is not filled in and as such there are no special education services on the August Kansas IEP. Likewise, the section on the August Kansas IEP for Related Services was not filled in. However, the Arizona IEP determined that related services were not necessary for this student. When this investigator compared the modifications from the Arizona IEP to the August Kansas IEP there are minor word changes noted, but likely nothing that changes the requirements included in this section. However, the August Kansas IEP is unclear regarding the frequency, duration, and location of these modifications. In the August Kansas IEP it states in the section regarding participation with non-disabled students in the regular education environment that the student "will participate in all classroom activities except for the time that [the student] is in the resource room." Additionally, the August Kansas IEP states that the student "shall receive a portion of [the student's] services in the resource room." The Arizona IEP makes no mention of this student spending time outside of the regular education environment. This investigator assumes that this provision in the August Kansas IEP refers to the IEP amendment for which the district failed to obtain parental consent.

When a student with an exceptionality, who has a current IEP in another State, transfers to a school district in Kansas, the new school district, in consultation with the parents, must provide the student with FAPE, including services comparable to those described in the student's IEP from the previous school district. K.S.A. § 72-987(g)(1). The district must provide the student with comparable services until the district either adopts the transferred IEP or develops and implements a new IEP for the student. *Id.* On August 26, 2014, the district adopted the student's Arizona IEP, dated March 27, 2014, "as it is written." The Interlocal maintains that it was implementing the student's Arizona IEP. The parent maintains that the Interlocal drafted an IEP that was different than the Arizona IEP.

To determine what version of the IEP the Interlocal was implementing this investigator reviewed the "IEP at a Glance" prepared by the special education teacher for staff at the private school. This IEP at a Glance included goals that matched the goals in the August Kansas IEP, but not the Arizona IEP. Additionally, the IEP at a Glance included the program modifications and accommodations from the Arizona IEP with a couple of word omissions that this investigator does not believe affected a teacher's ability to implement the program modifications and accommodations as required by the Arizona IEP. However, there is no frequency, duration, or location included for any program modification or accommodation listed. Additionally, the IEP at a Glance does not include any information on accommodations for assessments. This investigator's review of the IEP at a Glance leads this investigator to conclude that there was an August Kansas IEP and this IEP did not accurately reflect the information found in the Arizona IEP. This investigator substantiates a violation of K.S.A. § 72-987(g)(1) and 34 C.F.R. § 300.323(c)(2) because the district adopted the Arizona IEP and then implemented an altered version of this IEP.

The district must ensure that each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of this student's IEP be informed of his or her specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP. 34 C.F.R. § 300.323(d). 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. The omission of frequency, duration, and location regarding program accommodations and modifications as well as the omission of information regarding accommodations for assessments from the IEP at a Glance that the Interlocal provided to private school staff did not fulfill the requirements of 34 C.F.R. § 300.323(d). This investigator finds a violation of 34 C.F.R. § 300.323(d) regarding this concern. However, this investigator notes here, and will discuss more fully in issue six, that the private school staff were under no obligation to implement the requirements of this student's IEP.

The parent presented a concern in the facts section of issue six of the formal complaint that is more appropriately addressed here. The parent alleged that at the meeting in August where the district and parent agreed to adopt the Arizona IEP, not all of the required members of the student's IEP team were present. The Interlocal responded by stating that this meeting was between the parent and staff (private school principal, school psychologist, and special education teacher (for part of the meeting)) to adopt the student's IEP. The district maintains it is not required to hold an IEP team meeting when adopting the IEP of an interstate transfer student.

If the former IEP is adopted by the new district and the parents agree to its use, it can be implemented. There is no requirement that the new district hold an IEP meeting to adopt the former IEP if the new district and the parents agree to its use. *See, e.g., In re Student with a Disability*, 44 IDELR 83 (SEA MT 2005). The August meeting where the district and the parent agreed to adopt the Arizona IEP was not an IEP team meeting and therefore the members of the student's IEP team were not required to be present. The only parties required to be present to adopt a transfer IEP are a district representative and the parent. K.S.A. § 72-987(g)(1). At the August meeting at least two district representatives and the parent were present. Therefore, this investigator does not substantiate a violation of special education law regarding this concern.

ISSUE THREE: AT AN IEP TEAM MEETING IN NOVEMBER 2014 THE DISTRICT CHANGED THE DATES OF THE ADOPTED TRANSFER IEP TO BEGIN IN NOVEMBER 2014.

The parent alleges in the formal complaint that at the November 11, 2014, IEP team meeting she was provided with a copy of the adopted Arizona IEP with the dates altered to make it look like the Arizona IEP was not adopted until November as "an attempt to cover up the fact that" the student was not provided with special education services.

The parent asserts that the initiation date of the IEP should state the date that the district was obligated to provide services for the student. The parent misunderstands what the initiation date of the IEP means. The initiation date of a given IEP is the date that the district is required to begin to provide special education and related services under that IEP. The initiation date only concerns the IEP it is written on and does not relieve the district of its obligation to provide the student with special education and related services prior to that date. The district made special education and related services available to the student under the student's previous IEP.

The district provided this investigator with a copy of the draft IEP presented to the parent at the November IEP team meeting. This draft IEP does not include any information that would lead this investigator to believe that the district was attempting to cover up the fact that it adopted the Arizona IEP in August. The "Teacher Information Page" attached to the front of the draft IEP states that on August 26, 2014, the student entered from another district or agency. During the investigation the district provided this investigator with documents showing that the district adopted the Arizona IEP in August, the Arizona IEP, as well as a great deal of documentation showing the district's efforts to implement the adopted IEP. Due to a lack of facts provided by the parent to support this claim, this investigator finds no violation of special education law regarding this concern.

ISSUE FOUR: AT AN IEP TEAM MEETING IN NOVEMBER 2014 THE DISTRICT PRESENTED AN IEP TO THE PARENT WITH IEP GOALS THAT HAD BEEN SIGNIFICANTLY REDUCED WITHOUT THE PARENT'S CONSENT.

The parent alleged in the formal complaint that at the November 11, 2014, IEP team meeting she was presented with an IEP that was significantly different from the Arizona IEP and that these changes were made without a discussion by the full IEP team and without the parent's consent. The parent provided an IEP dated November 11, 2014, and it is not marked with the word "DRAFT" anywhere on the IEP. The special education director responded on behalf of the district and explained that the IEP that was discussed at the November 11, 2014, IEP team meeting was simply a draft IEP and that the full IEP team engaged in a discussion regarding the draft IEP. The IEP provided by the district that is dated November 11, 2014, is clearly marked "DRAFT" on the cover page of the IEP. Additionally, the district provided this investigator with a meeting agenda from the November 11, 2014, IEP team meeting and one of the agenda items is listed as "Review of proposed IEP." Additionally, the director asserted that this draft IEP was not implemented and therefore the parent's consent was not needed.

A draft IEP may be developed before any IEP team meeting. However, in order to ensure parent participation in the development of the IEP, the IEP may not be completed before the IEP team meeting. Members of the IEP team may come with evaluation findings and recommended IEP components, but should make it clear to the parents that these are only suggestions and that the parents' input is required in making any final recommendations. If district personnel bring drafts of some or all of the IEP content to the IEP meeting, there must be a full discussion with the IEP team, including

the parents, before the student's IEP is finalized, regarding content, the student's needs and the services to be provided to meet those needs. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting for discussion. Federal Register, August 14, 2006, p. 46678. The district bringing a draft or proposed IEP to the November 11, 2014, meeting is permitted by law. In addition, no credible evidence was presented to show a lack of full discussion or a lack of opportunity for the parent to participate in the discussions at the November 11, 2014, meeting, or that any decision had been made prior to the meeting. Therefore this investigator does not find a violation of special education law regarding this concern. However, this investigator notes that for some reason the parent was provided with a version of this November 11, 2014, draft IEP that was not clearly marked as a draft. The district needs to take great care to ensure that if a draft or proposed IEP is going to be presented to a parent at an IEP team meeting that it be clearly marked as a draft or proposal.

ISSUE FIVE: THE DISTRICT IGNORED OR DENIED THE PARENT'S REPEATED REQUESTS FOR COMPENSATORY SERVICES.

The parent alleges in the formal complaint that her repeated requests for compensatory services were ignored or denied. To support this allegation the parent stated in the formal complaint that she made this request at the November 11, 2014, IEP team meeting, and that this request was ignored. The special education teacher stated in her interview with this investigator that one of the reasons the November IEP team meeting was called was to discuss the parent's request for compensatory services. The special education director for the district stated in the district's response that the IEP team discussed the parent's request for compensatory services at the November meeting. Additionally, the director stated that Interlocal staff shared with the parent "that we'd be willing to have further discussions regarding compensatory services, but if [the student] wouldn't access the current service offered there was belief that [the student] would not access additional compensatory service."

The response from the district indicates that the parent's request for compensatory services was discussed at the November IEP team meeting and not ignored. Further, neither party has presented evidence that the request for compensatory services was denied. Interlocal staff indicated at the November IEP team meeting there could be future discussions about this request. The student's IEP team met again on December 18, 2014, and the principal stated in the district's response that he was present and that the parent's request for compensatory services was discussed again. The principal stated that he believed the parent's request regarding compensatory services was resolved through the services that were slated to be provided through the student's IEP that the IEP team agreed upon at the December 18, 2014, meeting.

Despite the district's assertion that this issue was resolved when the IEP team agreed to the December IEP, the parent clearly did not feel this issue was resolved because she filed this formal complaint and included this as an issue. The parent made a request for compensatory services. That is a request related to the provision of FAPE to the child. The district says it did not deny the request, but it did not approve it either. It did

nothing. The result was that compensatory services were not provided as requested, and the parent is frustrated and feeling she is without recourse in this matter. 34 C.F.R. § 300.503 required the district to respond to this request, with an answer, within a reasonable time with a Prior Written Notice of acceptance or refusal. The Kansas State Department of Education (KSDE) has issued guidance that a reasonable time to respond to a parent's request (regarding evaluation, identification, placement, or the provisions of FAPE) is 15 school days, unless the local education agency can justify a longer time. If the Interlocal felt like the parent's request had been resolved through the December IEP and therefore it did not need to send the parent a Prior Written Notice, the Interlocal should have documented this resolution in a letter to the parent inviting the parent to respond in a given amount of time if the parent did not feel this request was resolved. This investigator substantiates a violation of 34 C.F.R. § 300.503 regarding this issue.

ISSUE SIX: THE STUDENT DID NOT RECEIVE THE ACCOMMODATIONS AND MODIFICATIONS REQUIRED BY THE IEP.

The student's Arizona IEP, which the district adopted, included 23 accommodations and 2 modifications. The Arizona IEP stated that these accommodations were available to the student in class work, assignments, and assessments for all subjects. The special education teacher informed the student's teachers about these accommodations and modifications, but failed to note the frequency, duration, and location of the accommodations and modifications as noted in issue two. In the district's response, each of the student's private school, general education teachers created a list of all of the accommodations and modifications required by the student's IEP and then explained, in detail, how the teacher provided that accommodation or modification within the teacher's subject area. Rather than reviewing each accommodation and modification from the student's IEP this investigator will only discuss the specific accommodations and modifications that the parent alleges were not followed.

A. "Allow more time to complete assignments double time"

The parent alleges that "[o]n several occasions during the fall 2014 semester, [the student] was told by teachers that [the student] could not have extra time on lengthy written assignments." In the district's response multiple teachers of the student provided information that the student was given "extended time," "double time," flexible due dates, and "additional time" to complete assignments. This investigator notes that the variance in wording between the teachers explaining how this accommodation is implemented is likely due to the poor wording of the accommodation itself. The accommodation is unclear as to whether the student must simply be given more time or double time to complete assignments.

The parent specifically referenced that the English teacher denied the student's requests for extended time on lengthy written assignments. The response from the student's English teacher, as provided by the district, stated that "[l]ong term and short term assignment due dates are flexible with conferencing spent with student. Student

must show progress to allow extra time." This response is clearly in violation of the frequency noted in the student's Arizona IEP. The accommodation, as stated in the Arizona IEP, does not include any requirement that the student must show progress before extra time on assignments is allowed. "[M]ore time," perhaps "double time" is to be given to the student on assignments, regardless of whether progress is shown. This violation is likely due to the district's previously noted violation of 34 C.F.R. § 300.323(d).

Despite the district's previously noted violation of 34 C.F.R. § 300.323(d) perhaps leading to this accommodation not being followed, this investigator does not find a separate violation here. K.S.A. § 72-5393 states that the district will provide services for children in private schools upon request of the parent. That would include accommodations. In this investigator's opinion, the district should have said accommodations in the general education setting would only be provided at a public school for the very reason demonstrated here; the public school has no authority to direct these private school teachers to do anything.

This is not a case where the district referred the student to a private school. If that was the case, the district would have to select a private placement where it could contract for these services. But, this is a parent placement. This investigator does not believe K.S.A. § 72-5393 was intended to require a public school to do the impossible. Public schools simply cannot direct the staff of a private school with which it has no contract. No information has been provided to this investigator that a contract exists between the Interlocal or the district and the private school that would require private school staff to fulfill a district's responsibilities under a student's IEP.

This investigator notes that the arrangement between the public school district and the private school is unique and is likely misleading to parents, based on the allegations in this formal complaint. This complaint, and the disagreements and bad feelings that go along with it, resulted from a public school district choosing to provide special education services in a private school building when it is not obligated to. Under K.S.A. § 72-5393 a public school district determines the site for the provision of special education services in consultation with the parent or guardian of the child and officials from the private school. By selecting the private school as the location for services the district creates the misconception to parents that staff at the private school may be required to fulfill the requirements of a student's IEP. This is not the case. This misconception is further compounded in this case by the private school's staff willingness to implement the accommodations and modifications stated in the student's IEP when they had no obligation to do so. Because private school staff had no obligation to fulfill the requirements of this student's IEP no violation is substantiated regarding this issue.

B. Provide extra set of books for home use

The parent alleges in the formal complaint that the student has also not been provided textbooks for home use in all of the student's classes. The parent specifically noted that the religion teacher never provided the student with a textbook of her copy of class

notes. The principal provided in the district's response that the student's religion teacher did not use textbooks and that class content was delivered via lecture, discussion, short articles, and electronic media. The principal further stated that the religion teacher provided the student with copies of her presentations. The religion teacher also stated that she had emailed the parent and offered to send home an extra set of notes and that she had also made this same offer to the student. The English teacher stated that she had made the same offer regarding class notes to both the student and the parent as well as provided the student with an extra book to use at home. Another teacher provided that she had offered an extra book to the student to use at home, but the student had declined.

Due to a lack of evidence to support this allegation no violation of special education law is found regarding this concern.

C. "Alternative assignments will be provided as needed"

The parent alleges in the formal complaint that on a "Book Review project" for the student's English class that the student "requested that [the student] be allowed to present to just the teacher instead of in front of [sic] of the class because [the student] was not comfortable reading and presenting in front of the class" The parent stated that the English teacher denied the request. The English teacher did not provide any information in the district's response regarding her response to the student's request to an alternative assignment for the "Book Review project."

It is unclear who will determine whether an alternative assignment is needed, but because this is unclear this investigator will assume that the student needed an alternative assignment because the student requested it and the student was not provided with an alternative assignment. This modification not being followed is likely due to the district's previously noted violation of 34 C.F.R. § 300.323(d). Despite this, this investigator does not find a separate violation here for the same reasons stated above, that the district cannot require private school staff to fulfill its responsibilities under a student's IEP. However, this investigator hopes the district and Interlocal take note of this issue and in the future do not agree to provide a student with accommodations and modifications in a location in which it has no control over the staff.

D. Religion Class

The parent alleges in the formal complaint that the religion teacher refused to provide any of the accommodations listed in the student's IEP and that the teacher refused to provide make up or alternative assignments to change the student's poor grade in the class. The religion teacher's response, as provided by the district, details how she provided every accommodation listed in the student's IEP. There is no requirement in the student's IEP that the student be permitted to do "make up projects." There is a modification that the student must be provided with the opportunity to do alternative assignments. The teacher stated in the district's response that she provided this modification through the relevant accommodations such as accepting concrete answers

simplified answers in writing, allowing the student to use another device for written communication, reduce writing demands as needed on assignments, breaking down assignments into smaller parts, and allowing dictation to a scribe as needed. If the modification regarding alternative assignments was intended to allow the student to gain additional points in a class to improve a low grade then the student's IEP team should have stated that more specifically in the student's IEP. As written, the modification in the student's IEP regarding alternative assignments does not include additional assignments to raise a grade.

In addition to the comments made previously regarding the fact that the district cannot require the private school to fulfill the obligations of a student's IEP, this investigator also notes K.S.A. § 72-5394. It states "No special education services shall be provided in connection with religious courses, devotional exercises, religious training or any other religious activity." Clearly, KSDE cannot order the district to require this student's IEP accommodations to be provided by a religion teacher in a religion class at a private school.

E. Comments Principal Allegedly Made Regarding the Student's Accommodations and Modifications

The parent alleges in the formal complaint that on several occasions she met with the principal, who was also the student's Psychology teacher, to request that the accommodations in the student's IEP be followed. The parent claims that the principal replied that "creating a modified test . . . would be cheating, and that it would be a lot of extra work." Additionally, the parent claims that the principal "stated on more than one occasion that he did not understand how to provide accommodations" In the district's response the principal asserts that he did not make these comments and, if he did make a comment regarding this subject, that the parent misunderstood what he was saying. The evidence presented by the parent in this allegation regarding comments of a private school administrator does not substantiate a failure to implement accommodations and modifications in the IEP. No allegation of violation of special education law is found here.

ISSUE SEVEN: THE PARENT'S REQUEST FOR A NEW SPECIAL EDUCATION TEACHER FOR THE STUDENT WAS DENIED.

The parent claims that at the November 11, 2014, IEP team meeting that she requested that a different special education teacher be assigned to [the student] and that this request was denied. The decision as to which staff member will be assigned to provide special education services to a given student is completely the district's decision. There is no special education law that requires the district to change a staff member providing special education services to a student. The parent has not alleged a violation of special education law regarding this concern and none is found.

ISSUE EIGHT: BECAUSE OF THE LACK OF SPECIAL EDUCATION SERVICES THE PARENT WAS FORCED TO WITHDRAW THE STUDENT FROM THE DISTRICT.

The investigator analyzed this issue in conjunction with issue one. In the section of this issue where the parent discussed what she believed needed to be done to resolve this concern the parent stated that “[a]n audit should be done on all students that have IEP or 504 plans that attend the whole school (K-12).” This investigator notes that KSDE does not have the authority to investigate issues regarding Section 504. If the parent wishes to file a complaint with the Office for Civil Rights regarding any Section 504 concerns she may contact the regional location of the Office for Civil Rights at (816) 268-0550. Furthermore, the parent has not alleged any facts to show that other students that attend this private school who are on IEPs have experienced violations of special education law. Without any specific facts regarding these concerns this investigator cannot investigate alleged violations regarding other students.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education law. Specifically, there is a violation of the requirement in 34 C.F.R. § 300.323(c)(2), to provide the student with the special education and related services stated in the student’s IEP, and K.S.A. § 72-987(g)(1) because the district adopted the student’s Arizona IEP and then implemented an altered version of this IEP. Additionally, there is a violation of the requirement in 34 C.F.R. § 300.323(d) to ensure that each of the student’s teachers and providers are informed of their specific responsibilities to implement the student’s IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the student. Also, a violation of K.S.A. § 72-988(b)(6), which requires the district to obtain parent consent for a material change in services is found.

This investigator notes that the Interlocal discovered its violation of K.S.A. § 72-988(b)(6) prior to the filing of this complaint and initiated its own corrective action. The Interlocal held two meetings with different groups of staff and reviewed the Interlocal’s procedures for adopting transfer IEPs and when it is necessary to request parental consent for changes made during this process. This investigator commends the district for undertaking these steps and providing documentation of these efforts to this investigator. However, this investigator notes that additional corrective action is still needed.

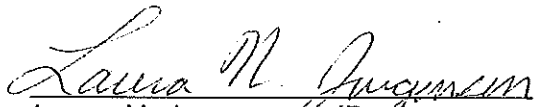
Therefore, the following corrective action is issued:

Within 30 days of the date of this report the Interlocal will conduct a training session for all relevant staff, as determined by the Interlocal, regarding the violations found in this formal complaint report. Relevant staff must include any staff with responsibilities for adopting and implementing transfer IEPs, staff responsible for informing general education staff of the contents of an IEP, staff responsible for amending an IEP where that amendment would require parental consent, and staff responsible for implementing

IEPs in a private school location. The Interlocal will create an agenda and supporting materials to distribute to Interlocal staff for this training session and provide the agenda and supporting materials to Early Childhood, Special Education, and Title Services within 30 days of the date of this report.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Kansas State Department of Education, Landon State Office Building, 900 SW Jackson Street, Suite 600, Topeka; Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see K.A.R. § 91-40-51(f), which is attached to this report.



Laura N. Jurgensen, JD
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Kansas State Department of Education
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K.A.R. § 91-40-51. Filing complaints with the state department of education.

(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).

15FC03

KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #
PUBLIC SCHOOLS
ON January 28, 2015

DATE OF REPORT: February 12, 2015

This report is in response to a complaint filed with our office by the parent of Ms. [redacted] will be referred to as the parent in the remainder of this report. [redacted] is the subject of this complaint, and will be referred to as "the student" in the remainder of this report.

The complaint alleges that the school district failed to inform the parent that special education services were available to the student at [redacted] High School, a private high school in [redacted].

Investigation of Complaint

The investigator spoke with the parent by telephone on February 11, 2015, and communicated with the Due Process Supervisor at the district by e-mail. The investigator also reviewed the following documents:

- Complaint form submitted by the parent
- District's written response to the complaint
- Student's IEP, dated January 30, 2014
- Student's IEP, dated January 29, 2015

Background Information

The student is a 15 year-old girl who has been identified as a child with a disability under the category of Specific Learning Disability. During the 2013-2014 school year, the student attended St. [redacted] Catholic School, in [redacted]. During her eighth grade year at St. [redacted], the student had an IEP and was receiving special education services from [redacted] Public Schools through the [redacted] Educational Services Interlocal Cooperative in [redacted], Kansas.

In January 2014, [redacted] Public Schools informed [redacted] High School of a transition IEP meeting scheduled for the student. This meeting was intended to plan for the transition of the student from grade school to high school. The staff at [redacted] High School were not able to attend the meeting due to scheduling

difficulties and, apparently, there was no opportunity or effort to reschedule the meeting.

In April, 2014, the parent made telephone contact with a social worker at [redacted] High School, informing the social worker that the student would be attending high school at [redacted] High School in [redacted]. The Social Worker indicated that she advised the parent that the parent had the option to choose any services offered in her child's 2014 IEP she wanted. The parent stated that she was not told special education services could be provided at [redacted] High School or that the student could be transported to [redacted] High School for special education services.

In May 2014, the parent provided the [redacted] High School social worker with a copy of the student's IEP. However, the parent acknowledged to the investigator that she did not request special education services from [redacted] High School. The written response from the district indicates the district's position that the parent was informed of the availability of special education services. According to the district, the parent refused special education services from the district at time of enrollment at [redacted] but wanted the IEP to remain in effect and current in case she should later decide to send the student to [redacted] High School.

The student began attendance at [redacted] High School in August, 2014. However, that experience did not go well. On December 19, 2014, the parent contacted the [redacted] High School Social Worker to enroll the student at [redacted] High School, indicating that the student had failed her first-semester coursework at [redacted]. On January 5, 2015, upon completion of Winter Break, the student enrolled at [redacted] High School. [redacted] High School provided comparable special education services, based on the 2014 IEP, until January 29, 2015, at which time a new IEP was completed. The student is currently attending [redacted] High School and receiving the services specified in the January 29, 2015 IEP.

Allegation

THE PARENT ALLEGES THAT THE SCHOOL DISTRICT FAILED TO INFORM HER THAT SPECIAL EDUCATION SERVICES WERE AVAILABLE TO THE STUDENT WHILE ATTENDING [redacted] HIGH SCHOOL.

The district admits that it did not attend the transition meeting scheduled by [redacted] Public Schools. The failure to attend that meeting, however, is not a violation of special education law or regulation.

The parent acknowledges that she did not request USD to provide special education services at High School, and the parent is not alleging that the district refused to provide services at . Rather, the parent alleges that the district did not inform her that special education services were available to her child even though her child was enrolled in a private school. In its response, the district states that the Social Worker at High School did inform the parent that services were available to private school students before the parent enrolled the student at

The evidence presented on this issue is inconsistent. However, despite the inconsistency, the investigator finds that the parent did receive adequate notice that special education services are available to children with disabilities who are enrolled in a private school.

First, the parent had actual notice that special education services are available to children with disabilities who are enrolled in a private school because the student received special education services from the public school while attending school at St. Elementary School during the 2013-2014 school year.

Second, on page 3 of the student's January 30, 2014 IEP, is a statement documenting that the parent was given a copy of the Notice of Procedural Safeguards on that date. The Notice of Procedural Safeguards is the notice required by law to be given to parents to inform them of their rights under the law of special education. That notice includes the following section:

***STATE REQUIREMENTS FOR CHILDREN VOLUNTARILY ENROLLED IN PRIVATE SCHOOLS**
K.S.A. 72-5393 and K.A.R. 91-40-43, 91-40-45, 91-40-46 and 91-40-47

Children with exceptionalities attending private schools have a right to receive a Free Appropriate Public Education (FAPE), through an IEP, from the school district where the student and parent reside, upon request. However, in consultation with the parent or guardian of the child and with officials of the private school, the school district determines the site for the provision of special education and related services.

- If services are provided at the public school, the public school must provide transportation from the child's private school or home to the site where the child receives services and from the site where the child receives services to the child's private school or home.
- If the services are provided at the private school, the cost of providing the services may be limited to the average cost to the school district for the provision of the same services in the public schools.

The school district is not required to provide services, including transportation, outside the boundaries of the school district.

Parents of private school children who are receiving special education and related services in accordance with an IEP may request special education mediation or initiate a special education due process hearing.

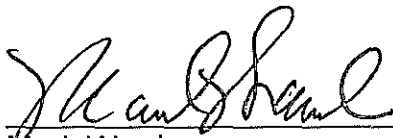
Accordingly, the investigator concludes the parent was provided the notice required by law regarding this issue, and therefore, the allegation of a violation of special education laws and regulations is not substantiated.

Corrective Action

Corrective action is not required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson St., Suite 620, Topeka, Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Mark Ward

Early Childhood, Special Education and Title Services

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).

15FC03A

In the Matter of the Appeal of the
Report Issued in Response to a
Complaint Filed Against School
District No. ____, _____

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on January 28, 2015, by _____, on behalf of her daughter, _____ against Unified School District No. ____, _____ Public Schools. Ms. _____ will be referred to as the “parent” in the remainder of this decision, and _____ will be referred to as the “student.” The complaint (15FC____-002) alleged that USD ____ failed to inform the parent that special education services were available to the student while attending Bishop Carroll High School.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the Early Childhood, Special Education, and Title Services section of the Kansas State Department of Education (KSDE). Following the investigation, an Initial Report was issued on February 12, 2015. That report concluded that there were no violations of special education laws and regulations.

Thereafter, on February 26, 2015, the parent filed an appeal regarding the issue addressed in the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the original complaint, the investigator’s report, information contained in the KSDE file regarding this matter, the parent’s notice of appeal, and the district’s response to the appeal.

DISCUSSION OF ISSUE ON APPEAL

The complaint alleged that USD ____ failed to inform the parent that special education services were available to the student while attending Bishop Carroll High School. The investigator determined that the parent had been notified of the content of the Kansas statutes and regulations related to the provision of special education services to children with disabilities who are voluntarily enrolled in private schools by their parents.

As an initial finding, the investigator stated that the evidence that was presented regarding whether USD ____ personnel provided the parent with information regarding the services available to this child at a private school was inconsistent. We believe the investigator did not intend for that statement in the report to mean that the parent had produced inconsistent evidence. Rather, we believe that statement in the report reflected the investigator’s communication with the parties involved in this complaint. The parent told the investigator that no one from USD ____ ever spoke to her about the availability of services for her child in a private school, and the district told the investigator that it’s personnel did speak to the parent on

this subject in April of 2014 and again in May of 2014. Thus, the investigator said the evidence presented to him on this subject was inconsistent. The Appeal Committee agrees that the evidence presented by the parties is not consistent, and cannot be fairly used as a basis for a decision in this matter.

In her appeal, the parent states that USD ___ did not give her a Notice of Procedural Safeguards. That appears to be correct. However, other than in particular situations which do not apply in this case, a district is only required to provide parents with a Notice of Procedural Safeguards one time in a school-year [34 C.F.R. 300.504]. At the time the parent filed this complaint, the student had not attended a public or private school located within USD ___ for an entire school-year. Thus, USD ___ was not required by special education laws and regulations to provide the parent with a Notice of Procedural Safeguards at any time prior to the filing of this complaint.

Ultimately, the investigator said the parent had actual notice of the private school provisions of Kansas law because, in the 2013-2014 school-year, the student had been receiving special education services at a private elementary school from the Goddard School District, through the Sedgwick County Area Educational Services Interlocal Cooperative. Secondly, the investigator determined that the student's January 30, 2014 IEP included a statement that the parents had been provided with a Notice of Procedural Safeguards on January 30, 2014, from the Sedgwick County Cooperative, and that notice provided information sufficient to inform the parent of the rights of children with disabilities attending a private school in Kansas.

The appeal committee agrees with the investigation report that USD ___ was not required by law to provide the parent with a notice of availability of services at a private school at any time prior to the filing of this complaint. Further, the appeal committee agrees with the investigation report that the parent had been provided with a Notice of Procedural Safeguards on January 30, 2014 from the Sedgwick County Cooperative. The fact that this notice was not provided by USD ___ does not negate the fact that the parent received the notice well in advance of enrolling her child at Bishop Carroll High School. In addition, the committee agrees with the investigator's conclusion that the parent already knew, or should have known, that services were available to children with disabilities in a private school because the student had been receiving special education services during the previous school-year at a private school.

As part of the report, the investigator also concluded that the failure of USD ___ to send staff members to a "transition" meeting sponsored by the Sedgwick County Cooperative in the spring of 2014 was not a violation of special education laws and regulations. The Appeal Committee agrees with the investigator on this conclusion. At the time of the "transition" meeting, the student was not enrolled in any school within USD ___, and USD ___ had no legal duty toward this student at that time. Accordingly, the failure of USD ___ to attend the "transition" meeting was not a violation of special education laws and regulations.

CONCLUSION

The Initial Report issued in this matter is sustained. Kansas Special Education Regulations provide no further appeal.

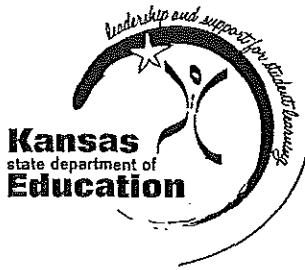
This Final Report is issued this 17th day of March, 2015.

APPEAL COMMITTEE:

Jana Rosborough

Laura Jurgensen

Julie Ehler



Early Childhood, Special Education and Title Services

Kansas State Department of Education
Landon State Office Building
900 SW Jackson Street, Suite 620
Topeka, Kansas 66612-1212

(785) 291-3097
(800) 203-9462
(785) 291-3791 - fax

www.ksde.org

April 15, 2015

, Kansas

RE: Formal Complaint Report – (15FC)

Dear Ms. :

We received the special education complaint you filed on behalf of your son, . In that complaint, you allege that the school district is not compliant with special education laws and regulations related to three specific areas: suspension, least restrictive environment (LRE) and confidentiality of student information.

After reading your complaint, I spoke on the phone with you and with , the Mediation/Due Process Supervisor for USD . I also reviewed the mediation agreement you reached with USD on April 9, 2015. After this review, I have concluded that the special education laws and regulations to which you referred do not apply under the current circumstances.

Your child () was identified as being gifted. Subsequently, a re-evaluation resulted in a determination that was not eligible for special education services as a child with a disability. That eligibility decision was made on February 23, 2015. There is a provision in the law that says a child who has not yet been determined to be a child with a disability may assert the protections of special education law if the parent has requested an evaluation, K.S.A. 72-994. However, that law ceases to apply if the child has been evaluated and found not eligible for special education, as is the case with your child, K.S.A. 72-994(c). The fact that the mediated agreement re-opens the evaluation is not relevant in this analysis because for this kind of protection to apply, the request for re-evaluation would have had to be made before the incidents which are alleged in the complaint occurred.

Accordingly, there can be no violation of federal special education laws and regulations.

With regard to state law, as I indicated above, the allegations in your complaint all relate to disciplinary removals (suspensions), least restrictive environment or confidentiality of student information. These provisions in state law apply only to children with disabilities who are

determined to be eligible for special education services through a properly conducted special education evaluation. None of these provisions in the state special education laws and regulations apply to students who are gifted, but who do not qualify for special education as a child with a disability (See K.A.R. 91-40-34(c), K.A.R. 91-40-21(a), and K.A.R. 91-40-50(b)).

It is therefore, the conclusion of this agency that the allegations in your complaint are not substantiated as violations of federal or state special education laws and regulations.

With regard to the confidentiality allegation in your complaint, you may wish to contact the Family Policy Compliance Office (FPCO), United States Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202-5920, 1-800-872-5327.

A copy of this letter of findings and conclusions is being provided to officials of the school district.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson St., Suite 620, Topeka, Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report..



Mark Ward

Consultant - Legal

Early Childhood, Special Education, & Title Program Services

Kansas State Department of Education (785) 296-7454

Landon State Office Building · 900 SW Jackson St. Suite 620, Topeka, KS 66612

cc: Mr. – Superintendent
 Mr. – Assistant Superintendent
 Dr. 1 - Director of Special Education
 - Due Process Supervisor,

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).

**KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #
ON DECEMBER 15, 2014**

DATE OF REPORT: JANUARY 22, 2015

This report is in response to a complaint filed with our office by on behalf of her son, . will be referred to as "the student" in the remainder of this report.

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Interim Director of Special Education for USD # , on January 7, 2015. On January 15, and 20, 2015, the investigator spoke by telephone with , Principal of Day School.

The investigator spoke by telephone with the student's mother on January 7, 2015.

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

- IEP for the student reflecting a team meeting on January 30, 2014
- Website for Day School
- Parent/Student Handbook
- Email correspondence related to the transfer of the student to Day School dated January 29, 2014
- Email correspondence provided by the district related to the parent's concerns regarding (among other things) his placement in a cubicle
- Email from the parent to the district dated December 10, 2014 regarding a meeting to discuss a change of placement for the student
- Behavior Reports for the student covering the period of January – December 2014
- Summary of restrictions for the first semester of the 2014-15 school year
- Discipline Referral Form dated August 27, 2014
- Discipline Referral Form dated September 10, 2014
- Discipline Referral Form dated September 30, 2014
- Discipline Referral Form dated November 17, 2014
- Discipline Referral Form dated December 14, 2014
- Grade report for the student covering school years 2010-11 through 2014-15

- Diagnostic Report of a mathematics assessment dated March 10, 2014
- Diagnostic Report of a reading assessment dated March 10, 2014
- Diagnostic Report of a mathematics assessment dated May 19, 2014
- Diagnostic Report of a reading assessment dated May 19, 2014
- Diagnostic Report of a mathematics assessment dated August 14, 2014
- Diagnostic Report of a reading assessment dated August 15, 2014
- Diagnostic Report of a mathematics assessment dated October 7, 2014
- Diagnostic Report of a reading assessment dated October 14, 2014
- Read Naturally summary covering the period of February 20 through August 28, 2014
- Student Level Summaries covering the period of September 10 through December 4, 2014

Background Information

This investigation involves an 11 year-old boy who is enrolled in the 5th grade in a special day school sponsored by the district. The student transferred to that school on February 3, 2014.

The day school was established through the cooperation of three school districts to address the emotional and mental health needs of their K-12 students. It offers four educational classrooms focusing on core and non-core courses through direct teacher instruction and the use of computerized curriculum. Students also have physical education available one to two times a week at an off-site location. All classrooms are staffed with certified special education teachers and behavior technicians. A full time registered nurse is also available on site for students' needs. Some students receive additional support during the school day through agencies such as the Mental Health Association (MHA), Behavioral Link, COMCARE, and other community based agencies that support students with disabilities.

In addition to traditional core curriculum, students receive group counseling under the supervision of a Licensed Specialist Clinical Social Worker (LSCSW) two times a week for 90 minutes each session.

The student has diagnoses of Oppositional Defiant Disorder, Bipolar Disorder, and ADHD. He is easily distracted in the classroom setting. He struggles to remain seated and needs frequent redirection. He was hospitalized in December for evaluation and returned to school wearing a patch designed to help enhance his focus. Staff report they are seeing improvement in the student's ability to remain on topic and on task.

Issues

In her complaint, the parent raised three issues. Two of those issues involved alleged violations of state regulations regarding the use of Emergency Safety

Interventions (ESI). Because my authority to investigate complaints is limited to only allegations of a violation of special education laws and regulations, the allegations regarding the use of Emergency Safety Interventions will not be covered under this investigation. The third issue centers on the provision of a free, appropriate public education (FAPE) to the student. That issue is as follows:

The parent alleges that the district's placement of the student in a "cubicle" has interfered with his educational progress.

According to the parent, the student was placed in a cubicle for 30 of 68 days during the first semester of the 2014-15 school year. It is the parent's contention that the use of the cubicle was so aversive to the student that it caused an escalation in his inappropriate, negative behaviors. When consequences were implemented to address these behaviors, the parent states that the student shut down and refused to complete assignments. These missing assignments depressed the student's overall performance, and his grades dropped. Further, the implementation of consequences limited the student's exposure to curriculum so that his educational progress suffered.

According to the district, the student was under some type of restriction for all or part of 20 of the 83 school days during the first semester of the 2014-15 school year. Restrictions for the student have fallen under three categories:

- Non-exclusionary restriction (NER): A student remains in the classroom but sits in a cubicle/study carrel during most instructional activities. Some activities may call for the student to be in another location in the room, and that is permitted. Students under NER are always included in outside recess.
- Exclusionary restriction (ER): ER is a disciplinary action applied as a consequence for extreme disruptive or aggressive behavior. Under ER a student is moved to the Affective Room/In-School Suspension Room – a space used for both discipline and for permitted "breaks" from other classroom settings. Teachers provide lessons and materials and are available as needed to assist students with academics. Behavior Technicians (Paraeducators) provide tutoring assistance to students who are moved to this room. All students moved to the Affective Room for a disciplinary consequence are seated in cubicles.
- "Red Level" restriction: Students at the day school earn points for behavior. Fifth graders are considered to have had a "productive and compliant day" if they earn 75 points. If daily counts fail to accumulate to a minimum standard, students are placed on a "Red Level" restriction that limits the student's available options in the classroom. Students on red level restriction are moved to a study

carrel/cubicle in the classroom and access to such things as snacks, music, and inside recess options are limited.

Discipline records provided by the district reflect that on 6 occasions during the first semester of the 2014-15 school year the student was moved to a “non-exclusionary restriction (NER) (cubicle in class)” as a consequence for inappropriate behavior. Disciplinary referrals were dated August 27, September 10 and 30, November 17 and 18, and December 1, 2014. Four of the five referrals show that the consequence was applied at 10:20 AM or earlier; one referral shows that the consequence was applied at 1:55 PM. Three referrals addressed behavior demonstrated during math, two during reading.

On 5 days the student was on red level restriction and was seated in a study carrel/cubicle in the classroom.

On August 28 and 29 and September 2, 2014, the student was placed on ER because of the level of his disruptive behavior. The student’s behavior became particularly disruptive again in December. For 6 days during that period (December 2, 3, 4, 5, 8, and 9, 2014), the student was moved to the Affective Room where he was seated in a study carrel/cubicle. The student was subsequently hospitalized and did not return to school for the rest of the semester.

It is the position of the district that its use of a study carrel as a non-exclusionary restriction has not limited the student’s educational progress. The district describes the carrel as a desk space with three sides (right, left, and front) designed to limit distractions. The carrel is located within the classroom. The back of the carrel is open, and students using a carrel are able to participate in classroom instruction along with classmates. Students using a carrel are monitored by paraeducators who provide assistance with academic instruction.

For 20% of the days that the student was under some type of restriction, he was able to earn enough points to have been considered to have had a “productive day.”

The Power School grade report provided by the district shows that the student’s performance in the area of reading varied widely during the first semester of his third grade year prior to his transfer to the _____ program. He earned an A for the first quarter and an F for the second. He earned C grades for the most recent three quarters.

The student’s performance on diagnostic reading assessments provided by the district improved from a percentile rank of 7 on August 15, 2014 to 28 on October 14, 2014. His scores on Read Naturally measures show that his reading comprehension is improving and he has consistently met target goals regarding reading rate. The student had demonstrated an overall average comprehension

score for the period of February 20 through May 14, 2014 of 58%. His average score for the period of August 28 through December 4, 2014 improved to 72% - even though his lowest comprehension score for the February through December period was earned on the first assessment following a three-month summer break.

In mathematics, the student's grades for the first two quarters of the 2013-14 school year were B and D. In the next four quarters he earned two C's and two D's. Language grades for 4 of 6 quarters were C's; he earned a B the first quarter of 2013-14 and an F for the last quarter of the year.

Additional records provided by the district show that the student has made educational progress in the area of mathematics during the first semester of the 2014-15 school year. On August 14, 2014, the student's score on that assessment had placed him at the 13%ile. The student scored at the 82%ile on a diagnostic assessment completed on October 7, 2014.

The student ended the 2013-14 school year with an overall grade of A in Science/Health. He earned a B the first quarter of this school year and a C the second quarter. The student's grade for Personal and Social Attitudes declined (from S to N) during the second quarter of the 2014-15 school year, and he earned an N for Workskills and Habits for that same quarter (down from S the first quarter).

In summary, this student was placed in the special day school because he demonstrated a need for a highly structured program designed to address his emotional and behavioral needs. Those needs were so significant that the team determined it was necessary to move him to a setting where he has no opportunity to interact with non-disabled peers. The learning and classroom performance of students placed in such a setting can be impacted by many factors – both intrinsic and extrinsic to the student.

While the use of a study carrel as an element of a disciplinary restriction may be aversive to the student, the investigator is unable to determine that the district's use of the carrel was the cause of the student's inappropriate behavior. It must be noted that while the student was assigned to a carrel for all or part of 20 school days, the behaviors that led to his disciplinary restrictions occurred *before* he was assigned to the carrel/cubicle.

For more than half of the days the student was under restriction, he was in the classroom and able to hear classroom instruction and to participate in discussions. While under restriction both in the classroom and in the Affective Room, he received one-on-one instructional support from a paraeducator and continued to receive instruction in the classroom curriculum. The student is making passing grades in all areas. On 20% of the days the student was

Quarter grades for the student have shown ups and downs since the start of his fourth grade year. No evidence was uncovered in the course of this investigation that would indicate that the use of a cubicle by the district has been exclusive cause of this variability. Additionally, individually administered assessments completed during the past twelve months indicate that the student has made progress in the core academic areas of reading and mathematics.

Under the circumstances outlined above a violation of special education laws and regulations is not substantiated.

Additional Information

Following Winter Break, the parent contacted the district to ask that the study carrel no longer be used as a consequence for the student. The District has agreed to the parent's request.

Corrective Action

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

Diane Durkin
Diana Durkin, Complaint Investigator

(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).

15FC06

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #
PUBLIC SCHOOLS
ON FEBRUARY 3, 2015

DATE OF REPORT: March 4, 2015

This report is in response to a complaint filed with our office by _____ and _____, the parents of _____. Mr. and Mrs. _____ will be referred to as "the parents" or "the parent" if one parent is referenced. _____ the subject of this complaint, and will be referred to as "the student" in the remainder of this report.

The complaint alleges that: the student is being neglected in the classroom while attending preschool. Specifically, the parents allege the student is being left in urine and feces filled diapers. Special Education laws and regulations do not address this specific allegation. Therefore, the focus of this investigation will be directed toward any commitment regarding this subject in the student's Individual Education Plan (IEP).

Investigation of Complaint

The investigator spoke with the parent on February 24, 2015. The investigator spoke with the special education director on February 4, and 25, 2015, and by email on March 2, 2015. Additionally, the investigator reviewed the following documents:

- Complaint form submitted by the parents;
- District's written response to the complaint;
- Incident Narrative Report from the _____ Police Department, dated January 27, 2015;
- Student's IEP from Iowa, dated September 4, 2014;
- Student's Evaluation/Eligibility Report and Student's IEP, dated January 14, 2015;
- Staffing notes, dated January 14, 2015; and
- Student's IEP, dated February 13, 2015.

Background Information

The student is a three year-old girl who has been identified as an exceptional child. Before December 2, 2014, the student lived in and received special education services in Iowa. The student's first day of school in the district was December 2, 2014. From December 2, 2014, through January 27, 2015, the student attended an integrated preschool operated by the _____ / School District, USD _____. The student attended four days per week, 8:00 A.M. to 11:00 A.M. each day. Both the parents and the district

indicated that the IEP from the student's school in Iowa, dated September 4, 2014, was the plan to be followed until the IEP meeting on January 14, 2015, according to 34 C.F.R. 300.323(f). The student currently receives special education services at home, pursuant to the student's current Individual Education Plan (IEP) was initiated February 13, 2015.

Allegations

ISSUE: THE PARENTS ALLEGE THE STUDENT IS BEING NEGLECTED IN THE PRESCHOOL CLASSROOM BY BEING LEFT IN URINE AND FECES FILLED DIAPERS ON 10 OR MORE OCCASIONS.

The parents documented that on January 26, 2015, the student's diaper was wet and that the student's clothes were wet when the parent picked the student up from preschool. The complaint did not include documentation for the other occasions alleged. When asked, the parent could not provide specific dates of instances when she felt that the student had urine or feces in the diaper, except that the parent stated that on the last day of school before Christmas break the student's diaper was wet when the student was picked up from school. There was also no evidence provided as to when the student urinated or defecated, this could have occurred at any time, including at the end of the day before the child was picked up from school.

The district admits that on two, possibly three, occasions the student was not changed at school between December 2, 2014 and January 26, 2015:

- On December 19, all students attended a Christmas movie at the theatre and then were engaged in holiday activities the rest of the morning. No students were changed that day.
- On January 26, the classroom teacher was out of the classroom part of the day. No other staff changed the student's diaper that day.

December 19, 2014, incident when all students attended Christmas activities and no students were changed:

The Iowa IEP, dated September 4, 2014, states on page 6 under Special Education Services, Paraprofessional Services-Non-Medicaid Billable, "[The student] is not toilet trained so will need an adult to take her to the bathroom and to change her when necessary. When [the student] starts toilet training, the associate will have to take her to the bathroom at the designated times in her routine."

A student must be provided with the special education services as stated in the student's IEP as required by 34 C.F.R. 300.323(c)(2). This IEP indicates that the student is not toilet trained, and an adult is required initiate toileting by taking the student to the bathroom and to change the student when necessary.

Part of the difficulty in the interpretation of the Iowa IEP is that it states the toileting service will be provided "when necessary." The words, "when necessary" do not provide the clarity with regard to the frequency of services that is required by federal regulation, 34 C.F.R. 300.320.

By the district's own admission, the student was not taken to the bathroom and changed when necessary on December 19, 2014. Therefore, this investigator substantiates a violation of special education law regarding this specific provision of the student's IEP not being followed. However, failure by the district to implement the student's IEP is not a finding of neglect.

On January 14, 2015, at the IEP Team Meeting, the parents expressed concern about the student not being changed on December 19, 2014. Discussion at that meeting indicated that a bathroom/changing schedule would be implemented. There is no indication that a bathroom/changing schedule was implemented at that time.

January 26, 2015, incident when the classroom teacher was out and the student was not changed by another adult:

Matters relating to alleged child abuse or neglect are properly reported for investigation to the Kansas Department for Children and Families (DCF). This occurred when the parent reported alleged neglect of the student by Elementary School staff to DCF on January 26. On January 27, the complaint was forwarded to and investigated by the Police Department. The Police Department did not have enough evidence to charge anyone with neglect of the student and advised DCF of their findings. No further investigation was conducted by DCF.

The Evaluation/Eligibility Report and IEP dated January 14, states under Daily Living Status, "[The student] does go into the bathroom when wet and takes her diaper/pull up off. She will sit on the toilet and she washes her hands independently;" and "Parents would like her diaper checked frequently." Under Meeting Notes Form the following statement is included, "Her mother wants her checked daily to prevent coming home with soiled panties." "Frequently" was not defined. The term "daily" appears in the notes section, not in the IEP, and had no reference to any specific time or interval within the day.

This IEP states, and district personnel confirm, that the student indicated when her diaper needed to be changed by going into the bathroom and taking her diaper off. District personnel further indicate that if the student did not indicate that her diaper needed to be changed, the student's diaper was checked and changed, if needed, around 10:30 A.M. by the classroom teacher. The classroom teacher put a diaper on her desk daily as a reminder to change the student if the student did not request a change by going into the bathroom and taking off her diaper. District personnel state that if the student had entered the bathroom

and indicated she needed to be changed, then staff would have changed her diaper.

A student must be provided with the special education services as stated in the student's IEP as required by 34 C.F.R. 300.323(c)(2). The IEP documents the student's behavior when she needed to be changed, specifically noting that the student initiated the toileting process. This IEP does not prescribe a specific protocol for the classroom staff to initiate the student's toileting. As a result, of the lack of clarity in the IEP and the lack of factual evidence to support an allegation of a failure to implement the student's IEP, this investigator cannot substantiate a violation of special education laws and regulations on this issue, the January 26, 2015, incident.

If both parties intended to require a particular protocol be followed for checking and changing the student's diaper, it should work toward clarifying the protocol by specifically recording the process to be used in a manner that is clear to all school personnel as well as the parents. For example, stating what the school will do rather than what the parent "would like" to happen; and by prescribing the toileting protocol with a specified frequency and with sufficient clarity to enable all providers, and the parents to know what the IEP commitment is.

The student did not return to the preschool after January 27. On January 27, the parent requested an IEP Team Meeting be scheduled. The meeting was scheduled for January 30, 2015. The district indicates that the draft toileting chart was going to be presented to the parents for their review at the meeting. The parents refused to attend that meeting.

Another IEP Team meeting was scheduled, which occurred on February 13, 2015. Pursuant to the IEP, dated February 13, the student is currently receiving special education services at home.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Specifically, there is a violation of the requirement in 34 C.F.R. 300.323(c)(2) to provide the student with the special education and related services stated in the student's IEP on December 19, 2014. As indicated above, the toileting provision in the student's Iowa IEP did not contain the clarity required in an IEP. 34 C.F.R. 300.320.

Therefore, the following corrective action is issued:

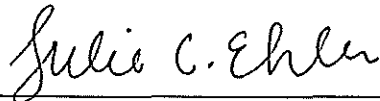
1. Draft a bathroom documentation template that can be used for students who are not toilet trained and receive staff assistance with toileting as required by an

IEP. The district provided this documentation with their response to the Complaint.

2. Within 10 days of the date of this report, the district shall provide the Kansas State Department of Education (KSDE) written assurance that the district will implement IEPs as written. This assurance shall be sent to KSDE's Early Childhood, Special Education, and Title Services.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson St., Suite 620, Topeka, Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Julie Ehler, JD
Early Childhood, Special Education and Title Services
Kansas State Department of Education
Landon State Office Building
900 SW Jackson Street, Suite 620
Topeka, Kansas 66612

K.A.R. 91-40-51. Filing complaints with the state department of education.

(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.

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- (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).

RECEIVED

SEP 23 2014

KSDE

KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

REPORT OF COMPLAINT
FILED AGAINST
PUBLIC SCHOOLS #
ORIGINALLY FILED MAY 1, 2014 AND SUBSEQUENTLY SUSPENDED ON
MAY 19, 2014
REINSTATED ON AUGUST 20, 2014

DATE OF REPORT: SEPTEMBER 18, 2014

This report is in response to a complaint filed with our office on behalf of _____ by his mother, _____. _____ will be referred to as "the student" in the remainder of this report. Mrs. _____ will be referred to as "the parent."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____, Director of Special Education for USD # _____, on May 13 and 14, 2014. On May 14, 2014 the investigator spoke by telephone with the student's mother.

On May 19, 2014, the student's mother contacted Special Education Services and requested that investigation of this complaint be suspended pending her request for mediation.

The complaint was reinstated on August 20, 2014. The investigator subsequently spoke again by telephone with the Director of Special Education as well as with the student's mother on August 28, 2013.

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

- IEP for this student dated March 2, 2012
- Critical Incident Report dated February 11, 2013
- IEP for this student dated February 28, 2013
- Staffing Record dated February 28, 2013
- Critical Incident Report dated May 9, 2013
- Agreement dated June 4, 2013 between the city and the school district regarding the assignment of a police officer to the high school
- Critical Incident Report dated October 13, 2013
- Chart of behavioral incidents covering the period of October 7, 2013 through January 17, 2014
- IEP Amendment Between Annual IEP Meetings dated August 15, 2013

- Police Department Offense/Incident Narrative Reports based on interviews with the special education teacher, Principal, Assistant Principal, the librarian, Assistant Librarian
- Critical Incident Report dated January 17, 2014
- Prior written notice of an IEP Team meeting to be held January 31, 2014
- Meeting Notes dated January 31, 2014
- Prior written notice of proposed changes to the student's Behavior Intervention Plan dated January 31, 2014
- Prior written notice of the district's refusal of the parents' request for placement of the student at Lakemary Center dated January 31, 2014
- Prior written notice of an IEP Team meeting to be held February 21, 2014
- Staffing Record dated February 21, 2014
- Prior written notice of an IEP Team meeting to be held February 28, 2014
- Staffing Record dated February 28, 2014
- IEP for this student dated March 28, 2014
- Letter from the Psychiatric Mental Health Nurse Practitioner to the principal dated February 7, 2014
- Letter dated March 3, 2014 from the attorney retained by the parents to the building principal
- Letter dated March 7, 2014 from the Director of Special Education to the family's attorney
- Letter date May 12, 2014 from the Psychiatric Mental Health Nurse Practitioner to the principal
- Orthopedic Surgery Therapy Prescription dated May 20, 2014

Background Information

This investigation involves a 17 year-old boy who is enrolled in the 11th grade. The student has been diagnosed with Coffin-Lowry Syndrome, a rare genetic disorder. His mother reports that he has an intellectual disability with autistic tendencies and is currently taking Prozac, Neurontin, and Trileptal. The student has also been diagnosed with ADHD, Generalized Anxiety Disorder, and PDD-NOS. In May 2014, he was determined to have scoliosis.

On January 17, 2014 an incident (described below under Concern One) occurred at the school that resulted in the student being taken by law enforcement officers to the Juvenile Detention Center. The student was given a one-day disciplinary suspension. The parents contend that the student was so traumatized by the experience that he has refused to return to the school building. Although parents did enroll the student for the 2014-15 school year, he has not attended school since the January 17th event and no special education services have been provided since that time:

The district has met with the parents on several occasions and has proposed a revised IEP for services. The parents have not agreed to any of the district's proposals. The student's mother told the investigator that she does not believe

that any "transition" plan can be successful because at some point the student's instruction would become the responsibility of school staff whom she does not believe capable of managing the student's behavior. It is her fear that the student or others could be injured should he return to the district program.

The parent believes that the only viable placement option for her son is Lakemary Center – a private treatment center in Paola, Kansas that serves individuals with developmental disabilities. The district contends that a Lakemary placement would be too restrictive for the student. The parties attempted mediation to resolve their dispute, but that process resulted in an impasse.

Issues

Seven issues were outlined in the original complaint. One additional issue was added to the complaint by the parent when she reinstated her original complaint.

Issue One: The district did not follow the student's Behavior Intervention Plan (BIP) and failed to ensure that all staff interacting with the student were aware of the student's BIP.

Federal regulations, at 34 C.F.R. 300.101, require a district to implement a student's IEP as written.

Once an IEP has been completed and consent for services has been obtained from the parents, the child's IEP must be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation. All individuals who are providing education to the child (regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for implementation of the IEP) must be informed by the IEP team of his or her specific responsibilities related to implementing the child's IEP, and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP (34 C.F.R. 300.323(d)(2)).

The "Social/Emotional" section of the student's February 28, 2013 IEP, states that his behavior does "impede the learning of self or others" and indicates that the student requires a Behavior Intervention Plan (BIP). However, no BIP was included at the time the IEP was developed. Under the "Positive Behavioral Intervention Plan" section of the document it was noted that the student did "require intrusive intervention procedures (physical guidance, physical restraint, seclusion, time-out, inhibiting devices, etc.) as a part of the Behavior Intervention Plan." However, the document did not include the attached "outlined procedure with team signatures" required by the document.

With regard to the Behavior Intervention Plan, the Staffing Record for the February 28, 2013 IEP Team meeting states only that the team would “continue to use interventions/ distractions that have been previously effective.”

On August 15, 2013, the parent gave written consent for the district to amend the student’s February 2013 IEP to include a “Positive Behavior Intervention Plan (PBIP).” The PBIP includes the following elements:

- “Hitting/pushing – Give time-out away from others – can be in a chair, on floor, standing by wall, etc. 1-3 minutes. For minor brushes with hand or nudges, give warning. (The student) removes himself typically.”
- “Refusals, etc. – Redirection, reward with preferred activity – once this is done, then you can look out the window. Give wait time, often (the student) may say ‘no,’ not move when he’s supposed to, but if you distract him by saying something funny and go on with routine – often will comply. Playing ‘games’ – I’m going to beat you to the bathroom (and pretend to race him.)”
- “If none of the interventions work, (the student is most likely in shut-down mode...The only intervention that works at this point is providing (him) a snack...or the option to lay down and rest...if possible, in an area with no human traffic, lights off and instrumental music...The verbal behaviors will continue to occur if he has an audience. Conversation should be limited, including with staff.”

The Addendum provides no specific guidance with regard to appropriate actions to be taken should the student not respond to the positive interventions outlined in the plan and contains no specific prohibitions regarding the intervention of law enforcement.

As documented by Critical Incident Reports, the student had struck and/or bitten staff on February 11, 2013, May 9, 2013, and October 3, 2013. In each case, records show that staff followed the student’s Behavior Intervention Plan (BIP) by giving the student “space.” On each occasion, the student was able to calm down. A chart of student behaviors covering the period of October 7, 2013 through January 17, 2014 shows that “shut downs” occurred on five occasions – October 7th and 8th and January 14th, 15th, and 17th. In each case, staff gave the student “space” to calm down and used humor to redirect the student. “Shut downs” ranged in length from 30 to 45 minutes prior to January 17th. The record shows that the January 17th shut down lasted for 2 hours.

According to witness statements obtained by the city police department, the student came into the high school library daily from January 14-17, 2014. On each occasion, he was agitated and refused to return to his classroom. On January 16, 2014, he was in the library for over an hour. On that occasion, the library was cleared of other students and the School Resource Officer (SRO) was

contacted to provide assistance. According to the SRO he was able to deescalate the student by talking with him, and the student returned to class.

Witness statements regarding an event that occurred on January 17, 2014 were obtained by the city police department. Summarizing those statements, the incident transpired as follows:

At approximately 11:30 a.m. the student left the designated special education bathroom and entered the library. The special education teacher followed the student into the library. Statements indicate that the student wanted to watch TV but was not allowed to do so. The student refused to comply with direct instructions from school staff that were talking to him in an effort to calm and redirect him. The student became increasingly agitated and struck a telephone and computer screen. At the request of the special education teacher, the building principal was contacted and the principal's assistance was requested in order to help manage the student.

Before the principal arrived, the student moved toward a bookshelf where a flowerpot was located. Staff believed that the student intended to knock the pot off the shelf since he had knocked a library flowerpot to the floor the preceding day. The special education teacher held the plant in place, and, after telling the student, "No," the librarian approached the student for the purpose of removing the plant. As she approached, the student turned and hit the librarian.

The librarian then moved away from the student as the building principal arrived on the scene. Staff continued to try to intervene to calm the student. The principal directed the special education teacher to leave the library to notify the parents of the situation. The principal also requested assistance from the School Resource Officer (SRO).

The SRO and building principal spoke to the student in an attempt to calm him but the student remained very agitated. The SRO asked the student to sit down but the student did not comply. The SRO then approached the student who swung at the SRO, striking him on the arm. The SRO applied an arm restraint, and the student was seated in a chair. The SRO told the student he would release the restraint but when the restraint was removed, the student allegedly attempted to bite the officer.

The SRO then opted to restrain the student with handcuffs. The student attempted to avoid restraint by head butting and biting, but with assistance from the building principal, the SRO was able to handcuff the student. The student continued to struggle. The SRO called for backup from outside law enforcement. The student was removed from the building and taken to the Juvenile Detention Center.

According to the parent, the incident resulted in the following injuries to the student: a sprained right forearm, sprained right ankle, pulled tendons in his right foot, rug burns on his left shoulder, cut above left eye, concussion, bloody nose, rug burn on back of left arm, rug burn on back, and scratch all the way down his back, injury to his ankle, wrists, forehead, arm, and back.

The district contends that those employees who worked with the student were following his May 14, 2013 BIP by giving him space to deescalate in the library and by minimizing their verbal interaction with the student.

The student's special education teacher was trained with regard to the student's plan. According to the district, the building principal was aware that the student had a behavior plan but neither the principal nor the librarian had been trained on the plan since neither typically had interactions with the student.

The SRO is not a district employee but rather is a city employed police officer assigned to provide law enforcement services to the school district. The SRO is not required to follow the student's Behavior Intervention Plan. Though he was aware of the student's status as a special education student, the SRO was not – nor was he under any legal obligation to be – trained in the implementation of the student's BIP.

Eyewitness reports indicate that staff followed the student's BIP by minimizing conversation with the student and by attempting to redirect the student from the library setting. Nothing in the student's BIP prohibited the principal from seeking the assistance of the SRO in managing the student's increasingly agitated behavior. When carrying out the restraint and detainment of the student, the SRO was operating not as a school employee but as a city police officer responsible for "maintaining a safe campus" as outlined in the Memorandum of Understanding between the district and the city.

Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Two: The district failed to review and revise the student's IEP (including his BIP) following a January 17, 2014 incident.

A student's IEP is to be reviewed at least once every 12 months, to determine whether the annual goals for the child are being achieved and to revise the IEP as appropriate. The review and revision of the IEP is to address: (a) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; (b) the results of any reevaluation conducted; (c) information about the child provided by the parents; (d) the child's anticipated needs; or (e) other matters. The IEP team is to consider any of the special factors related to the child's IEP (K.S.A. 72-987(f)).

Although the school is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with an exceptionality have the right to request an IEP meeting at any time. The child's teacher or other school staff may also propose an IEP meeting at any time they feel the IEP has become inappropriate for the child and revision should be considered (K.S.A. 72-987(f)).

The parent asserts that the district has failed to address the needs of the student following the January 17, 2014 incident described above. According to the parent, the student was extremely agitated and traumatized by the event and refused to return to school.

The parent states that the student's medical and mental health provider advised the district that it was a medical necessity that the student not return to school. The building principal received a letter dated February 7, 2014 from the Psychiatric Mental Health Nurse Practitioner who had been treating the student since 2009. In that letter, the nurse practitioner states, "I am asking for the immediate transfer out of the public school system into Lake Mary (sic), where the staff is prepared to handle behaviors caused by (the student's) disability...I would appreciate your assistance in the matter as it is of grave importance to (his) mental health that this action occurs swiftly."

It is the parent's contention that the district failed to review and revise the student's IEP to address needs resulting from the incident, did not modify the Addendum to the student's February 2013 BIP, did not discuss the student's lack of progress toward attainment of IEP goals, and did not properly address needed services, modifications, accommodations, and supports including

- installation of plexi-glass in all windows which could be accessed by the student,
- training all staff in Safe Crisis Management,
- use of Safe Crisis Management strategies and a Safety Emergency Plan,
- providing a list of the variables unavailable in the public school program which would be available at Lakemary Center,
- Snoezelen multi-sensory room,
- time-out room in each classroom and the use of a quiet time-out room which can allow separation from others with the lights off and which would have space for the student to lay down,
- adapted PE
- sufficient supports to obviate the need for grandparents to come to school to take the student home,
- transitioning between classes before or after the bell in order to decrease opportunities for behaviors such as bumping into other students in the hallway,
- music or art therapy

- Crisis Prevention Intervention (CPI) training for staff other than the teacher and two paraeducators,
- use of CPI,
- use of Crisis Management Training (CMT),
- behavior levels system, and
- classroom behavior management using researched methods.

It is also the contention of the parent that the district failed to provide any homebound services, to offer an alternative placement following the behavior incident (specifically a move to Lakemary Center), or to consider moving the student to a classroom without windows.

Failure to Review and Revise the IEP and Behavior Intervention Plan

The district contends that it did review and revise the student's IEP in response to the behavioral incident of January 17, 2014.

It is the position of the district that some of the behaviors that arose at the time of the incident were not addressed in the August 2013 BIP amendment because prior to January 17th those behaviors had not occurred at a significant rate. However, the district did revise the plan following the incident to more specifically target the aggression displayed on January 17th.

Records show that an IEP Team meeting was convened on January 31, 2014. According to the district, the purpose of that meeting was to revise the student's behavior plan in preparation for his re-entry into school following a one-day suspension. On January 31, 2014, the district provided the parents with prior written notice of proposed changes to the student's Behavior Intervention Plan. On January 31, 2014, the student's mother signed that form indicating that she did not consent to the changes to the BIP proposed by the district.

On February 21, 2014, a second IEP Team meeting was convened. The student's behavior plan was again reviewed. His present levels of performance were discussed, as was the student's educational placement. At the meeting, a letter from the Nurse Practitioner who had been working with the student in a therapeutic setting was introduced. In that letter, the provider recommended that the student be placed at Lakemary Center because of the emotional trauma suffered in the January 17th incident. The district contends that the team considered the letter in the context of his present levels of performance and his educational needs. All participants except the parents agreed that the high school program was the most appropriate placement for the student at the time.

On March 3, 2014, the building principal received a letter from an attorney hired to represent the family. In the letter, the attorney states, "(The parents) are requesting an IEP meeting be scheduled as soon as possible and prior to the

school reporting any of (the student's) further absences as being unexcused." The Director of Special Education responded to the attorney on March 5, 2014 stating, "...you will note that we just held an IEP at parents' request on February 21, 2014, (but) will schedule an additional meeting upon coming to a mutually agreed upon time with the parents."

A third IEP Team meeting was held at the request of the parents on March 28, 2014. According to the district, the student's behavior plan and placement were again reviewed.

There is sufficient evidence to show that the district reviewed the student's IEP after the January 17th incident and proposed revisions to his behavior intervention plan. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

Lack of Progress Toward Attainment of IEP Goals

Progress Reports provided by the district show that the student was at the time of the January 17, 2014 incident making progress toward attainment of his IEP goals.

Goal 1 of the student's May 2013 IEP called for him to "demonstrate counting objects and identifying numbers 1-20 using 1-1 correspondence in everyday activities with 95% accuracy for 3 consecutive data days" by May of 2014. As of May 12, 2013, he was "counting objects with 50% accuracy." On October 18, 2013, it was reported that he was unable to accurately demonstrate 1-1 correspondence but was able to rote count from 1-20 with 10% accuracy. As of December 20, 2013, his 1-1 correspondence accuracy had increased to 6% while rote counting to 20 remained at 10%.

Goal 2 stated that the student would "demonstrate independent living skills by completing benchmarks at stated accuracies. According to the Progress Report, the student achieved his May 2013 benchmark of "performing and engaging in a variety of independent living skills (cooking, vacuuming, cleaning, folding towels, laundry, shopping, etc.) with visual cues, unlimited verbal prompts and hand over hand assistance. By October 2013, it was anticipated that the student would be able to demonstrate those same skills with visual cues and hand over hand assistance but only 7 verbal prompts. The Progress Report indicates that as of October 18, 2013, he had accomplished that benchmark by averaging 7 verbal prompts per skill. By December 20, 2013 the number of verbal prompts needed for the student to complete tasks had reduced to 6; the December 2013 benchmark called for a reduction to 5 verbal prompts.

According to Goal 3, the student would attain 80% accuracy on 3 consecutive data days with regard to reading and matching "functional, safety and daily living words to the everyday life and multiple settings when he encounters them (sic)."

By May 12, 2013, he was able to match 50% of the words. As of October 18, 2013, he was still at the 50% level, but by December 20, 2013, he was matching 68% of the words.

There is evidence to show that the student was progressing toward attainment of his IEP goals. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

Failure to Address Services, Modifications, Accommodations, and Supports

Federal regulations, at 34 C.F.R. 300.503(a), state that prior written notice must be provided by the district when the school refuses a parent's request to initiate or change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services to the child.

The district contends that the parent has not at any time made specific requests for the modifications, accommodations, and supports listed in her complaint. It is the position of the district that the parent instead made a request that the student to be placed at Lakemary Center and referenced some of the listed elements as components of the Lakemary Center program.

It is the position of the district that placement of the student in his current high school program is more appropriate and less restrictive than a placement at Lakemary Center. According to the district, the January 17, 2014 incident represented a novel occurrence, and prior to that incident the student had been very successful in his placement at the high school. Notes from the February 21, 2014 IEP Team meeting show, however, that the district offered the option of early entry into the district's ADULTS program, a community-based transition program for 18-21 year old students who require continued services to meet IEP goals.

Staffing Notes from the IEP Team meetings of January 31, February 21, and February 28, 2014 contain no reference to any requests from the parent regarding elements specified in this issue of her complaint aside from her request to have the student placed in Lakemary Center.

In an August 28, 2014 telephone conversation with the investigator, the parent confirmed that she was not interested in having any services provided within the district but instead wanted to have her son placed in Lakemary Center where a full range of service options would be available to him.

On January 31, 2014, the district provided the parent with prior written notice of the district's refusal to change the student's placement to Lakemary Center.

For the foregoing reasons, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

Issue Three: The district has failed to provide the parents with prior written notice of proposed action regarding requests made by the parents.

Federal regulations, at 34 C.F.R. 300.503(a), state that prior written notice must be provided by the district when the school refuses a parent's request to initiate or change the identification, evaluation, or educational placement of the child, or to make a change to the provision of special education and related services to the child.

According to the parent, she made the following requests at a January 31, 2014 IEP Team meeting:

- time-out room
- adapted PE
- music therapy
- art therapy
- Snoezelen multi-sensory room

At an IEP Team meeting on February 21, 2014, the parent states that she repeated the above requests and also asked the district to contact the student's medical and mental health providers to obtain additional information regarding the student's needs and to coordinate efforts with those individuals.

The parent asserts that at an IEP Team meeting on February 28, 2014 she repeated her request for adapted PE as well as art and music therapy and made new requests for swimming therapy and plexi-glass windows. She also requested that, during the school year, the student attend school 5 days per week from 8:00 AM until 4:00 PM.

By report of the parent, none of these requests have been granted, and the district has not provided any prior written notice of refusal to meet any of the requests.

According to the district, the parent provided signed permission allowing communication between the district and a nurse practitioner but made no specific request that the district initiate contact. The district believed that contact could be made at the discretion of either the district or the nurse practitioner. After receiving a letter from the practitioner on January 31, 2014 and discussing the contents of that letter at an IEP Team on February 21st team meeting, the district assumed the parents would share the outcomes of that discussion with the practitioner and initiated no additional contact.

The district received a second letter from the practitioner on May 12, 2014 – after the filing of this complaint by the parent. The Director of Special Education called the practitioner on May 16, 2014 to explain the process of placement determination and to let the practitioner know that her recommendations had been considered by the team at the February 21st IEP Team meeting.

The district contends that the parent has not made any specific requests for the services or accommodations specified above. It is the position of the district that the parent has instead asked that the student be placed at Lakemary Center where a range of therapies would be available to the student and could be of benefit to him. According to district staff, the needs of the student were being addressed in the school setting in a variety of ways, such as using an empty classroom as a quiet, calming place, employing a sensory diet to address anxiety, and providing adapted involvement in art, music, and PE.

According to the Meeting Notes from a January 31, 2014 IEP Team meeting, the team discussed the following:

- social stories;
- changes to the student's behavior plan;
- the possibility that the student has bi-polar disorder;
- the possibility that there is someone in the Life Skills room the student does not want to be around;
- signs that the student is suffering from PTSD resulting from the January 17th incident; and
- the mother's stated preference that the student attend Lakemary Center

Comments written by the mother on the Meeting Notes from the January 31st meeting state, "Parents wish to reconvene IEP to discuss other options besides sending their son back where he has been traumatized or pulling him from school and denying him of his right to be educated."

The IEP Team again convened on February 21, 2014. At this meeting, the Staffing Record reflects that the team discussed the following topics:

- outside vision and hearing testing;
- current medications;
- the student's performance in his PE class;
- the student's performance in the area of Speech/Language and Speech services;
- annual goals;
- anticipated services;
- planning for the 2014-15 school year;
- accommodations;
- the student's BIP (including suggestions from the parent regarding modifications to that plan); and

- Extended School Year (ESY).

The Staffing Record also shows that there was discussion regarding whether or not the current school program met the student's needs. According to the record, the Director stated that the program did meet the student's needs, but the student's mother disagreed. District staff made statements in support of the student's return to school, but the parents indicated they did not want the student to return to the building.

The district offered the option of early entry into the ADULTS program should the student be unsuccessful under the district's current proposed plan. The student's mother expressed concern that the student might hit his head on the windows at the high school and injure himself with broken glass. The record notes, "further discussion will take place at a separate meeting to address non-IEP issues."

The IEP Team met once again on February 28, 2014. The Staffing Record from that meeting reflects discussion of the following topics:

- the student's performance in his Vocal Music class;
- a change to a consultative model for Speech/Language services;
- oral stimulation objects;
- goals for speech, OT, reading, independent living, and math;
- the possible use of an i-Pad;
- the Behavior Plan for the student and behavioral cues to watch for;
- transition and post-secondary goals;
- peer models; and
- assessments.

On January 31, 2014, the district provided the parents with prior written notice of the district's refusal to change the student's placement to Lakemary Center.

While there is clear evidence to show that the parents have asked the district to place their son at Lakemary Center, there is no evidence to show that the parents have specifically asked the district to provide – within the public school setting – a time-out room, adapted PE, music therapy, art therapy, swimming therapy, a Snoezelen multi-sensory room, plexi-glass windows, or a modified school day. The parent has confirmed to the investigator that she was only interested in having the student placed in the Lakemary Center program, not in having services delivered through district programs. The district has provided the parents with written notice of its refusal to transfer the student to Lakemary Center. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Four: The district failed to provide an accommodation involving modifications to the classroom setting.

According to the parent, the district agreed in 2013 to put a doorway between two special education classrooms and to set up the smaller of the two rooms as a quiet area to be used by the student. It is the contention of the parents that the district failed to follow through on this agreement.

The parent states that she spoke to the student's special education teacher during the 2013-14 school year about an anticipated modification to her classroom for the 2014-15 school year. The special education teacher reportedly told the parent that she planned to set up the room adjoining the special education classroom in a manner that would allow for a quiet space for the student. However, according to the parent, the classroom was assigned to a different special education teacher for the 2014-15 school year, and that teacher opted to use that space in a different manner.

The student's February 2013 IEP does not call for any modification to classroom space, and there is no evidence that the district made or failed to carry through on any specific IEP commitment regarding classroom modifications. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Five: The district has failed to properly review and revise the student's IEP to address his deterioration and lack of adequate progress on and failure to meet all goals.

The parent contends that the district has not provided any reason for the student's lack of adequate progress on his annual goals or his failure to meet those goals. According to the parent, the district has not discussed or proposed changes to address the student's lack of progress.

The student has not been in school since January 17, 2014 and has not received any special education services. Progress reports provided by the district indicate that the student had made gains toward attainment of all goals by the end of the first semester of the 2013-14 school year, although with regard to one of the student's three goals his progress had not reached the level anticipated by benchmarks. There is no way to know how much progress the student might have made by the end of the IEP year had he continued to attend school.

The district cannot be held responsible for any lack of progress on the part of the student if the student has not been made available for instruction. The district has met on three occasions to discuss the student's IEP and on February 28, 2014 proposed a revised IEP that includes extensions of some of the goals contained in his February 2013 IEP as well as new goals targeting additional skills, but that IEP was not implemented because the student was not attending school. Under these circumstances, a violation of special education laws is not substantiated on this issue.

Issue Six: The district failed to conduct an adequate evaluation of the student.

Federal regulations, at 34 C.F.R. 300.303, state that a reevaluation must be conducted if the school determines that the education or related services needs, including improved academic achievement and functional performance of the child, warrant a reevaluation, or, if the child's parent or teacher requests a reevaluation. However, a reevaluation shall not occur more than once a year, unless the parent and the school agree otherwise. If a parent requests a reevaluation, or more than one reevaluation per year, and the school disagrees that a reevaluation is needed, the school must provide Prior Written Notice to the parent that explains, among other things, why the school refuses to do the reevaluation and the parent's right to pursue the reevaluation through mediation or due process.

The parent contends that the student has sensory issues that the district has failed to assess. She reports that the student's outside treating therapist advised the school in February and May of 2014 of additional problems the student was experiencing including heightened anxiety and trauma. According to the parent, the therapist has asked the school to contact her so that she could provide further information, but the school has not done so.

By report of the parent, she asked the student's Occupational Therapist whether the therapist believed the student had sensory issues. According to the parent, the therapist responded that she would have to "think about it." The parent stipulates that she did not formally request – either verbally or in writing – that the student be evaluated to determine whether or not he does have sensory needs.

According to the district, the student was given a full re-evaluation in the Spring of 2012. A sensory profile was not developed as a part of that evaluation. The district states that it stands ready to conduct a sensory assessment or to cover the cost of an Independent Educational Evaluation involving a sensory profile if the parent requests such an evaluation and makes the student available to be evaluated.

Further, the district stands willing to consider any and all information contributed by the parents from outside sources when developing an IEP for the student.

Under these circumstances, a violation of special education laws and regulations is not substantiated.

Issue Seven: The district failed to timely notify the parents of behavior or incidents that resulted in injury to others.

Federal regulations, at 34 C.F.R. 300.101, require that a student's IEP be implemented as written.

According to the August 15, 2013 amendment to the student's February 2013 IEP (signed by the parents on August 15, 2013 and noted to be "effective 5/14/13") "behaviors will be reported to parents/guardians through daily communication journal sent home or a phone call will be made...Incidents of concern that are communicated to parent will be documented...The PBIP (Positive Behavior Intervention Plan) will be reviewed by the team bi-monthly or as needed if incidences occur and additional supports are needed."

The parent reports that in May of 2013, the student bit a paraeducator on the shoulder. In October of 2013, the student kicked and hit a paraeducator. Parents assert that they were not notified of these incidents until March of 2014.

A Critical Incident Report completed by staff describes a "shut down" by the student on May 9, 2013. During the incident, the student struck, pushed, and then bit his Life Skills Teacher during a transition period. According to the district, the teacher recalls contacting the parent, but there is no record of that contact on the Critical Incident Report that does document that the teacher informed the building principal, Behavior Specialist, and School Nurse of what had occurred.

A second Critical Incident Report dated October 3, 2013 documents that the student kicked and struck a paraeducator. In this case the report indicates only that the special education teacher was informed of the incident.

It was not until August 15, 2013 that the parents agreed to a Behavior Intervention Plan requiring parental notification regarding behavioral incidents. If the Plan is to be considered retroactive to May 14, 2014, the May 9th incident predated that effective date. The district was not, therefore, required by the IEP to provide notice of the incident to the parents.

However, the district was required by the August Amendment to the February 2013 IEP to provide the parents with notice of the October 3rd incident. School staff reports that they have a "vivid" recollection of speaking to the mother about this incident; the parent is equally adamant that no notification was provided.

According to the district, it is now policy to document parental contact regarding critical incidents, but the district stipulates that it can provide no documentation that parents were provided the required notification regarding the October 3rd incident. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

Issue Eight: The district has failed to appropriately address limitations to the student's ability to participate in general education classes resulting from diagnoses of scoliosis and anxiety.

The parent states that the district was on March 28, 2014 made aware that a new evaluation of the student's scoliosis resulted in a recommendation that he no longer participate in general education Physical Education. Further, due to his anxiety, he would no longer be able to participate in Chorus. If these two opportunities for interaction with non-disabled peers were removed from his schedule, the student's only opportunity for such interactions would occur during lunch. The parent believes that the student should be transferred to Lakemary Center where he would have the opportunity to receive music therapy and Adapted Physical Education.

It is the district's position that while the parents have reported that the student is unable to participate in P.E. or Chorus, they have not provided the district with any reports from specialists or physicians to confirm that report. The district contends that it is willing to incorporate all new information into the student's IEP and would address any established need the parent presents to the student's IEP Team.

A violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on one of the issues presented in this complaint. Specifically, the district failed to comply with 34 C.F.R. 300.101, which requires that a student's IEP be implemented as written because there is no documented evidence that the parents were notified of an October 3, 2013 behavioral incident.

The district has subsequently implemented a policy of mandated documentation of parent contact in the event of a "Critical Incident." No additional corrective action is directed at this time.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.


Diana Durkin, Complaint Investigator

(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).

15FC08

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # PUBLIC SCHOOLS ON MARCH 23, 2015

DATE OF REPORT: APRIL 15, 2015

This report is in response to a complaint filed with our office by _____, the parent of _____. Ms. _____ will be referred to as "the parent" in the remainder of this report. _____ is the subject of this complaint, and will be referred to as "the student" in the remainder of this report.

The complaint includes allegations regarding the use of physical force and seclusion. As I indicated in my letter to the parties on March 23, 2015, these allegations are not governed by special education laws and regulations. Accordingly, they will not be addressed in this report. My letter of March 23, 2015, advised the parent of other agencies which may be able to address these concerns. The sole remaining allegation is that the student's special education teacher did not provide the student with breaks, as required by the student's IEP.

Investigation of Complaint

The investigator reviewed the complaint form submitted by the parent, the student's IEP, Behavior Charts completed by school personnel, and written statements from the student's special education teacher, dated April 7 and April 13, 2015. The investigator also spoke with the parent by telephone on March 31, 2015 and with the Director of Special Education on March 31, 2015 and April 2, 2015.

Background Information

This complaint was filed on December 23, 2014. On that same day, the parent also requested a due process hearing on what appeared to be identical issues. In compliance with law, the complaint was set aside until the expiration of the hearing. On March 23, 2015, the Department received a copy of the hearing officer's order of dismissal of the due process hearing, after the parties had reached a settlement agreement specifying a change of placement for the student. On that same day, the investigator contacted the parent regarding this complaint. The parent stated she wished to proceed with the complaint. On that date, the investigator notified all parties that the complaint would proceed and that the filing date for the complaint would be amended to March 23, 2015.

The student who is the subject of this complaint is an 8 year-old boy in the third grade. He has been identified as a child with a disability, and has an IEP.

Allegation

ISSUE: THE STUDENT'S SPECIAL EDUCATION TEACHER IS NOT FOLLOWING THE IEP PROVISIONS REGARDING BREAKS.

The parent stated that she believes the breaks specified in the student's IEP were not being provided by the special education teacher from January 2014 to December 2014 because the student told her he was not getting these breaks. The parent provided no evidence to support this allegation.

The special education teacher for the period of time in question submitted two written statements, which provide a detailed description of how the breaks in this student's IEP were implemented.

The IEP in force for the time in question, referred to "breaks" in four different sections, as follows:

1. Under the heading "Supplementary Aids in Special Education," the IEP says "During the school day, and when needed, movement breaks will be provided at designated site, regularly as deemed necessary by general and special education teachers. Outside and/or gym breaks can be another opportunity for movement and break time."
2. Under the heading "Supplementary Aids in General Education," the IEP says "During the school day, and when needed, movement breaks will be provided at designated site, regularly as deemed necessary by general and special education teachers."
3. Under the heading "Emergency Intervention/Safety Plan," the IEP says the adults working with the student will identify possible triggers as soon as possible and intervene quickly and in a positive manner and the student "should be invited to take a break and/or move to a predetermined safe and quiet spot."
4. Under the heading "Describe Accommodations for Instruction and Assessment," the IEP says "Frequent breaks will be provided on an established schedule."

With regard to paragraphs 1, 2 and 4, the term "movement breaks" refers to opportunities for the student to move around instead of sitting. It includes walking around the classroom or in the hall, playing active games, kicking a ball,

shooting baskets in the gym or cafeteria, and going outside to run, jump or do backflips. A break system was developed to enable the student to take a 5 minute break upon completion of a task or assignment. This system permitted the student to choose the order of tasks and assignments throughout the day and the option to take a break after each task or to "bank" time for larger breaks later in the day. These breaks typically occurred 2 to 7 times in the morning and 2 to 5 times in the afternoon. Because Music and Physical Education were in the afternoon, the breaks tended to be less frequent at that time. During breaks, the student was able to choose from activities such as games, computer time, drawing, coloring, playing with toys such as Legos, working on puzzles, walking in the hall, going to the gym or cafeteria or outside if weather permitted. This break system was implemented by the student's special education teacher for the entire period from January 2014 to December 2014.

With regard to the breaks described in paragraph 3, there were a number of behaviors that were identified as indicators that the student was under stress and could escalate to disruptive behaviors. These were referred to as "triggers." When these "triggers" became apparent, teachers, including the student's special education teacher, encouraged the student to take a break and get involved in one of the break activities described above. These break opportunities were also made available to the student when he asked for them. A variety of "safe" areas were also used, including the teacher's desk, the gym, the cafeteria, the library, playground or soccer field.

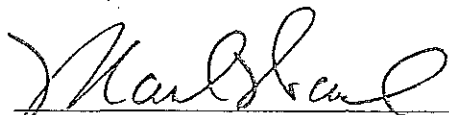
Considering all of the evidence presented in this complaint, the investigator is not able to substantiate the allegation.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education laws and regulations. Therefore, no corrective action is required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson St., Suite 620, Topeka, Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Mark Ward -Early Childhood, Special Education and Title Services

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).

15FC09

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # PUBLIC SCHOOLS ON FEBRUARY 17, 2015

DATE OF REPORT: MARCH 11, 2015

This report is in response to a complaint filed with our office by _____, the parent of _____ Ms. _____ will be referred to as "the parent" in the remainder of this report. _____ is the subject of this complaint, and will be referred to as "the student" in the remainder of this report. The complaint alleges that: (1) the district removed the speech/language services from the student's IEP on February 26, 2014 without parent consent; and (b) the student has not received any of the agreed upon services for his disability during the 2014-2015 school year.

Investigation of Complaint

The investigator spoke with the student's parent by telephone on February 25 and March 11, 2015, and reviewed all of the documents submitted by the parent. In addition, the investigator reviewed the district's written response, along with the accompanying documents, and made several e-mail contacts with the Director of Special Education.

Background Information

This student is a 15 year-old boy in the 9th grade. He has been identified as a child with a disability. On November 10, 2014, the student was involved in an incident which, after a manifestation determination review on November 14, 2014, resulted in expulsion and assignment to an alternative educational setting. The parent filed a request for an expedited due process hearing to challenge the results of the manifestation determination. However, that request was withdrawn on December 24, 2014, after the parties reached a "probationary" agreement. This agreement permitted the student to return to the high school, upon the conditions that: (a) the parent and the student cooperate on completion of a new evaluation and IEP; and (b) the student maintain specified behavior standards. Due to a delay in obtaining parent consent, the reevaluation has not been completed and the student currently remains in the alternative educational setting.

Allegations

ISSUE 1: THE DISTRICT REMOVED THE SPEECH LANGUAGE SERVICES FROM THE STUDENT'S IEP ON FEBRUARY 26, 2014 WITHOUT PARENT CONSENT.

The district admits that 30 minutes per week of speech/language services were removed from this student's IEP on February 26, 2014 without parent consent, and that, until very recently, those services were not provided thereafter. A Prior Written Notice, dated February 7, 2014, indicated the IEP team was proposing to remove the speech services from the student's IEP. The student's parent signed the consent portion of that form, but had checked a box on the form just above her signature indicating she did not give consent for the actions specified in the notice. It appears school personnel mistakenly believed the student's parent had consented to the removal of the speech services and deleted those services from the newly developed IEP, dated February 26, 2014. Those services were not provided until after the mistake was discovered during the process of preparing for the IEP meeting scheduled for February 16, 2015. At that meeting on February 16, the speech services were added back to the IEP. On February 17, 2015, this complaint was filed.

The first attempt to begin providing the reinstated speech services was made on February 25, and again on February 26 and 27. However, the services could not be provided on those dates because the student was absent. The first successful attempt to provide the reinstated speech services occurred on March 2, 2015.

Although admitting that it had incorrectly removed speech services from the student's IEP and had discontinued those services, the district's written response to this complaint suggests that compensatory services would not be an appropriate remedy because the team had determined the student did not need the speech services at the time it notified the parent of its intent to remove those services from the student's IEP in February 2014. In support of this position, the district cited a Federal District Court decision from Texas. That case is A.L. v. El Paso Indep. Sch. Dist., 3:08-CV-76-KC. (W.D. TX 2009).

In that case, like this one, a school failed to provide speech services specified in an IEP, and the student's IEP team had concluded the student no longer needed speech services. The parents did not contest this conclusion either at hearing or in court proceedings. Although it was undisputed that the services had not been provided, the court declined to order compensatory speech services, saying compensatory services in an area for which the student exhibits no disability does nothing to further the IDEA goal of providing services designed to meet the unique needs of children with disabilities to prepare them for further education, employment and independent living. The court said forcing a school to provide compensatory services under this circumstance would be a waste of school

resources that could be better used in providing children “with services they may in fact need to treat disabilities from which they in fact suffer.” The court added that requiring compensatory services under this circumstance would serve as a form of damages, a remedy the court said was inappropriate under the IDEA.

Although the investigator finds some merit in the court’s reasoning, the investigator will not apply it in this complaint for two reasons. First, in Kansas, this approach would nullify the state law which requires parent consent for a material change in services [K.S.A. 72-988(B)(6)]. If a district could simply remove a service from an IEP because the school professionals believed the student no longer needed the service, and not be subject to providing compensatory services through a complaint process, the statutory requirement to obtain written parent consent for a material change in services would be meaningless. Second, the facts of this case are different than the facts presented to the federal court in the El Paso case. In the El Paso case, the court said it was uncontested that the student did not need speech services. In that case, the court took time to point out that the parent did not contest the school’s assertion that the student no longer needed speech services. In this complaint, however, the uncontested facts are far different. In this case, it is uncontested that the parent did challenge the team’s decision that the student was no longer in need speech services, by signifying in writing on the Prior Written Notice that she did not consent to the proposal to remove the services from the child’s IEP. Further, the parent filed this complaint specifically alleging that the services continued to be needed by the student, and were unlawfully removed without her approval or consent.

A violation of special education laws and regulations is substantiated on this issue.

ISSUE 2: THE STUDENT HAS NOT RECEIVED ANY OF THE AGREED UPON SERVICES FOR HIS DISABILITY DURING THE 2014-2015 SCHOOL YEAR.

The federal special education regulations, at 34 C.F.R. 300.153 state that a complaint to a State Educational Agency, such as this one, must include a statement alleging a violation of special education laws and regulations and must include a statement of the facts on which the allegation is based. The parent produced no factual evidence to support the allegation in this issue. In the interview with the student’s parent, she told the investigator she believed the IEP services were not provided because the student has told her he is not receiving services and the student has failed every subject, which would not be possible if the student was receiving special education services. Although the parent provided no factual basis to support this allegation for any period during the past year (which includes both the alternative educational setting and the general education setting prior to the expulsion), the investigator required the district to provide evidence to sufficiently demonstrate that it was providing the student with the modified level of Free Appropriate Public Education (FAPE) it is required to

provide students who are being educated in an alternative educational setting for disciplinary reasons.

Special education laws and regulations require the district to provide children in an alternative educational setting, such as this student, with a modified level of FAPE, which includes the services that are needed to do two things: (a) to enable the child to participate in the general curriculum; and (b) to enable the child to make progress toward IEP goals. This is sometimes referred to as a "modified" FAPE. Under this standard, the district is not required to provide all of the services which are specified on the student's IEP. The Office of Special Education Services (OSEP) provided the following explanation in the comments section of the federal regulations:

In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

Federal Register, Aug. 14, 2006, p. 46716

These requirements are meant to provide the student with the opportunity to continue to participate in the general curriculum and the opportunity to make progress toward IEP goals. They do not guarantee that a student in an alternative educational setting will receive passing grades or meet IEP goals.

A review of the student's transcripts over the past two years verifies that the student has received some failing grades, particularly in math and science. The student's grades in other areas are average or below average. While in the alternative educational setting, the student has earned 3 full credits toward graduation, which is a half-credit more than he would have earned if he had remained at the high school. Progress reports for the period in which the student has been in the alternative educational setting show modest progress. The special education teacher at the Alternative Learning Program provided a written statement verifying that the student was receiving special education and related services in the Alternative Learning Program.

The evidence presented to the investigator supports the district's position that it is providing sufficient services to enable the student to have an opportunity to continue to participate in the general curriculum and to make progress on IEP goals while in the alternative educational setting.

The allegation of a violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Specifically, the district has failed to provide 30 minutes of speech/language services per week since February 26, 2014. Therefore, corrective action is required.

Required corrective action includes the following paragraphs, one through five, to be completed no later than April 24, 2015:

1. Send Early Childhood, Special Education and Title Services a written statement of assurance that in the future, the district will make material changes in services in a child's IEP only after it has received written consent from the parents of that child;
2. The district shall develop and send to all special education staff at High School a written memorandum reminding them that: (a) the Request for Consent form the district uses includes two boxes above the parent's signature, one box signifying that the parent is giving consent and the other box signifying that the parent does not give consent; and (b) parent consent is obtained only when the parent checks the box indicating that the parent is giving consent and the parent provides a signature. The district shall send a copy of this memorandum to Early Childhood, Special Education and Title Services along with written verification that it has been disseminated to staff members as described in this paragraph;
3. The district shall develop a schedule to offer compensatory speech/language services to the student. The offer must be for a minimum of thirty 30-minute sessions. The services may be scheduled for times outside the regular school day.
4. The student's parent may accept all, part, or none of the offered compensatory services, and the district shall notify Early Childhood, Special Education and Title Services of the extent to which the parent has accepted the offer; and

5. The district shall send Early Childhood, Special Education and Title Services a copy of the compensatory services schedule developed in accordance with paragraph 3, above.

6. Finally, the district shall notify Early Childhood, Special Education and Title Services when all of the compensatory services accepted by the parent has been completed.

Further, the district shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education, and Title Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Ave., Topeka, Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Mark Ward
Special Education Services

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).

KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION, AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
PUBLIC SCHOOLS #
ON OCTOBER 23, 2014

DATE OF REPORT: NOVEMBER 22, 2014

This report is in response to a complaint filed with our office on behalf of _____ by her parents, _____ and _____ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. _____ will be referred to as "the parents."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____, Director of the _____ Special Education Cooperative, on November 3, 2014. On November 20, 2014, the investigator spoke in a conference call with the Director as well as with Assistant Director _____, School Psychologist _____, and Principal _____.

The investigator spoke by telephone with the student's mother on November 7, 2014 and received email communication from the parent on November 7 and 10, 2014.

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

- Evaluation/Reevaluation Eligibility Report dated April 22, 2013
- IEP for this student dated May 3, 2013
- Email to the parent dated March 31, 2014
- IEP for this student dated May 1, 2014
- Email correspondence between district staff dated March 31, 2014 regarding paraeducator services
- Email from the student's mother dated June 27, 2014 requesting modification of a progress report
- Email from the student's mother to the Director and Superintendent dated August 4, 2014 asking for a meeting to discuss her request for amendment of records and her request for an IEE
- Email from the Director to the student's mother dated August 5, 2014
- Email from the student's mother to the Director dated August 5, 2014
- Email from the student's mother to the building principal dated August 10, 2014

- Email from the Director to the parent dated August 11, 2014 regarding the scheduling of a meeting
- Email from the student's mother to the building principal dated August 11, 2014
- IEP Review information developed by the parents and shared with school staff prior to the August 19, 2014 IEP Team Meeting
- IEP Amendment Between Annual IEP Meetings dated August 19, 2014
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated August 19, 2014
- Email from the student's mother to the building principal and other district staff dated September 2, 2014
- District response to the complaint
- On-line Parent Rights in Special Education posted by USD #
- On-line calendar for the 2014-15 school year
- Daily schedule for paraeducators

Background Information

This investigation involves a 6 year-old girl who has been diagnosed with Down Syndrome. The student was first determined to be eligible for Special Education services in 2008 and received services under Part C programming. Prior to transitioning to services at the _____ where she is currently enrolled for the second year in Kindergarten, the student had participated in a 5-day per week Early Childhood program where she also received Speech/Language support.

Issues

Three issues are outlined in this complaint. In a telephone call with the investigator on November 7, 2014, the parent put forward two additional issues that are addressed in this complaint report.

Issue One: The district has failed to provide the parents with information regarding their rights, ability, and process for obtaining an Independent Educational Evaluation.

Kansas regulations, at K.A.R. 91-40-12, state that if – following an initial evaluation or subsequent reevaluation – parents disagree with that evaluation, they have the right to ask for an independent educational evaluation at public expense. "Independent educational evaluation" (IEE) means an evaluation conducted by a qualified examiner who is not employed by the district responsible for the education of the child in question. Public expense means that the district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

If the parent requests an independent educational evaluation the school must either:

- Provide information to the parent about where an independent educational evaluation can be obtained, the agency criteria (which may include qualifications of examiners and location to obtain the evaluation); and
- ensure that the evaluation is provided at public expense, unless a special education due process hearing officer determines that the independent educational evaluation did not meet agency criteria; or
- initiate a due process hearing to show that the school's evaluation was appropriate.

If a parent requests an independent educational evaluation, the agency may ask the reason for the objection to the public evaluation. However, the explanation by the parent shall not be required, and the agency shall not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

A due process hearing would determine whether the school must pay for the independent educational evaluation. If the school's evaluation is found to be appropriate and the parents still want an independent educational evaluation, the expense is the responsibility of the parents. When an independent educational evaluation is conducted, the school or a special education due process hearing officer, or both must consider the results of the independent educational evaluation in decisions made with respect to a free appropriate public education for the child.

If an independent educational evaluation is provided at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the school uses when it initiates an evaluation. These criteria may include the location of the evaluation and the qualifications of the examiner. The credentials of the independent evaluator or evaluators must be comparable to the school's evaluators. The school may set reasonable limitations on the costs for which it will be responsible.

A parent is entitled to only one independent education evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees (34 C.F.R. 300.502(b)(5)).

District policy requires that parents be given a copy of the Parents Rights document before the student is first evaluated to determine his/her eligibility for Special Education services. A copy of Parents Rights is again provided to parents before the team meets to review the results of the initial evaluation. Parents are given another copy of Parents Rights at each annual IEP Team meeting and at any time they are given notice of a reevaluation. The student's May 2014 IEP indicates that parents were provided with a copy of Parents

Rights. The student's mother confirmed in a telephone conversation with the investigator that she had been given copies of her Parental Rights.

The Parental Rights document provided by the district contains information related to Independent Educational Evaluations. The document does not, however, provide any specific information regarding where an IEE can be obtained nor does it outline the district's criteria regarding IEEs.

The student was initially determined to be eligible for Special Education Services in November 2008. A reevaluation was completed in April of 2013 in anticipation of her transition from a pre-Kindergarten program in a district Early Childhood Center to a general education Kindergarten classroom.

For the reevaluation, new information was collected in the areas of communication, academic performance, and fine and gross motor skills. Signatures on the evaluation report indicate that team members – including the student's father and mother – agreed that the evaluation addressed all areas of concern and determined that the student was eligible for and in need of special education services.

The parents contend that the district has failed to grant their subsequent request for an Independent Educational Evaluation (IEE) and has not provided them with information regarding the process for obtaining such an evaluation.

In their complaint, the parents state, "(We) need the IEE to help Staff with implementing strategies on how to provide inclusive education with necessary accommodations and modifications to be successful."

In a telephone conversation with the investigator, the parent stated that she believes that an independent evaluation is warranted because the previous evaluation conducted in 2013 did not provide her daughter's team with sufficient information to adequately develop the student's current educational program.

According to the parents, they met with the district's Superintendent on July 1, 2014 and told her that they wanted to have an IEE conducted. The parents specifically requested that the evaluation be conducted by a presenter employed by the district for staff training on effective instruction and inclusive practices. The parents contend that the district has not responded to their request and has provided them with no informational material regarding their parental rights and the IEE process.

The parents report that they followed up with the Superintendent and the Director via email on August 4, 2014 requesting information regarding their request for an IEE. In an email to the Director dated August 5, 2014, the student's mother states, "We have requested an Individualized Educational Evaluation utilizing

(the presenter) since the district is utilizing him for other Co-teaching model training. If this is not going to happen we need to know.”

The student’s mother contacted the Principal of the student’s school on August 10, 2014 asking for “any word on the Independent Educational Evaluation.” In an August 11th email to the Principal, the parent again references the family’s interest in an IEE.

In an email dated September 2, 2014, the student’s mother states that the parents “still believe that it would be greatly beneficial...to have...an external evaluation **of the program** (emphasis added) established for (the student).”

The district stipulates that it has not provided the parents with any information regarding where an independent educational evaluation can be obtained or the district’s criteria regarding such an evaluation. The Director states that he has been unclear as to the nature of the parent’s request and has not followed up with the parents for clarification.

The district reports, however, that the Assistant Director of the Special Education Cooperative did meet with the student’s mother on October 6, 2014 and discussed – among other topics – the parents’ request for an IEE. The Assistant Director questioned the student’s mother regarding what information the parents wanted to obtain through an IEE and concerns the parents had regarding the evaluation.

By report of the Assistant Director, the parent stated that she did not disagree with or have questions about the evaluation but wanted feedback for the school on the student’s educational program. The parent did not agree with the description of an IEE put forth by the Assistant Director and requested that the evaluation be conducted by a specific outside consultant who was then scheduled to be working with district staff – including the student’s general and special education teachers – during 3 days in October 2014. It is the district’s contention that the consultant does not have the appropriate credentials to perform an IEE and determine eligibility and need for special education services.

The parents first made a request for an IEE in July of 2014. The district has not provided the parents with any information about where an IEE could be obtained or about the district’s criteria regarding an IEE. The district has the right to initiate a due process hearing to oppose the parents’ request for an IEE if it believes that the district’s most recent reevaluation of the student was appropriate. The district also has the right to establish appropriate criteria for the evaluation. The district cannot, however, simply take no action on the parents’ request.

Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

Issue Two: The district failed to implement the student's IEP and to make recommended changes, accommodations, and modifications. The district further failed to include in the student's IEP a statement of the special education, related services and supplementary aids and services that she needs.

Federal regulations, at 34 C.F.R. 300.101, require a district to implement a student's IEP as written. The parents contend that the district did not provide the paraeducator services called for in the student's May 2013 and May 2014 IEPs and failed to implement subsequent changes made to the May 2014 IEP during an IEP Team meeting on August 19, 2014.

Paraeducator Services

The "Anticipated Services to be Provided" section of the student's May 2013 IEP contains the following statement:

"(Initiate) 8/14/2013-5/02/2014 Cognitive/Academic: 170 minutes 1 time a week in general education classroom (in-class support) for the duration of the IEP to address goals in 1 and 2. (Initiate) 8/14/2013-5/02/2014 Cognitive/Academic: 150 minutes 3 times a week in general education classroom (in-class support) for the duration of the IEP to address goals in 1 and 2. (Initiate) 8/14/2013-5/02/2014 Cognitive/Academic: 140 minutes 1 time a week in general education classroom (in-class support) for the duration of the IEP to address goals in 1 and 2."

The "Anticipated Services to be Provided" section of the student's May 2014 IEP for the student states, "(The student) will receive 90 minutes of direct special education services using a pull-out model 5 days a week for ELA and math. (She) will receive 180 minutes of indirect special education services using an in class support model 5 days a week for ELA, math, music, PE, art, library, and science."

According to the parent, she does not believe that the student has received 180 minutes per day of in-class support from a paraeducator during the Spring of 2014 and questions whether those services have been provided during the 2014-15 school year as well. The parent bases this allegation on the fact that no paraeducator was present when the parent visited the classroom, including visits on April 13 and October 2, 2014.

Schedules provided by the district show that for the 2014-15 school year 3 paraeducators have been assigned to the Kindergarten classroom to provide the 180 minutes of in-class support called for by the student's IEP.

The district stipulates that for the weeks of March 10 and March 24, 2014 the student was not provided the full level of in-class services called for in her May 2013 due to the transfer of a paraeducator who had been supporting the student. During this period, the student missed a total of 9 hours of special education services in the general education classroom. Under these circumstances, a violation of special education laws and regulations is substantiated on this aspect of this issue.

Changes to the IEP

At an annual IEP team meeting, changes to the IEP are to be made by the entire IEP team. However, between annual IEP reviews, if the parent and school representative agree, changes can be made without an IEP team meeting, by amending the IEP rather than by rewriting the entire IEP. (K.S.A. 72-987(b)(4)(A)).

In amending a child's IEP, the parent of a child with an exceptionality and the school representative may agree not to convene an IEP team meeting for the purpose of making those changes, and instead may develop a written document to amend or modify the child's current IEP. There are no restrictions on the types of changes that may be made, so long as the parent and the school representative agree to make the changes without an IEP team meeting. If changes are made to the child's IEP without a meeting, the school must ensure that the child's IEP team is informed of those changes (K.S.A. 72-987(b)(4)(B); 34 C.F.R. 300.324(a)(4)).

Even when using the IEP amendment process, the school must provide Prior Written Notice of any changes in the IEP. If the changes in the IEP constitute a substantial change in placement or a material change in services, the school must request parent consent to implement the change.

Specific day-to-day adjustments in instructional methods and approaches that are made by either a general or special education teacher to assist a child with an exceptionality to achieve his or her annual goals do not require action by the child's IEP team.

Prior to a Staffing scheduled for August 19, 2014, the parents report that they provided the district with a list of topics/IEP changes they wanted to discuss with the team. The parents contend that at the meeting, those in attendance agreed to a series of "Recommendations" that were outlined in the Staffing Notes from the August 19th meeting. It is the position of the parent that those recommendations were intended to be reflected in changes to the student's May 2014 IEP, but the district did not revise the student's IEP document to reflect those changes. They further contend that these changes to the IEP agreed to by the team have not been implemented.

The "Recommendations" documented in the Staffing Notes from the August 19, 2014 meeting are as follows:

- "OT can provide classroom with activities for a small group or the entire class to do.
- Try using AAC to see if she can use it
- APE will see (the student) during gen ed PE one day a week. (The specialist) will work with multiple kids, not just (the student)
- At this time, (the student) will not participate in APE swimming.
- (General and special education teachers) can differentiate math and writing.
- (The student) can use an iPad for writing
- We will find a computer mouse that does not (sic) a roller and one button
- Ideas – use photography for speech/to create her own picture schedule.
- (The student) likes music and singing – maybe to help with speech
- Amend IEP and send home draft including goals tied to the common core
- Have (the Speech Pathologist) do a new speech eval.
- Add training for teachers. Dr. Causton and Dr. Villa
- (Speech Pathologist and classroom teacher) can work on socialization skills
- Parents would like to have a Respite worker go to Latchkey until they are comfortable"

It is the contention of the district that the "Recommendations" outlined in the meeting notes from the August 19th meeting represents a combination of service delivery changes and action items. It is the district's position that the action items contained in the list of recommendations were not intended to be incorporated into the student's IEP as new accommodations/ modifications. The Assistant Director, School Psychologist, and Principal (3 of the 6 district staff present at the meeting) have told the investigator that it was the intent of the team to determine whether any of the action items would prove beneficial for the student. If any were determined to be essential to the success of the student's educational program, those elements would be incorporated into the student's IEP at a later date.

According to the district, the only changes to the student's IEP that were made as a result of the August 19th meeting were those outlined on the IEP Amendment Between Annual IEP Meetings form and on the Prior Written Notice form signed by the parents. Those changes are described on the IEP Amendment form as follows:

"Effective 8/20/2014, (the student) will receive direct speech services within the regular classroom for 20 minutes twice a week, direct OT services within the regular classroom for 20 minutes once a week, and adaptive PE services for 30 minutes within the regular PE class once a

week. (The student) will receive 90 minutes of direct special education services in the regular education setting for writing and math. (The student's) regular education indirect support will continue as stated in her IEP."

It is clear to the investigator that there was not a meeting of the minds regarding the "recommendations" developed at the team meeting of August 19, 2014. While the parents believed that all these recommendations were to be incorporated into an amended IEP for the student, the district considered many of the recommendations to be action items, not to be included in an amended IEP. The fact that these items were not written into the IEP amendment form and the Prior Written Notice form, both of which were signed by the parent, supports the district's position. The district has implemented the changes spelled out in both the IEP Amendment form and consented to by the parent on a prior written notice form. Under these circumstances, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

Issue Three: The district has failed to follow through to amend or remove inaccurate information from records as agreed upon.

Federal regulations, at 34 C.F.R. 300.618, state that "a parent who believes that the information in the education records...is inaccurate or misleading...may request the participating agency...amend the information." Then, "within a reasonable time of the receipt of the request," the agency shall decide whether or not to amend the information, and the agency must inform the parents if it decides to refuse to make the amendment. A memorandum dated January 8, 2002 from the Team Leader of Student Support Services (now Early Childhood, Special Education, and Title Services) of the Kansas State Department of Education provided guidance to districts saying that, under most circumstances, "15 school days" would constitute a "reasonable time."

The parents report that they first contacted the Director via email on June 27, 2014 asking to have statements removed from a fourth quarter Progress Report regarding the student developed by the district's Speech Pathologist. According to the parents, they received an email from the Director on July 1, 2014 indicating that information could be removed from the file. On August 4, 2014, the parents sent an email to the Superintendent and the Director requesting a meeting to discuss, among other topics, the removal of information from the student's records.

On August 5, 2014, the Director responded via email to the parent's email stating, "We will strike the information requested from (the student's) IEP quarterly progress report. Specifically, the information that states, 'She often appears to be in her own world, oblivious to things around her. Her interactions with peers consist of a hug, but when she begins to babble or daydream, her peers will discontinue interaction. Observations in the classroom reveal (the

student) needs multiple repeated directions and redirects and will often be led by an adult to the proper place in the room. (The student) could benefit from a communication device to help build her verbal output.” The Director stated that once the parent had confirmed striking the above statements met her approval, the district would “complete paperwork and request your signature so that we can modify (the student’s) IEP as we have agreed.”

The student’s mother followed up via email to the Director on August 5, 2014, stating, “there are additions from what is listed...”

The student’s mother states that at an IEP Team meeting on August 19, 2014 she provided the district with a copy of highlighted documents showing the information she wanted to have removed from the student’s file.

The district contends that it is willing to make changes to the student’s educational records but has been unable to come to an understanding with the parents as to what changes the parents are requesting. A meeting has been scheduled with the parents for November 24, 2014 for the purpose of discussing the specific changes to educational records they are requesting.

The district promptly agreed to the parents’ request for an amendment to the student’s educational records. In early August 2014, the district outlined its plan for amending records, but the parents indicated that they believed additional changes were needed. Although several weeks have passed as the parents and the district attempt to reach agreement regarding precisely what changes should be made to the student’s records, this delay is not in the opinion of the investigator solely the responsibility of the district. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Four: Parents have not been provided with a copy of the student’s amended IEP in a timely manner.

Each parent must be provided a final copy of the IEP at no cost (K.A.R. 91-40-18(d); 34 C.F.R. 300.322(f)). If a student’s IEP is subsequently amended, parents must, ***upon request***, be provided with a revised copy of the IEP ***with the amendments incorporated*** (emphasis added). (See IEP Amendment Form at <http://www.ksde.org/Default.aspx?tabid=544>; Federal Register, August 14, 2006, pp. 46685-46686).

No specific timeline has been specified within which a district must comply with a parent’s request, but in the absence of some special circumstances, 15 school days would generally be considered to be a reasonable time.

The student’s May 2014 IEP was amended on August 19, 2014. In an email dated September 2, 2014, the student’s mother asked to “review a copy of the

changes that were made in the meeting and to what extent (sic) they have been implemented...” The student’s mother states that she met with the Assistant Director of Special Education on October 6, 2014 and requested that – among other issues – the district provide a copy of the student’s amended IEP.

According to the student’s mother, the student’s special education teacher subsequently told her that the IEP would – because of district policy regarding changes to goals – have to be rewritten. An IEP Team meeting for the purpose of reviewing and revising the student’s IEP was held on November 3, 2014, and a copy of the new IEP was made available to the parent on November 14, 2014 (9 school days after the meeting). The parents have never been given a copy of an IEP reflecting changes made at the August 19th meeting.

It is the position of the district that parents were not provided with a copy of an IEP because the team did not develop a new IEP at the August 19th meeting but instead agreed to amend the student’s May 2014 IEP. According to the district, parents were provided with a copy of the IEP Amendment Between Annual IEP Meeting form completed that day as well as a copy of the Prior Written Notice form detailing the changes in services and placement agreed to by the parents. Parents were also given a copy of Staffing Notes from the meeting.

The district has failed to comply with the parents’ request for a copy of the student’s IEP showing changes made during the meeting of August 19, 2014. The district neither produced for the parent a copy of the May 2014 IEP with the amendment attached nor provided a revised copy of the IEP with the amendments incorporated. A violation of special education laws and regulations is substantiated on this issue.

Issue Five: The student’s general education teacher was not in a timely manner provided with a copy of the student’s IEP.

Federal regulations, at 34 C.F.R. 300.323(d)(1) state that the IEP for a student receiving special education services must be “accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation.” All individuals who are providing education to the child (regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for implementation of the IEP) must be informed by the IEP team of

- his or her specific responsibilities related to implementing the child’s IEP, and
- the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP

The student's mother contends that on September 25, 2014 – when the parent was observing in the student's Kindergarten classroom – she was told by the general education teacher that the teacher did not have a copy of an amended IEP for the student. According to the parent, the student's general education classroom teacher had not at the time of the filing of this complaint on October 23, 2014 been provided with a copy of the student's amended IEP.

According to the district, the general education teacher for the student has been provided with a copy of the student's May 2014 IEP and was made aware of her responsibilities with regard to that IEP. That teacher participated in the team meeting of August 19, 2014. The amendments to the May 2014 IEP made as a result of that meeting are as follows:

“Effective 8/20/2014, (the student) will receive direct speech services within the regular classroom for 20 minutes twice a week, direct OT services within the regular classroom for 20 minutes once a week, and adaptive PE services for 30 minutes within the regular PE class once a week. (The student) will receive 90 minutes of direct special education services in the regular education setting for writing and math. (The student's) regular education indirect support will continue as stated in her IEP.”

None of the amendments made by the team on August 19th alter the specific responsibilities of the general education classroom teacher with regard to the implementation of the student's May 2014 IEP. Further, no changes that would impact the general education teacher's delivery of services were made to the accommodations/modifications listed in that document. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, violations were substantiated with regard to

- K.A.R. 91-40-12, which requires a district to respond to a parent's request for an Independent Educational Evaluation (IEE);
- 34 C.F.R.300.341, which requires that a student's IEP be implemented as written; and
- 34 C.F.R. 300.324(a)(6), which requires a district to provide parents with a revised copy of the IEP, with amendments incorporated, upon request.

Therefore, USD # is directed to take the following actions:

- 1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education, and Title Services stating that it will comply with
 - a. K.A.R. 91-40-12 either by providing these parents with pertinent information regarding an IEE and facilitating the provision of that evaluation at public expense or by initiating a due process hearing,
 - b. 34 C.F.R.300.341 by implementing this student's IEP as written, and
 - c. K.A.R. 91-40-18(d); 34 C.F.R. 300.322(f) by providing parents with a final copy of their child's IEP at no cost.

- 2) Within 5 school days of the receipt of this report, the district must either
 - a. provide the parents with information about where they may obtain an IEE and with information about the school district's criteria regarding independent educational evaluations, or
 - b. request a due process hearing to show that the district's evaluation of the student is appropriate.

- 3) Within 10 school days of the receipt of this report, the district must schedule a meeting for the purpose of developing a plan for the delivery of compensatory services to address those 9 hours during March of 2014 when in-class paraeducator support to the student was not provided. The parent shall have the option of accepting all or part of the total compensatory services that are offered or of declining any or all of those services.

- 4) Within 5 school days of the receipt of this report, the district must provide these parents with a copy of the student's revised IEP that incorporates the amendments developed on August 19, 2014.

- 5) Within 5 school days of the date of the meeting required in corrective action No. 3, above, provide Early Childhood, Special Education and Title Services with written documentation of completion of corrective actions Nos. 2, 3, and 4.

Further, USD # shall, within 10 calendar days of the date of this report, submit to Special Education Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;

- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

Diana Durkin

Diana Durkin, Complaint Investigator

(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).

**KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES**

**REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #
ON JUNE 2, 2015
DATE OF REPORT: JUNE 25, 2015**

This report is in response to a complaint filed with our office by _____ on behalf of his daughter, _____ will be referred to as "the student" in the remainder of this report. Mr. _____ will be referred to as "the parent."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____ Assistant Director of the _____ Special Education Cooperative, on June 24, 2015. Ms. _____ will become the Director of the Cooperative as of July 1, 2015.

On June 22, 2015, the investigator spoke by telephone with _____ Director of Education for _____, and with _____, classroom teacher.

The investigator spoke by telephone with the student's father on June 15, 2015.

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

- Letter from the Director of the _____ Special Education Cooperative to the parent dated April 3, 2014
- Email from the Director to the parent dated April 3, 2014
- IEP for the student dated July 21, 2014
- Email from the parent to the Director dated May 22, 2015
- Email from the Director to the parent dated May 27, 2015
- Draft IEP for the student dated June 8, 2015
- Statement prepared by _____ staff and submitted to the investigator on June 24, 2015
- _____ website

Background Information

This investigation involves an 18 year-old girl whose primary exceptionality is Autism. She attends _____ – a not-for-profit residential and day-school program in _____, Kansas serving children ages 5-21. _____ serves students diagnosed with Autism Spectrum Disorders, speech and language

impairment, Down Syndrome, and other developmental disabilities. Many students at the school also have challenging behaviors that interfere with their academic progress at school as well as their home life and community access.

The "Day-Only" program at _____ includes a seven-hour school day and operates Monday through Friday following the school calendar of the referring school district. The student participates in the _____ day program and then returns to her home in _____.

Since her enrollment at _____, the student has consistently received ESY services during the month of June.

Issues

In his complaint, the parent raises a single issue:

The district is unwilling to provide extended school year (ESY) services to the student at _____ during the month of July 2015 because summer services are not provided to other special education students in _____ at that time .

Kansas regulations, at K.A.R. 91-40-1(x) define extended school year services (ESY) as "special education and related services that are provided to a child with a disability under the following conditions:

- (1) Beyond the school term provided to nondisabled children;
- (2) in accordance with the child's IEP; and
- (3) at no cost to the parents of the child."

When the IEP is developed initially or reviewed annually, the IEP team must consider the need for ESY services for children with disabilities. ESY services are different than general education summer school. ESY may or may not be provided in conjunction with the general education summer school. A child may need ESY even though summer school is not offered for general education children. The reason for these services is to ensure the provision of FAPE so that the child can make progress toward the goals specified on the child's IEP and to prevent regression, which would impede such progress.

Under K.A.R. 91-40-3(e), the regulations outline ancillary FAPE (Free Appropriate Public Education) requirements related to ESY as follows:

- “(1) Each agency shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.
- (2) An agency shall be required to provide extended school year services only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.

(3) An agency shall neither limit extended school year services to particular categories of disability nor unilaterally limit the type, amount, or duration of those services (emphasis added)."

The IEP for this student dated July 21, 2014 reflects team consideration of ESY services. The section of the document entitled "IEP Meeting Report" contains the statement "ESY discussed and approved as arranged with district." Under "Special Considerations," the document shows that the IEP Team felt that the student was eligible for ESY services. According to the "Extended School Year (ESY) Determination Documentation" form contained in the IEP, the degree of the student's disability was considered to be "Severe/Profound" and the degree of regression suffered was considered to be "severe." The form also indicates that it would take "months" for the student to recoup skills lost during the summer break if services were not provided. According to the document, the "parents do not have the support required to maintain structure while (the student) is at home" and supportive home care was considered "limited."

The Draft IEP for the student dated June 8, 2015 again shows that the IEP Team considered the student to be eligible for ESY services. The "Extended School Year (ESY) Determination Documentation" form again reflects that the team felt the student's degree of disability to be "severe/profound," that the degree of her regression would be "severe," and that "recovery time/recoupment from this regression" could be "months." It is noted, "parents do not have the resources (the student) needs to maintain structure and routine." "Supportive home care while in the home environment...is limited."

According to the parent, the student has not been provided ESY services during the month of July at any point since her enrollment at The parent contends that the district has been unwilling to pay for July services even though her IEP Team has determined that ESY services are needed in order to avoid severe regression that could require months of recovery time/recoupment.

The parent states that he has not protested the district's limitation of ESY services to the month of June in the past because he was unaware that any option for service for the full extent of the summer break was available. Upon having learned that consideration could be given to services beyond the month of June, the parent states that he contacted the Director of the Special Education Cooperative via email to ask that the district consider paying for the student to attend the program in July. The Director sent an email response to the parent on May 27, 2015 stating " will be providing ESY services to (the student) during the month of June five days a week starting June 1, 2015 to June 26. Services will resume on August 3, 2015."

The Director of Education for the program told the investigator in a telephone call that he and other staff who were a part of the June 6th IEP Team Meeting believed that it was important for the student's ESY program

to include services during the month of July. Both he and the student's classroom teacher stated that the student has demonstrated regression when absent from school. However, _____ staff provided the investigator with no data to support their contention regarding regression and instead noted in a written statement that "due to (the student's) IEP being scheduled so close to summer break, it can be difficult to compare data from one IEP year to the next."

In a telephone conversation with the investigator, the parent indicated that he was unaware of any data that indicated that significant regression has occurred as a result of previous lapses in service for his daughter during the month of July. He indicated that he believed that the reason no such lapse was documented was that his daughter experienced a "honeymoon" period upon her return to _____ in August and that regression was not evidenced until later in the Fall. The parent was not, however, able to rule out other factors that could have an impact on student performance.

According to the parent, the IEP Team talked in general terms at the June 8th meeting about the need for services beyond the regular school year. The team did not specifically discuss whether or not the provision of services to the student in June would be sufficient or whether a lapse in service during the month of July would in-and-of itself result in severe regression.

The Assistant Director stipulates that the district's position regarding the duration of ESY services for this student posited by the Director in his email to the parent on May 27, 2015 was based solely upon the established schedule for the district's ESY program for other special education students. The Director unilaterally made the decision regarding services; he did not take the individual needs of this student when making the decision to limit services to the month of June.

The Assistant Director was present at the June 8, 2015 IEP Team meeting. She reports that the team did not complete the "Extended School Year (ESY) Determination Documentation" form during the meeting. She reports that while ESY services were discussed, _____, staff did not provide any data to support a contention that the student would suffer from significant regression should services be limited to the month of June 2015. The Assistant Director contends that she asked _____ staff to provide data to support the need for ESY in general, but no supportive data was presented.

Because the district limited the duration of ESY services provided to this student without first considering the her individual needs, a violation of special education laws and regulations is substantiated. However, no evidence has been provided to show that the student has failed to receive FAPE because of the district's position.

Additional Information

The student has received ESY services during the month of June 2015 for five days per week. In a written statement provided to the investigator, staff noted, "it would be best for consistency and programming efficacy that (the student) be able to attend _____ during the month of July on Mondays, Wednesdays and Fridays."

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, a violation was substantiated with regard to K.A.R. 91-40-3(e)(3) which prohibits districts from limiting the type, amount, or duration of ESY services without considering the individual needs of the student.

Therefore, USD # _____ is directed to take the following actions:

- 1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will comply with
 - a. K.A.R. 91-40-3(e)(3) by basing decisions regarding the type, amount, or duration of ESY services on the individual needs of the students.
- 2) Upon receipt of this report, take immediate action to schedule an IEP Team meeting for the specific purpose of determining whether or not ESY services for this student during the month of July 2015 are needed based upon the individual needs of this student. That meeting shall be held within no more than 10 calendar days of the receipt of district's receipt of this report.
- 3) In making the its decision regarding ESY services, the IEP team should work toward consensus, keeping in mind that the district is not required to provide ESY services merely because the student could benefit from them. Instead, the IEP Team must determine if the regression experienced by the student as a result of limiting ESY services to those already provided in the month of June would significantly affect the student's maintenance of skills and behaviors. It will be important for the team to consider the student's performance following past extended lapses in instruction when determining current needs.
- 4) If the IEP team cannot reach agreement, the LEA representative at the meeting – in this case the Assistant Director/Director of Special Education – has the ultimate authority to make a decision and then to provide the parents with appropriate notice of the district's decision regarding additional ESY

services and request consent for the proposed action if additional services are to be provided.

- 5) If the team determines that additional services are to be provided, the district shall, within 5 calendar days after this IEP Team meeting, send a copy of the plan for the provision of services – including the type, amount, and duration of those services – to Early Childhood, Special Education and Title Services.

Further, USD #: shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education and Title Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.


Diana Durkin, Complaint Investigator

(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).

15FC11A

In the Matter of the Appeal of the
Report Issued in Response to a
Complaint Filed Against Unified
School District No. ____, __ Public Schools

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on October 23, 2014, by ____ and ____
____, on behalf of their daughter, _____, against Unified School District No. ____,
____ Public Schools. The complaint (15FC__-001) alleged five violations of special education
laws and regulations.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the
Early Childhood, Special Education and Title Services Section of the Kansas State Department
of Education. Following the investigation, an Initial Report, addressing the complaint, was
issued on November 22, 2014. That report concluded that there was a violation of special
education requirements with regard to Issues 1 and 4. The report included specific corrective
actions to address those violations. The report also contained findings and conclusions
indicating there were no violations of special education laws and regulations with regard to
issues 2, 3 and 5.

Thereafter, on December 5, 2014, the parents filed an appeal regarding issues 2, 3 and 5. On
December 15, 2014, the school district filed a response to the parents' appeal. Upon receipt of
the appeal, an Appeal Committee was appointed pursuant to Kansas regulations at K.A.R. 91-40-
51(f). The Appeal Committee has reviewed the information provided in connection with this
matter and now issues this final report.

DISCUSSION OF ISSUES ON APPEAL

**ISSUE 2: THE DISTRICT FAILED TO IMPLEMENT THE STUDENT'S IEP AND TO
MAKE RECOMMENDED CHANGES, ACCOMMODATIONS AND MODIFICATIONS.
THE DISTRICT FURTHER FAILED TO INCLUDE IN THE STUDENT'S IEP A
STATEMENT OF THE SPECIAL EDUCATION, RELATED SERVICES AND
SUPPLEMENTARY AIDS AND SERVICES THAT SHE NEEDS.**

On August 19, 2014, the district held an IEP meeting. That meeting generated three different
forms. One form was titled "IEP Amendment Between Annual IEP Meetings, and was signed by
the parent and an authorized representative of the district. A second form was a Prior Written
Notice and Request for Consent form, signed by the parent. A third form was titled "Staffing
Notes," and it was signed by all who were in attendance at the meeting. Each of these forms lists
what appears to be a set of proposed services.

The services proposed in the IEP Amendment form are identical to the services proposed in the Prior Written Notice and Request for Consent form. There is no question that the services proposed in these two forms were intended to be added to the student's IEP. The services listed in the Staffing Notes are different than the services listed in the other two forms. The district's position is that the services listed in the Staffing Notes are only recommendations. The parents' position is that the services listed in the Staffing Notes were not merely recommendations, but were also intended to be added to the student's IEP.

The complaint investigator found that the district's position was supported by the fact that the services listed in the Staffing Notes were not included in the IEP Amendment form or in the Prior Written Notice and Request for Consent form. The Appeal Committee agrees with the complaint investigator.

IEP changes are required to be recorded on a Prior Written Notice form to notify the parent of the changes the team is proposing to make. When the Prior Written Notice form was given to the parent, the parent was notified, in writing, that the changes on the form were being proposed for addition to the IEP. The parent signed the attached Request for Consent to make those changes. No Prior Written Notice and Request for Consent was given to the parents regarding the services specified in the Staffing Notes.

It is not clear why the team also used an IEP Amendment form to document changes to this IEP that were made at the August, 19, 2014, IEP meeting. However, the IEP Amendment form is also a legal document districts may use to document IEP changes agreed to by an IEP team. As it did with the Prior Written Notice and Request for Consent form, the team omitted the services listed on the Staffing Notes from the IEP Amendment form. The Appeal Committee agrees with the investigator that is evidence that the district was not proposing to add the services in the Staffing Note to the IEP.

In addition, the Prior Written Notice form specified the changes being proposed under the heading "A description of the action proposed or refused," and provided an effective date for the changes in services. The IEP Amendment form specified the exact same changes specified in the Prior Written Notice form, under the heading "Description of proposed IEP Change(s) and effective date(s)," and provided the same effective date as specified in the Prior Written Notice. In contrast, the services listed in the Staffing Notes were listed under the title "Recommendations." The Staffing Notes did not specify any effective date.

Although sustaining the complaint report on this issue, the Appeal Committee understands why the parents came to the conclusion that the services listed in the Staffing Notes were intended to be added to the IEP. The Appeal Committee, itself, found the Staffing Notes to be confusing on this issue. The Staffing Notes list a series of recommendations. At the end of that list, the form says: "Those in attendance: (Signatures)." Below that statement, those in attendance placed their signatures. That would indicate that the signatures only documented that those signing were in attendance at the meeting. However, to the right of each signature are two boxes, titled "Agree" and "Disagree." Each of these boxes are checked "Agree" for each of those signing the document. If the substance of the Staffing Notes is only to document discussion and recommendations, there is no need to sign on the document whether individual team members

agree. Including this kind of documentation of agreement or disagreement in Staffing Notes, strikes the Appeal Committee as being both unnecessary and unnecessarily confusing to parents. The Appeal Committee highly recommends removing the boxes marked “Agree” and “Disagree” from this form. The Appeal Committee also wishes to advise the parents that they may always request an IEP meeting to discuss their concerns and make proposals. Because of the confusion resulting from how the Staffing Notes document was written, the Committee recommends the parents request another meeting to discuss whether the items listed in the Staffing Notes should be added to the IEP, and if not, to receive a Prior Written Notice specifying why not.

For the foregoing reasons, the Appeal Panel sustains the report with regard to Issue 1.

ISSUE 3: THE DISTRICT HAS FAILED TO FOLLOW THROUGH TO AMEND OR REMOVE INACCURATE INFORMATION FROM RECORDS AS AGREED UPON.

It is uncontested that at the August 19, 2014 IEP meeting, the parents provided the district with a highlighted copy of a document showing the information they wanted removed from their child’s education records. In the complaint report, the investigator cited a 2002 Kansas State Department of Education Memorandum stating that districts must respond to parent requests within a reasonable time and that, unless there are unusual circumstances, a reasonable time to respond to a parents request extends to 15 school days. That standard remains the standard of the Kansas State Department of Education.

The district’s response to the parent’s appeal indicates that the district did not respond with an answer to the parents’ request within 15 school days. The district’s response indicates that on October 6 the district met with the parent to discuss her request. This was 33 school days after the parent gave the district the highlighted document. Upon the filing of this complaint on October 23, 2014, the district still had not communicated a response as to whether it was going to remove the information the parent highlighted at the August 19 meeting. The investigator recognized this delay and determined that the delay was not solely the responsibility of the district because there may have been some confusion regarding precisely what information the parent wanted removed.

In the appeal, the parents responded, saying “The Parents of Alyssa provided the District a highlighted document outlining the changes that were requested.” The Appeal Committee finds that the parents clearly indicated precisely what they wanted removed by highlighting the words to be removed, and that the district failed to notify the parents of its decision regarding this request within a reasonable time. From the evidence presented in this complaint, it appears to the Committee that the district either has no procedures for responding to this kind of request from a parent or that it failed to implement the procedures it has.

The complaint report is overturned on this issue. The Appeal Committee finds that a violation of special education regulations is substantiated on this issue and corrective action is required. Therefore, in addition to the corrective action specified in the original complaint report, the district is directed to develop a written procedure for how school personnel are to process a request from a parent to amend the education records of their child, including a process for how parents will receive a response to their requests within a reasonable time. The district shall send

a copy of this written procedure and conduct a training session on how to implement the procedure to all special education staff members at USD____. Finally, the district shall provide written notice to Early Childhood, Special Education and Title Services when these corrective actions have been completed. That notice shall include a copy of the written procedure and the date and names of those attending the training session. All of these actions shall be completed no later than March 31, 2015.

ISSUE 5: THE STUDENT’S GENERAL EDUCATION TEACHER WAS NOT IN A TIMELY MANNER PROVIDED WITH A COPY OF THE STUDENT’S IEP.

According to the parents, the student’s general education teacher told the parents that she did not have a copy of the amended IEP generated at the August 19 meeting. The district produced no evidence to the contrary. The pertinent regulation is 34 C.F.R. 300.323(d). That regulation states: “

(d) Accessibility of child's IEP to teachers and others. Each public agency must ensure that--

(1) The child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(2) Each teacher and provider described in paragraph (d)(1) of this section is informed of--

- (i) His or her specific responsibilities related to implementing the child's IEP; and
- (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

The complaint investigator determined that none of the changes made to the student’s IEP at the August 19 meeting altered the responsibilities of the general education classroom teacher. It is also uncontested that the general education teacher was at, and participated in the August 19 meeting, and so would likely be familiar with the changes made at that meeting. No evidence to the contrary was presented in this appeal. In addition, the district’s response to the appeal stated that copies of IEP are housed in the building and general education teachers in the building have access to the IEP s of the children with whom they are working. Accordingly, the Appeal Committee finds that the requirements of 34 C.F.R. 300.323(d) were met.

For the foregoing reasons, the Appeal Committee sustains the complaint report on this issue. However, the Committee recommends the district review its policies regarding access to student information, and assess: (a) how school personnel may effectively access updated information from the amended IEPs of their students; (b) how aware school personal are of procedures to access this kind of information; and (c) how school personnel may access this information in a manner which protects the confidentiality of that information.

CONCLUSION

For the reasons stated above, the committee sustains the complaint report with regard to Issues 2 and 5, and overturns the complaint report with regard to Issue 3. This is the final decision of the state department of education with regard to this complaint. Kansas law allows no further review.

This Final Decision is issued this _____ day of December, 2014.

APPEAL COMMITTEE:

Colleen Riley

Jana Rosborough

Laura Jurgensen

15FC12

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION, AND TITLE SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # COUNTY COMMUNITY SCHOOLS ON JANUARY 15, 2015

DATE OF REPORT: FEBRUARY 12, 2015

This report is in response to a complaint filed with our office by _____, the mother of _____ Ms. _____ will be referred to as "the parent" in the remainder of this report. _____ is identified as a child with an exceptionality and is the subject of this complaint. _____ will be referred to as "the student" in the remainder of this report. The complaint included five allegations: (1) district staff are having physical contact with the student when the student is upset; (2) district staff are not calling the parents after the student has been aggressive or noncompliant for 30 minutes; (3) the student is not receiving breaks as stated in the student's IEP; (4) district staff are chasing the student when the student is exhibiting aggressive behavior; and (5) the student does not have a teacher and para with the student at all times.

Investigation of Complaint

The investigator reviewed the complaint submitted by the parent, the student's current IEP (dated November 6, 2014), which includes the student's behavior intervention plan (BIP); one of the student's past IEPs (dated September 2, 2014); staffing notes from the February 24, 26, and 27, March 6, September 2, and November 6, 2014, meetings; Prior Written Notices and Requests for Consent dated February 26, March 6, and September 2, 2014; and the complaint response letter from the special education director for the district. Additionally, the investigator interviewed the parent by telephone on January 29 and February 5, 2015. The investigator also exchanged emails with the parent on February 9 and 10, 2015. The investigator also spoke with the special education director by telephone on January 20, 21, 29, and February 3 and 4, 2015. The investigator exchanged emails with the special education director on January 29 and February 3, 4, 10, and 11, 2015. The investigator emailed the information systems manager for the service center providing special education services for the district on February 4 and 5, 2015, and spoke with the information systems manager by phone on February 5, 2015. The investigator spoke with the district superintendent by phone on February 6, 2015.

Background Information

The student is a seven-year-old boy who is in the second grade and has been identified as an exceptional child. The student's current IEP was initiated on November 6, 2014. The student attends Community Elementary in Unified School District

The student's IEP included numerous components designed to address the student's behavioral needs. The student's IEP included behavioral goals and objectives and a BIP to address the student's behavioral needs and allow the student breaks to cool down when needed. The BIP was designed to address behaviors of concern such as impulsivity, emotional responses to stressors and frustrations, and aggression.

Issues and Conclusions

ISSUE ONE: DISTRICT STAFF ARE HAVING PHYSICAL CONTACT WITH THE STUDENT WHEN THE STUDENT IS UPSET

The parent alleges that the student's IEP states that if the student is upset it is best not to have physical or verbal contact with the student. The parent goes on to allege that the parent has received information from several notes sent home at the end of the school day, a text message to the student's father, and the parent's own observation of district staff having physical contact with the student when the student is upset. The provision of the student's IEP that the parent is referring to is located in the student's BIP. This provision states, "If [the student] is upset, it is best to have no physical or verbal contact when [sic] [the student]."

However, this statement in the student's IEP does not prohibit physical or verbal contact. It only makes a recommendation to staff regarding what is best to do when the student is upset. Because this statement is merely a recommendation it cannot be enforced and therefore this investigator cannot substantiate a violation of special education law on this issue and cannot issue corrective action as to this issue. Because this statement is merely a recommendation its utility is questionable. More importantly, it is an example in this IEP of a statement capable of alternative interpretations, resulting, at least in part, in the filing of this complaint. If the IEP team intended to require a particular protocol to be followed when the student is upset it should work toward greater clarity on this statement and specify the process to be used in a manner that is clear to all school personnel as well as the parent.

ISSUE TWO: DISTRICT STAFF ARE NOT CALLING THE PARENTS AFTER THE STUDENT HAS BEEN AGGRESSIVE OR NONCOMPLIANT FOR 30 MINUTES

The parent also alleges that the IEP states that the parents will be called if the student is upset. Additionally, the parent alleges that the parents will be called after 30 minutes of noncompliance or aggression. The provision of the student's IEP that the parent is referring to is located in the student's BIP. This provision states, "If [the student] is

upset, it is best to have no physical or verbal contact when [sic] [the student]. If [the student] runs, [the student] will not be chased. Staff will try to maintain visual contact with [the student]. *Mom and Dad will be called.* Parents will also be called if [the student] climbs on the banister. If [the student] leaves the school grounds, officials will be called to protect [the student]. *Mom or Dad will be called after 30 minutes of noncompliance or aggression time.*" The relevant portions to the analysis of this issue are italicized for emphasis.

The parent states in the formal complaint that the parent receives a daily note nearly every day that states that the student was noncompliant or aggressive for more than 30 cumulative minutes per day. The parent goes on to state that despite the student exhibiting noncompliant or aggressive behavior for more than 30 cumulative minutes per day the parent was not called. The district states in its response that the parents are contacted after an incident of noncompliance or aggression that lasts for 30 consecutive minutes. However, the parents are not contacted when the student exhibits multiple incidents of noncompliant or aggressive behavior for more than 30 cumulative minutes in a day. Additionally, the district states in its response that in one instance staff did not notify parents until after 90 minutes of aggression or noncompliance. The district further stated that "[b]oth staff members that were assigned to [the student] were attempting to redirect [the student] and did not make a call."

This provision of the student's BIP is also capable of alternative interpretations. The parent appears to interpret this paragraph to mean that she will be called every time the student is upset or after 30 cumulative minutes of noncompliance. The district appears to interpret this paragraph to mean that the parents will only be called after 30 consecutive minutes of noncompliance. Additionally, it is difficult to understand how the two italicized portions of the quoted paragraph are to be reconciled and when each sentence applies. When does the sentence "Mom and Dad will be called" apply? When the student is upset? When the student runs? A student must be provided with the special education and related services as stated in the student's IEP. 34 C.F.R. § 300.323(c)(2). Additionally, all IEPs must have the necessary clarity and components required by 34 C.F.R. § 300.320. Based on the district's own admission, as well as the ambiguous and contradictory nature of this provision, this investigator substantiates a violation of special education law regarding this specific provision of the student's IEP not being followed.

ISSUE THREE: THE STUDENT IS NOT RECEIVING BREAKS AS STATED IN THE STUDENT'S IEP

Additionally, the parent alleges that the IEP states that the student will have a break card that the student may use to take a break. The district did not respond to this allegation in its response. The provisions in the student's IEP regarding breaks are located in the student's BIP, the section on accommodations, and the section on modifications. These provisions are confusing and inconsistent. In the accommodations section and the BIP there are specific references that the student may use a break card to show the instructor that the student has become overwhelmed or frustrated and that

the student requests to leave the classroom. If the student's request is granted, then the student may go to the "work room until the instructor feels that the student is ready to return to class." Additionally, the accommodations section states that the student may only use the break card two times in the morning and two times in the afternoon. This same restriction is not noted in the student's BIP and it is unclear whether the provisions in the BIP and the accommodations section are meant to be independent or whether they are referring to the same thing. In the accommodations section it states that the breaks may be between 5–45 minutes, except in extreme circumstances. In the BIP only the minimum number of minutes for a break is listed (five). It is unclear whether the maximum number of minutes for a break applies (45) and whether "extreme circumstances" could permit a longer break. The break card is also mentioned in the section of the IEP that describes the extent to which the student will not participate in general education classes, but without the specificity included in the accommodations section and BIP. Additionally, in the accommodations section an accommodation of "separate, quiet setting" is listed. This accommodation is available at the student's request and "times of distress." It is unclear whether this is a separate accommodation from the break card. Additionally, in the modifications section a modification of "sensory breaks" is listed. It states that the student may take sensory breaks whenever the student feels overly stimulated or stressed. It is unclear whether these sensory breaks are in addition to the break card. These "sensory breaks" are mentioned again in the student's BIP without the specificity noted in the modifications section.

The parent provided a factual scenario in a follow-up conversation with this investigator after the filing of this formal complaint that clearly illustrates the confusion and inconsistency created by these provisions of the student's IEP. In this scenario the parent contacted a district staff member with a concern that the provision of the student's IEP regarding break cards was not being followed because the district staff member was only permitting the student to take a five minute break. The parent cited to the accommodations section of the student's IEP which states that the breaks may be between 5–45 minutes, except in extreme circumstances. The district staff member stated that the student's IEP was being followed and cited the BIP where it states that a break "will be for a minimum of 5 minutes with a 2 minute warning." This is just one example of the vague and ambiguous provisions of this student's IEP being interpreted differently by district staff and the parent which resulted in the filing of this formal complaint.

These provisions raise many questions that likely make it very difficult for district staff to implement and challenging for the parents to understand. For example, in the student's BIP it states that when the student uses a break card to request a break and the instructor grants that request that the student may go to the "work room until the instructor feels that [the student] is ready to return to class." It is unclear what might compel the instructor to feel that the student is ready to return to class. There are statements regarding "break cards," "separate, quiet setting," and "sensory breaks" located in the student's BIP, accommodations section, and modifications section of the student's IEP. It is unknown whether these statements should all operate separately from each other or be understood to be the same thing. The differences in these

sections are not just limited to the labeling of these items, but also include the duration of these items, the frequency at which they may be used, and the circumstances that permit their use. For example, the accommodation regarding breaks permits the student to have a longer break in extreme circumstances. What constitutes extreme circumstances? As another example, the modification of a "separate, quiet setting" is available at the student's request and "times of distress." Could the student request a separate, quiet setting if the student has used all breaks allocated to the student for the morning or afternoon, for example? Additionally, who determines what constitutes "times of distress"? There is also a mention of "sensory breaks" as a modification and as part of the BIP. The modifications section states that the student may take "sensory breaks" whenever the student feels overly stimulated or stressed. Is this in addition to the breaks the student receives using the student's break card as an accommodation and part of the student's BIP? To use these "sensory breaks" does the student need to show the student's break card to the instructor? Who determines whether the student is overly stimulated or stressed? The duration is listed as lasting for generally 3–5 minutes, but could last longer in "extreme cases." Who determines what constitutes an "extreme case"? These "sensory breaks" are mentioned again in the BIP. Is this the same "sensory break" that is included as a modification? Ultimately, how does a staff member distinguish between "sensory breaks," breaks used as part of the break card cuing system, and the frequent breaks listed as an accommodation?

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. Additionally, the district must ensure that each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of this student's IEP be informed of his or her specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP. 34 C.F.R. § 300.323(d). The manner in which the student's BIP is currently written is so confusing and inconsistent it is not possible for the district to fulfill its obligation under 34 C.F.R. § 300.323(d). This is exemplified in the factual situation relayed by the parent that showed the different interpretations between the parent and a district staff member on these provisions. Therefore, this investigator finds a violation of special education law regarding this issue.

ISSUE FOUR: DISTRICT STAFF ARE CHASING THE STUDENT WHEN THE STUDENT IS EXHIBITING AGGRESSIVE BEHAVIOR

The parent alleges that the student's IEP states that the student will not be chased during a period of aggressive behavior. The parent claims that on January 14, 2015, the student was chased during an episode of out-of-control behavior. The provision of the student's IEP that the parent is referring to is located in the student's BIP. This provision

states, "If [the student] is upset, it is best to have no physical or verbal contact when [sic] [the student]. If [the student] runs, [the student] will not be chased. Staff will try to maintain visual contact with [the student]." An instructor and a para responded on behalf of the district to this specific incident. It is unclear from the instructor and para's responses whether the student was chased during this episode of out-of-control behavior. The instructor states in the district's response that the instructor "used proximity" during this incident. It is unclear whether using proximity would constitute chasing the student. Additionally, the instructor states in the district's response that "Student ran across to the other side of the gym. I ran and to the other side of the gym." [sic] The instructor's statement is not completely clear as to whether the student was chased when the student ran, however, it can be inferred from the instructor's statement that the student was likely chased during this incident of out-of-control behavior. 34 C.F.R. § 300.323(c)(2) requires the district to provide the student with the special education and related services stated in the student's IEP. Based on the district's own admission, this investigator substantiates a violation of special education law regarding this specific provision of the student's IEP not being followed.

This is another example in this IEP of a statement capable of alternative interpretations. If the IEP team intended to require a particular protocol to be followed when the student runs it should work toward greater clarity on this statement and specify the process to be used in a manner that is clear to all school personnel as well as the parent. This statement is not clear as to what might constitute "chasing" the student. Additionally, the utility of the recommendation that staff "will try to maintain visual contact with [the student]" is questionable. There could be incidents where staff should follow the student for the student's own safety. The IEP team should consider this when revising this statement in the student's IEP.

ISSUE FIVE: THE STUDENT DOES NOT HAVE A TEACHER AND PARA WITH THE STUDENT AT ALL TIMES

The parent alleges in the formal complaint that the student's IEP states that a "teacher/para" will be with the student at all times. When this investigator asked the parent to clarify this allegation during a follow-up phone call the parent stated that the student's IEP requires that a teacher and para be with the student at all times. When this investigator could not locate this requirement in the student's IEP, this investigator asked the parent to point out the requirement in the student's IEP. The parent pointed to a sentence in the section of the student's IEP under the heading "Describe the extent to which the student will not participate in general education classes" that reads ". . . [the student] will have an instructor and/or a para to deliver the following services when school is in session." The statement that the parent points to does not require the student to have a "teacher/para" with the student at all times. This statement requires "an instructor and/or para" to deliver the services identified in the student's IEP and does not mean the "instructor/and or para" will be with the student at all times. This investigator does not substantiate a violation of special education law on this issue.

Note: While this investigator has not substantiated a violation of special education law on the precise issue presented by the parent, from reviewing staffing notes from past meetings between the parent and the district as well as the district's response to this formal complaint it appears that there is a misunderstanding about whether a teacher and/or para is required to be with the student at all times. In the staffing notes for the September IEP in the "Topics and Discussion" section it states that, "[The student]'s parents want an instructor and para with [the student] at all times. [The student] will get sped support for entire day." Additionally, in the staffing notes from the March 6, 2014, meeting under the section "Topics and Discussion" the parent is recorded as stating, "So [the student]'s going to be in that little room with the teacher and the para." Further, in the staffing notes from the February 26, 2014, meeting there is a reference to a "1:1 para," however this is no "1:1 para" in the student's current IEP. From the district's response it appears that the district may also be under the impression that two staff members must be with the student at all times as well. In its response the district states, "[b]oth staff members that were assigned to [the student]" The district is only required to follow what is stated in the student's IEP, not information located in staffing notes or a response to a formal complaint. However, based on the apparent misunderstanding regarding whether staff should be with the student at all times the IEP team should consider discussing this issue at an upcoming IEP team meeting.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education law. Specifically, there is a violation of the requirement in 34 C.F.R. § 300.323(c)(2) to provide the student with the special education and related services stated in the student's IEP. Additionally, there is a violation of the requirement in 34 C.F.R. § 300.323(d) to ensure that each of the student's teachers and providers are informed of their specific responsibilities to implement the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the student. As cited throughout the report there are many provisions in this student's IEP that do not contain the clarity required in an IEP. 34 C.F.R. § 300.320.

Therefore, the following corrective action is issued.

1. Within 10 days of the date of this report, the district shall schedule an IEP team meeting to discuss the issues identified by the parent that are numbered two, three, and four in this formal complaint report. When a date has been set for this meeting, the district shall send a Notice of Meeting to the parent and forward a copy of this notice to Early Childhood, Special Education, and Title Services on the same day it is sent to the parent.
2. At the IEP meeting referred to above, the IEP team shall modify the student's IEP to rewrite and clarify the provisions of the IEP identified in issues two, three, and four of this formal complaint report, and will provide the parent with a Prior Written Notice of its decisions, including a request for consent, if necessary, and

provide Early Childhood, Special Education, and Title Services with a copy of the Prior Written Notice given to the parent on the same day the Prior Written Notice is sent to the parent.

3. The district shall inform each of the student's teachers and providers of their specific responsibilities to implement the student's IEP and the specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP. The district shall document its effort to inform each of the student's teachers and providers of their specific responsibilities and provide a copy to Early Childhood, Special Education, and Title Services within ten days of the student's new IEP being implemented.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Kansas State Department of Education, Landon State Office Building, 900 SW Jackson Street, Suite 600, Topeka, Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see K.A.R. § 91-40-51(f), which is attached to this report.



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K.A.R. § 91-40-51. Filing complaints with the state department of education.

(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).

15FC13

KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # SCHOOLS ON JULY 2, 2014

DATE OF REPORT: AUGUST 1, 2014

This report is in response to a complaint filed with our office by _____, the mother of _____ is identified as a child with an exceptionality and is the subject of this complaint. _____ will be referred to as "the student" in the remainder of this report. The complaint included four allegations: (1) the student's right to privacy has been violated; (2) school staff failed to follow agreed upon procedures to communicate with the parent when the student's behavior escalated; (3) the student is discriminated against because of his disabilities; and (4) school staff have created a hostile learning environment for the student.

This investigator did not investigate allegation number three. Federal regulations authorize state departments of education to conduct investigations only when complaints allege a violation of special education law. See 34 C.F.R. § 300.153. In this particular allegation, the parent did not allege any violation of special education law because special education law does not address issues regarding discrimination. Issues of discrimination are addressed by Section 504 of the Rehabilitation Act. The Office for Civil Rights within the U.S. Department of Education has the authority to investigate complaints regarding discrimination. If the parent wishes to pursue this allegation, she may contact the Office for Civil Rights, U.S. Department of Education, 8930 Ward Parkway, Suite 2037, Kansas City, Missouri 64114; (816) 268-0550.

Investigation of Complaint

The investigator reviewed the complaint submitted by the parent, the student's current IEP, the student's functional behavior assessment, the student's behavioral intervention plan and the data collected under the plan, and the two complaint response letters from the principal of _____ Elementary. Additionally, the investigator interviewed the parent by telephone on July 11, 2014, and reviewed emails sent by the parent on July 12 and July 29, 2014. The investigator also spoke with the assistant special education director by telephone on July 11, July 16, July 17, July 21, and July 29, 2014. The investigator

spoke with the principal of _____ Elementary on July 16. The investigator spoke with the special education director in person on July 23 and 24, 2014.

Background Information

The student is an 11 year-old boy who will be in the sixth grade and has been identified as an exceptional child. The parent states in the formal complaint that the student has attention deficit hyperactivity disorder and an intellectual disability. The student's current IEP was initiated on December 13, 2013. During the 2013–14 school year the student attended _____ Elementary in Unified School District _____.

Issues and Conclusions

ISSUE ONE: THE STUDENT'S RIGHT TO PRIVACY HAS BEEN VIOLATED.

The parent states that the first concern in her formal complaint is that the student's right to privacy has been violated. She states that on May 19, 2014, she visited the student in his classroom and saw a t-chart drawn on a whiteboard in his cubicle. The parent states that although this whiteboard was located in the student's work area that is separated from other students' work areas by dividers the whiteboard was still visible from outside of the work area. A t-chart is composed of two columns and is traditionally used to help students compare and contrast two items. The parent took a photo of this t-chart and provided it to the investigator. The investigator will recreate the t-chart below using a table.

	Other kids
walk ahead of adults	whole class Courser time.
Sky – WAY more than anyone else.	
Indoor – legos & computer, tablet	
- oil	
cool down corre	
- _____ doesn't have to do cursive.	
- earn money	
- jobs	

The district responded to this concern by stating that on this occasion the student's behavior began to escalate and he repeatedly stated to his teacher that he felt like other students were able to do activities that he was not. The teacher called the principal and asked for his assistance in deescalating the student. The principal came to the classroom and sat down with the student at his cubicle. The principal engaged in an activity that had been successful in the past to deescalate the student. As the student dictated the principal drafted the t-chart, recreated above, on the whiteboard in the student's cubicle. After a few minutes the student realized that he was able to do many activities that other students did not have the opportunity to do. The student's behavior was deescalated and he continued with his day. The principal stated in the district's response that each student in this classroom has a whiteboard in their cubicle and it is

used for staff to post individual reminders for each student. The principal stated that the only people allowed in each student's cubicle are staff and the respective student.

Parental consent must be obtained before personally identifiable information maintained by the district can be disclosed, unless the disclosure is authorized without parental consent by the Family Educational Rights and Privacy Act (FERPA). 34 C.F.R. § 99.30. The term disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in educational records, to any party, except the party that provided or created the record. This includes disclosing information orally, in writing, or by electronic means. 34 CFR § 99.3.

In this situation, it does not appear that the information on the student's whiteboard was maintained by the district. In *Owasso Independent School District No. 1-001 v. Falvo*, 534 U.S. 426 (2002), the United States Supreme Court said students in school may grade each other's papers even though that process discloses student grades to other students. The Supreme Court said this practice was not a violation of student privacy rights because the information disclosed was not yet recorded and maintained by a teacher in a grade book or stored in a file or database. Thus, as in *Owasso*, the fact that other students can see this student's whiteboard is not, by itself, a violation of law. The facts presented to the investigator indicate that information on these whiteboards is used for daily instruction and this information is not recorded and maintained in the student's educational records.

In addition there are no facts that show that the information was viewed by anyone other than the principal, the parent, and the student, all of which have a right under the law to access personally identifiable information regarding this student. To violate the confidentiality provisions of the IDEA school staff must have disclosed personally identifiable information in a way that does not conform to the law. There is no evidence here that any unauthorized disclosure occurred.

The IDEA confidentiality provisions prevent the unauthorized disclosure of personally identifiable information maintained by the district, but as the information on the whiteboard was not information maintained by the district and there was no disclosure, no violation is substantiated.

ISSUE TWO: SCHOOL STAFF FAILED TO FOLLOW AGREED UPON PROCEDURES TO COMMUNICATE WITH THE PARENT WHEN THE STUDENT'S BEHAVIOR ESCALATED.

In the facts supporting the parent's second concern she states that a meeting took place with district staff, herself, and the student's stepfather. At this meeting a procedure was discussed and agreed upon by which the principal would communicate with the parent and the stepfather should the student's behavior escalate. The principal summarized this communication procedure and the meeting discussion and emailed this to participants. This meeting was not an IEP team meeting. The communication procedure agreed upon at this meeting was not incorporated into the student's IEP and the parent

did not request that the procedure become a part of the student's IEP. One of the statements in this communication procedure read as follows, "Every attempt will be made to contact parents before [law enforcement] is involved. If, however, an emergency/safety situation arises, there may be times that [law enforcement] needs to be contacted before parents."

On April 23, 2014, the student's behavior escalated and school staff determined that the situation was an emergency. For the student's safety and the safety of others the principal called law enforcement and then sent the parent a text message, per the agreement, informing her that law enforcement had picked up the student and were taking him to the hospital.

There is no provision in the IDEA or its accompanying regulations that speak to agreements made outside of an IEP team meeting and not included in an IEP. Therefore, these kinds of agreements which are not part of an IEP are not enforceable through the special education complaint process. No violation of special education law is substantiated here.

ISSUE FOUR: SCHOOL STAFF HAVE CREATED A HOSTILE LEARNING ENVIRONMENT FOR THE STUDENT.

In the parent's fourth concern she states that school staff have created a hostile learning environment through actively ignoring the student, telling the student that he determined when in-school suspension begins and how long it lasts, and not holding an IEP team meeting once the student had been suspended for ten cumulative school days.

In its response, the district stated that school staff does not ignore any student at any time, including this student. However, there are situations, including with this student, when school staff will ignore the bad behavior of a student as a behavior management technique. When this student's bad behavior is ignored school staff communicates clear and concise expectations to the student. As soon as the bad behavior ceases school staff begin to interact normally with the student.

Also, in its response in reference to the parent's concern about in-school suspension, the district states that on the day that the student's in-school suspension began, April 11, 2014, the student was off task and not doing what was required of him during in-school suspension. Rather than continue to escalate the student's behavior staff communicated their expectations for the student's behavior and told him that as soon as he complied with the requirements of in-school suspension that the suspension time would begin. Staff also told the student that he may need to finish his in-school suspension the following school day if he did not timely comply with the requirements of in-school suspension. After sticking with this behavior strategy for several minutes the student chose to comply and the in-school suspension began. The student finished the in-school suspension the following school day.

There is no mention in the IDEA and its accompanying regulations of a "hostile learning environment." As such, on its face, the parent's concern does not state a violation of the IDEA. However, this investigator may consider whether actions of school personnel have denied the student a free appropriate public education (FAPE). However, there are no facts to substantiate that school personnel have acted in a manner which has denied this student a FAPE. There are no facts that support that this student is being actively ignored, except for those instances when it is used as a generally accepted behavior management technique to address misbehavior. In addition to the district's response the investigator reviewed the student's behavioral intervention plan and data collected under the plan. Each day staff collects data on the student's behavior in 15-minute intervals. Staff frequently record comments about the student's behavior, including positive and negative interactions with staff and students. This extensive documentation shows continuous interaction between staff and this student. There are also no facts that support the parent's assertion that staff have informed the student that in-school suspension will take as long or as short as the student desires. The district has appeared to engage in appropriate behavior techniques to redirect the student when is off task and to keep him from escalating.

As part of this allegation, the parent also asserts that district staff did not hold an IEP team meeting after suspending the student for more than ten cumulative school days. The IDEA and its accompanying regulations do not require that there be an IEP team meeting once a student has been suspended for more than ten cumulative school days. An IEP team meeting is required once a student has been suspended for more than ten consecutive days or for a removal that cumulates to more than ten school days and shows a pattern of removal constituting a change of placement. 34 C.F.R. § 300.536. During the 2013–14 school year the student was out-of-school suspended on:

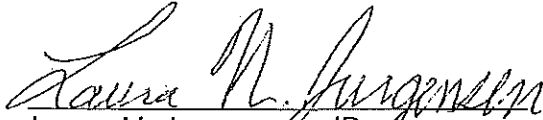
- September 17 through September 18, 2013 (two school days)
- November 13 through 15, 2013 (three school days)
- December 2 through 15, 2013 (ten school days)

The student was suspended out of school for a total of 15 school days during the 2013-14 school year. The student was never suspended out of school for more than ten consecutive school days. Because the student was not suspended out of school for more than ten consecutive school days an IEP meeting was not required under that portion of the regulations. 34 C.F.R. § 300.536(a). Additionally, the parent has not presented any facts that show that the student's suspensions during the 2013–14 school year show a pattern of removal constituting a change of placement. It does not appear from the facts presented that the district was required to hold an IEP team meeting to conduct a manifestation determination.

In conclusion, a "hostile learning environment" is not mentioned in the IDEA or the accompanying regulations. If staff engaged in actions that created a hostile learning environment for a student it could potentially constitute a denial of a FAPE for that student. However, there are no facts presented that support that school staff have created a hostile learning environment for this student. No violation is substantiated.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Kansas State Department of Education, Landon State Office Building, 900 SW Jackson Street, Suite 600, Topeka, Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see K.A.R. § 91-40-51(f), which is attached to this report.



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K.A.R. § 91-40-51. Filing complaints with the state department of education.

(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).

15FC14

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # PUBLIC SCHOOLS ON FEBRUARY 3, 2015

DATE OF REPORT: FEBRUARY 26, 2015

This report is in response to a complaint filed with our office by _____, the parent of _____ and _____ Ms. _____ will be referred to as "the parent" in the remainder of this report. _____ and _____ are the subjects of this complaint, and will be referred to as "the students" in the remainder of this report.

The complaint allegations are identical for each of the students. The complaint alleges that: (1) the district failed to properly implement the state and federal legal procedures for a child with an IEP transferring to the school district with an out-of-state IEP by failing to provide comparable services; and (2) the district has failed to create an appropriate IEP in a reasonable amount of time.

Investigation of Complaint

On February 9, 2015, the investigator met with the parent in _____ for approximately six and one-half hours. This meeting consisted of listening to approximately five hours of audio-tape made by the parent at the January 22 and January 26, 2015 IEP meetings and discussing the complaint issues related to those meetings. In addition, the complaint investigator completed a telephone interview with the parent on February 10, 2015. The investigator also exchanged e-mail correspondence with the parent on February 11, 2014. In addition, the investigator conducted an on-site investigation, which included interviews with the Director of Special Education, Assistant Director of Special Education, Elementary School Principal, School Psychologist, Autism Coordinator; and the students' Physical Education Teacher; Special Education Teacher, Speech Therapist, and Occupational Therapist. The investigator also reviewed the Massachusetts IEPs, the district's proposed IEPs, Evaluation materials for both students, Letters of Recommendation from the student's previous school in Massachusetts, and multiple e-mail and text correspondence between the parent and school personnel.

Background Information

The two students who are the subjects of this complaint are eight year-old twin boys. Both boys were identified in Massachusetts as having autism, and were receiving special education services through an IEP in Massachusetts. The family moved to _____, Kansas in October of 2014. The boys began attending elementary school in _____ on October 6, 2014.

Allegations

ISSUE 1: THE DISTRICT FAILED TO PROPERLY IMPLEMENT THE STATE AND FEDERAL LEGAL PROCEDURES FOR A CHILD WITH AN IEP TRANSFERRING INTO THE SCHOOL DISTRICT WITH AN OUT-OF-DISTRICT IEP BY FAILING TO PROVIDE THE CHILDREN WITH SERVICES COMPARABLE TO THE SERVICES SPECIFIED IN THEIR OUT-OF-STATE IEPs.

When a child with an IEP transfers from one state to another state within a school year, Federal regulations, at 34 C.F.R. 300.323(f), require the school in the receiving state to provide a free appropriate public education (FAPE), "including services comparable to those described in the child's IEP from the previous public agency." The comments to this regulation acknowledge that the term "comparable services" is not defined in the special education statute or regulations, but adds that the United States Department of Education interprets the term to mean "similar" or "equivalent" services. Federal Register, Aug. 14, 2006, p. 46681.

This complaint alleges that the district has failed to provide services comparable to the services specified in the IEPs these children brought to Kansas from Massachusetts. Specifically, the parent alleges that the district has failed to provide comparable: Parent Training services, Community/Daily Living services; Social Pragmatics services; Adaptive Physical Education services; and Extended Day services.

The complaint also alleges that the district has not been working with the children to achieve the goals specified in the Massachusetts IEP, that the district is not providing comparable consultation time to the IEP team, and is providing behavior therapy, but doing so with personnel who are not adequately trained to provide the therapy.

Each of these parts of this allegation will be addressed separately below:

Parent Training Services:

The Massachusetts IEP states that there will be two Parent Training sessions per 5-day cycle. One session is a 60-minute consultation with a Board Certified Behavior Analyst and the other is a 120 minute direct training session with a Behavior Therapist. In the remainder of this report, the 60-minute consultation session will be referred to as "Consultation Parent Training" and the 120-minute direct training session will be referred to as "Direct Parent Training." The Massachusetts IEPs say the parent training consultation session will be delivered:

in a variety of environments and ways. There may be times when this consult will take place in the school while doing an observation of the BT working with [the student]. It may occur in the home when the BT is in the home providing parent training with [the student] or it may occur in the home or school without the BT and [the student] [present]. The use of these hours will be flexible and address the needs as they arise.

However, there is a separate provision for the direct parent training session. Under the heading "Additional Information" the IEPs say: [The student] qualifies for parent training sessions in the home. The focus during this time will be on teaching his parents to use a variety of strategies to both handle behavioral issues in the home as well as to teach [the student] various skills such as self-care, communication, daily living skills, and leisure skills."

The district has not provided Consultation Parent Training sessions at the school or in the students' home. According to staff members, consultation parent training sessions at school have been attempted, but are not possible because when the students' mother is present she becomes angry and "dominates" the meeting by doing 95% of the talking. Under these circumstances, school personnel say they "just cannot get to consultation." Never the less, Consultation Parent Training sessions must continue to be offered at specified times to fulfill the district's obligation to provide comparable services.

The district has also refused to provide Direct Parent Training in the parent's home. The district's position is that it can provide comparable Direct Parent Training in the school setting, by simulating a home environment. The district has offered to provide this training at school on Wednesday mornings. The parent has declined this offer. The parent's position is that Direct Parent Training in the home is substantively different than Direct Parent Training at school, and so Direct Parent Training at school is not comparable to Direct Parent Training at home.

The only court case dealing directly with this issue is Sterling v. Washoe County School District, 3:07-CV-00245-LRH-RJJ (D. NV 2008). In that case, a child with a profound bilateral hearing loss and a Cochlear Implant was receiving Deaf and Hard of Hearing (DHH) services through an IEP in California. Pursuant to the

IEP, the DHH services were being provided at the student's home. When the student moved to Nevada during the school year, the Nevada school accepted the California evaluation, but began the process to develop an initial Nevada IEP. In the meantime, the Nevada school developed an "interim" IEP to provide the student with comparable services. The interim IEP included the DHH services, but offered those services at a public school building, rather than the student's home. The parent initiated due process alleging that the DHH services at a public school building were not comparable to the same services provided in the home. The hearing officer and state review officer ruled in favor of the public school. On appeal, the federal district court upheld the decisions of the hearing officer and review officer. The court said the Nevada school was not required to adopt the California IEP in its exact form, and that although the school changed the physical location of the services from the home to a public school building, the services offered were "similar" or "equivalent" to the services in the California IEP.

This case appears to address the exact issue presented with regard to the Direct Parent Training services portion of this complaint. The requirement to provide comparable services does not mean the receiving district must provide the services exactly as described in the out-of-state IEP. In particular, as cited by this court and as explained by the Office of Special Education Programs (OSEP) in the comments to the federal regulations, as long as the services are "similar" or "equivalent," they would be considered to be comparable. See: Federal Register, Aug. 14, 2006, p. 46681. This federal court adds the clarification that a change in the physical location of services from the home setting to the school setting does not negate the comparability of the services. Because Direct Parent Training was offered at school on Wednesday mornings, the allegation that the district has failed to provide comparable Direct Parent Training services is not substantiated.

A violation of special education laws and regulations is substantiated with regard to the allegation that the district has failed to provide comparable Consultation Parent Training services.

Community/Daily Living Services:

The Massachusetts IEP states that community/daily living services will be provided in one session, for 120 minutes in each 5-day cycle. The parent believes this service is to consist entirely of community-based services, in which the children are taken away from school and into the community for learning experiences. The district focuses on the "Daily Living" portion of the service description and takes the position that these services may be provided either in the community or at school.

This distinction was important to the district because it believes these children use behaviors, such as "bolting," that could be dangerous in a community setting,

at least until staff had a chance to get to know the children and establish some instructional control. As a result, the community based instruction provided for these students has been limited. From October 14 to December 9, the students were transported to University to attend "Drama Therapy." However, that activity is no longer available, and community based instruction was not provided after December 9 until February 10, 2015. Currently, the district is providing services to the children in the community. In the meantime, the district did provide Daily Living Skills services. These Daily Living Services included practicing independent tasks, such as brushing teeth, toileting, making lunch, etc. The Daily Living services also include working on tasks the children would need to learn to successfully participate in activities in the community.

Under the heading "Additional Information," in the Massachusetts IEPs, is this description:

The program also provides weekly opportunities for [the student] to practice new skills in the community. With the proper support of a BT, [the student] will practice skills necessary to participate in common, age appropriate activities such as shopping, eating in a restaurant, and leisure activities such as bowling and going to the movies.

From this description, the investigator concludes that, although it is not necessary that the entire 120 minute session be provided in the community, it was intended that at least a portion of the weekly session would be provided in the community. In Massachusetts, community based services would be required to implement this provision in the IEP. Again, however, with regard to comparable services, the little guidance that exists on this subject is consistent in saying it is not necessary for services to be provided in the location specified in the incoming IEP in order to be comparable. Children can be taught and can practice skills necessary to participate in shopping, eating in a restaurant and participating in other community activities without actually going into the community, at least as part of initial instruction in a new state.

The allegation that the district has failed to provide comparable services is not substantiated with regard to this part of the issue.

Social Pragmatics Services:

The Massachusetts IEP states that the students are to receive two 120 minute sessions of Social Pragmatics Services. This service is to be provided by a Behavior Therapist. Social Pragmatics refers to instruction in social skills, such as taking turns, using appropriate body language, using basic conversation skills, and the like.

The district is not conducting a separate "Social Pragmatics Service" with a Behavior Therapist. The district's position is that it is teaching the student social pragmatics throughout the day, including in its Daily Living instruction, Speech Therapy, Morning and Ending Routines, and even during lunch and recess. Under the title "Additional Information," The Massachusetts IEP states that at least part of this service will be provided in a structured lunch buddies group to target social interactions with a small group of peers. This has not been done. The investigator concludes that this deviation from the IEPs involved different methodologies than those specified in the students' IEPs, and is not merely a change in the physical location of the services.

To the extent that this service has not been provided in a small, structured group of peers, the allegation that the district has not provided comparable services is substantiated on this issue.

Adapted Physical Education:

The Massachusetts IEPs state that each of the students will receive one 30 minute session per 5-day cycle of Adapted Physical Education (APE). Adapted Physical Education is not a defined term in the laws and regulations related to special education. The regulations, however do define the term "physical education" to mean the development of physical and motor fitness, fundamental motor skills and patterns, and skills in aquatics, dance, and individual and group games and sports, including intramural and lifetime sports. See 34 C.F.R. 300.39(b)(2). Although not specifically defined in these regulations, Adapted Physical Education generally means adapting the content, methodology or delivery of instruction to meet the unique, individual needs of the child to enable the child to make progress in the development of physical and motor fitness for the purpose of enabling the child to have an opportunity to participate in the physical education activities listed in the definition of the term "physical education," (noted above). The parent alleges the students are not receiving APE because the person providing physical education to the students is not qualified to provide APE. The district believes the person who originally provided APE in the district and the person who is currently providing APE are both: (a) qualified to provide APE; and (b) have been adapting the content, methodology and delivery of physical education instruction to meet the unique physical and motor fitness needs of these students. This investigator contacted the Assistant Director of the Teacher Licensure and Accreditation Office at the Kansas State Department of Education for guidance on the qualifications to provide APE services, and was advised that APE services may be provided by anyone licensed to provide physical education. There is no separate endorsement for APE. The district confirmed that both providers of APE are licensed to provide physical education, and that, in addition, each of these providers have completed coursework in "Survey of Exceptionality" and in "Special Populations in Physical Education and Recreation." Accordingly, the investigator concludes APE

services have been provided to these students by school personnel who are qualified to provide APE.

The allegation that the district has not provided comparable services is not substantiated on this issue.

Extended Day Services:

The Massachusetts IEPs have a service grid, consisting of columns and rows. That grid specifies the particular IEP goal emphasized for each of the services, the type of service to be provided, the kind of personnel who will provide the service, the frequency and duration of the service, and the start and end dates of each service. This grid is titled "Service Delivery." Under that title, are the words: "What are the total service delivery needs of this student?" Extended day services do not appear on this grid.

However, the Massachusetts IEP for each of these students has another page with a section titled "Schedule Modification." On this page, the IEPs state: "Due to [the student's] needs and the level of programming he requires, he will attend school for a longer day and be provided with parent training services as defined in the service delivery grid (Emphasis added)." This section of the IEPs does not include statements regarding frequency or duration. It appears the frequency and duration for the extended day services was intended to be the frequency and duration specified for the direct parent training services on the service grid. That amounts to one session for 120 minutes per 5-day cycle, for each of the students.

The parent provided the investigator with a copy of the daily schedule for each of the students in Massachusetts. Those schedules show 120 minutes of parent training after school on Tuesday for one of the students and 120 minutes of parent training after school on Thursday for the other student. The daily schedule also shows 60 minutes of Music Therapy and 60 minutes of Pragmatics Group after school on Wednesdays for one of the boys. The parent states that both boys participated in these Wednesday sessions. However, the Music Therapy and Pragmatics Group are not referred to in the IEPs in the section regarding a longer school day. Under 34 C.F.R. 300.323(f), the receiving Kansas district is only required to provide "services comparable to those described in the child's IEP from the previous state." Nothing in the IEPs of these students requires Music Therapy or Pragmatics Group Services to be provided after school. The investigator concludes that the Massachusetts IEPs require a total amount of extended day services of 240 minutes per 5-day cycle for Direct Parent Training, consistent with the requirement in the "Schedule Modification" section in each of the students' IEPs to provide 120 minutes of Parent Training service per 5-day cycle outside the school day. As indicated previously in this report, these Direct Parent Training Services do not need to be provided in the

home. However, they do need to be provided as extended day services. Extended day services have not been provided.

The allegation that the district has not provided comparable services is substantiated on this issue.

Consultation with IEP team:

The IEPs for both of the students include substantial consultation time from the Special Education Teacher, School Psychologist, Board Certified Behavior Analyst, and to a lesser extent, from the Speech Therapist and Occupational Therapist. The IEPs specify that this consultation will be with the IEP team. Members of the team indicated that the consultation is occurring. However, the parent has not been notified of the time and place for these consultations and has not attended. Because the parent is a member of the IEP team, it is necessary that the parent be notified of the date, place and times for these consultations so that she at least has an opportunity to attend. Because these consultations were not with the IEP team (which includes the parent), they were not in compliance with the Massachusetts IEP.

The allegation that the district has not provided comparable services is substantiated on this issue.

Working toward achievement of goals:

The parent alleged that the district is not working with the students to help them achieve the goals in the Massachusetts IEP. However, the parent did not present convincing evidence on this subject. The service providers for these children stated they do work with the children on their IEP goals when they provide the services specified in the IEP. It is not necessary to work on every goal every day. It is only necessary to work on goals sufficiently to enable the students to achieve those goals within a specified time. The evidence presented indicates the service providers are working with these students to help them achieve the goals in their IEPs.

The allegation that the district has not provided comparable services is not substantiated on this issue.

Untrained Personnel:

The students who are the subjects of this complaint have significant needs. They arrived in Kansas with IEPs requiring significant services. Under the title "Additional Information," the Massachusetts IEP states that the students will participate in "a program based on the principles of Applied Behavior Analysis," and will be "supported by a 1:1 Behavior Therapist trained in ABA."

The term "Behavior Therapist" is not a defined term in the special education laws and regulations. However, the student's special education teacher is a certified special education teacher who completed training at the Kansas Center for Autism Research Training (KCART) to become an ABA Registered Behavior Technician (RBT) before the students arrived in Kansas. The students are also supported by the district's Autism Coordinator, a Board Certified Behavior Analyst. These students are also supported by paraprofessionals under the supervision of the special education teacher and the Autism Coordinator.

Federal regulations permit states to allow paraprofessionals and assistants who are appropriately trained and supervised in accordance with written policy to assist in the provision of special education and related services. 34 C.F.R. 300.156(b)(iii). Kansas has developed written policy for the use of paraprofessionals in delivering special education and related services. The minimum requirements for special education paraprofessionals are specified in the Kansas Special Education Reimbursement Guide. Those minimum requirements are: (a) high school graduation; and (b) completion of an orientation session addressing confidentiality, the services to be provided, and the policies and procedures of the school district concerning special education. In addition, paraprofessionals must be directly supervised a minimum of 10% of the time they are working with students. At all times the paraprofessionals working with these students met these minimum requirements.

When these students arrived in October, the paraprofessionals assigned to assist the professionals did not have ABA training. The district provided training for the paraprofessionals through KCART, and by November 5, 2014, one paraprofessional completed the training. The other paraprofessional left and training had to begin over with the replacement paraprofessional. At this time, both students are supported with paraprofessionals who are ABA Registered Behavior Technicians.

Although there was a period in which the district did not have paraprofessionals who had completed the Registered Behavior Technician training, the paraprofessionals assigned to assist these students at all times had the minimum qualifications and supervision needed to assist in the provision of special education services.

The allegation that the district has not provided comparable services is not substantiated on this issue.

ISSUE 2: THE DISTRICT HAS FAILED TO CREATE AN ADEQUATE IEP IN A REASONABLE AMOUNT OF TIME.

In this issue, the parent alleges that the draft IEPs offered to her do not provide adequate services for her children, that the district has interfered with her right to

participate in the development of the IEP by pre-determining the amount and methodologies of services without adequate consideration of data available to the team. The parent further alleges that the district is failing to consider the unique needs of her children, by limiting instructional methods to those already available in the district, by citing funding concerns as a consideration for providing services, and by rejecting parent proposals by stating that the district is not legally required to provide the services requested by the parent. The parent also alleges that the district failed to provide advance written notice of an IEP meeting. Finally, in this issue, the parent alleges that the district has unreasonably delayed making an offer of initial Kansas services in a proposed IEP to which she may either provide consent, provide partial consent, or refuse to consent, thereby delaying her opportunity to exercise procedural safeguards, including the right to request a due process hearing.

Each of these allegations will be addressed separately:

Draft IEPs for consideration by the IEP team do not offer adequate services for the students.

The IEP offered to the parent of a child with a disability must offer a Free Appropriate Public Education (FAPE). The United States Circuit Court of Appeals for the 10th Circuit has said the standard for FAPE in 10th Circuit states (such as Kansas) is that the IEP be reasonably calculated to provide an educational benefit that is more than “de minimis.” Under this standard, if the educational benefit to be received is only a de minimis or a trivial benefit, the IEP has not offered a FAPE. If the educational benefits to be received are more than de minimis or more than trivial, the IEP has offered FAPE. R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 (10th Cir. 2008). In this case, the 10th Circuit opinion states: “this standard is not an onerous one.”

The IEPs offered to these students include a full day of special education and related services, including: Occupational Therapy, Speech and Language Therapy, Attendant Care services during non-instructional times such as lunch and recess, and Direct Special Education instruction in both general education and in special education settings. Under the proposed IEPs, there is no time during the day in which these students are without special education and related services.

Because the determination of what services are needed in order to provide a Free Appropriate Public Education for an individual child is, by law, given to the group of persons who are best situated to make such decisions (the child’s IEP team), a state department of education must proceed cautiously when asked to overturn the decisions of the team. The United States Department of Education itself is reluctant to overturn the decisions of an IEP team or a Section 504 team when investigating complaints to the Office for Civil Rights (OCR). See, OCR Complaint Case Processing Manual, Section 110(d), which says it is the policy of

the Department to refrain from assessing the appropriateness of decisions made by a Section 504 team or of pedagogical decisions by such a team. Accordingly, the Early Childhood, Special Education and Title Services investigator will overturn the decisions of an IEP team only in extraordinary circumstances where an IEP is clearly not adequate. That is not the circumstance with these IEPs.

The allegation that the district has not offered adequate services in the proposed IEP is not substantiated.

The district has interfered with the parent's right to participate in the development of the IEP by pre-determining the amount and methodologies of services, without adequate consideration of data available to the team, and by failing to consider the unique needs of her children by limiting instructional methods to those already available in the district.

The files of these students contain a considerable amount of data regarding these students. There is no evidence presented to this investigator to indicate the students' IEP teams did not consider this data in formulating a proposed IEP for these students. In the interview conducted by this investigator with the primary service providers for these students, it was apparent that these members of the IEP team were very familiar with the data accumulated and maintained in the files of these students. In addition, the IEPs the district has proposed for these children state that the primary methodology to be used to provide services for autism will continue to be primarily ABA, including discrete trial sessions. There was no evidence that the services proposed for these students were limited only to instructional methods already available in the district, and not based on the individual needs of the students.

With regard to the allegation of pre-determination, the investigator notes that members of the IEP team may meet with each other for informal conversations on teaching methodology, lesson plans or coordination of services and may also meet to develop proposals for an IEP meeting or to develop responses to parent proposals. As long as the final decisions are not made at these preliminary meetings, team members may meet without the parent. See, K.A.R. 91-40-25(e). In other words, as long as a decision has not been reached and the parents have an opportunity to participate in the decision making process, IEP team members may meet with each other to prepare for coming IEP meetings.

This investigator listened to approximately 5 hours of audio tape recordings of the IEP meetings on January 22 and January 26. Both of these meetings were dominated by the parent, who the investigator estimates did approximately 90% of the talking. Much of what the parent said came in the form of a series of what appeared to be leading questions to team members. Often the parent cut off the response to her questions before team members could fully reply by asking an additional series of questions. In the opinion of this investigator, the only person

in those two IEP meetings who appeared to be unwilling to consider alternatives was the parent.

The allegations that the district pre-determined the amount of services and methodologies and interfered with the right of the parent to participate in the development of an IEP for her children, limited instructional methodologies to those already available in the district and failed to consider the unique needs of the children are not substantiated.

The district cited funding concerns as consideration for providing services:

There is nothing in the special education laws and regulations which prohibits consideration of how services will be funded. Public schools are entrusted to spend public funds wisely. If districts can find a way to fund particular services more economically, they should do so. Of course, a district may not refuse to put a service the IEP team believes the student needs in an IEP, or refuse to provide a service specified in an IEP, because of the cost of providing the service. No evidence has been presented in this complaint that the district has refused to provide a service these students need to receive a FAPE because of the cost of the service.

The allegation that the district is in violation of special education laws and regulations by citing funding concerns is not substantiated.

The district rejected parent proposals by stating that the district is not legally required to provide the services requested by the parent.

The director of special education has told the parent that the district is not legally required to provide some of the services requested by the parent. This comment was made in meetings and electronic communications. After a careful review of all of the communication evidence presented to the investigator, it is the opinion of the investigator that these comments were made with regard to parent proposals that were rejected by the IEP team, and the director was attempting to communicate that the district was, therefore, not legally required to provide the services. The parent alleges that the director was making the decision not to provide some of these services by herself. This investigator found no evidence to support that allegation. In the interview with the IEP team members, this investigator specifically asked each member if he or she felt any pressure from administrative staff regarding their input at meetings or their ability to openly participate in the decision making process. All of them indicated they were free to express their concerns and opinions at meetings, to advocate for their position, and that decisions at meetings were team decisions.

Part of the parent's allegation on this particular issue results from conversations between the parent and IEP team members, both in meetings and electronically, in which the director of special education and other team members have told the

parent they agree her children need certain services, including services in the home, but those services need to be provided by other agencies or individuals and will not be provided by the district. In the interview, the director and other team members told this investigator they have made such statements in an attempt to help the parent distinguish between educational needs and other needs the students might have. These team members hoped to explain to the parent that the IEPs they were proposing must meet the educational needs of the students and that the IEPs they were proposing did that, even though these students might have medical or other kinds of needs that should be addressed by other professionals. The parent has been unpersuaded and continues to assert in this complaint that the school district must meet all of the needs of the students.

Distinguishing between educational needs and non-educational needs can be tricky, especially with children who have a significant level of disability. One thing is clear however. The services proposed in an IEP must be reasonably calculated to provide more than de minimis educational benefit. The district is not required to maximize the potential of a child with a disability, or to provide the best services and methodologies, or to offer more services than are needed to provide the student with more than de minimis educational benefits. The district believes it has offered such an IEP, and, as indicated previously, there are no clear or extraordinary circumstances in this case that would permit the investigator to overturn the decisions of the IEP team.

The allegation that the district has improperly rejected parent proposals by stating that it is not legally required to provide those proposals is not substantiated.

The district has unreasonably delayed making an offer of initial Kansas services in a proposed IEP to which the parent may either provide consent, provide partial consent, or refuse to provide consent, which has resulted in delaying her opportunity to exercise her procedural safeguards, including the right to request a due process hearing.

These students are twin boys whose disabilities are very similar and who came to Kansas in October of 2014 with almost identical IEPs. They began attending school at the district on October 14, 2014. The district adopted the Massachusetts evaluations and implemented what it believed to be comparable services. IEP meetings were held on November 10, 2014 and December 11, 2014. The team was unable to reach consensus on a new IEP for the students. Because the students were so similar, it was decided to try to eliminate duplication of effort by first attempting to develop an IEP for one of the students. The hope was that if the team could come to consensus on one of the students, it would be much easier and quicker to develop an IEP for the other student. IEP meetings followed after the Christmas break for a total of a little more than five hours on January 22 and again on January 26, 2015. The team still did not

reach consensus. At the end of the January 26 meeting, the Director of Special Education offered mediation. The parties agreed to mediate the unresolved issues. The mediation took place on February 19, 2015. It ended in impasse.

This process has spanned four months. At any time during this period, the district could have given the parent a Prior Written Notice stating that the deliberation had ended and the proposed IEP was the district's offer of FAPE. Instead, the district continued to respond to the parent's questions electronically and participated in mediation in a continuing effort to reach agreement. The district was ultimately unsuccessful, but the investigator finds the district's continuing efforts were not unreasonable.

The investigator also concludes that the district's continuing effort to reach agreement with the parent on an educational program for the students did not delay the parent's opportunity to exercise her procedural safeguards, including her right to request a due process hearing. The parent was not obligated to wait for a final offer from the district to request a due process hearing. The parent could have requested a due process hearing in November of 2014 and again in December of 2014, after the district presented its first proposed IEPs, or at any time thereafter.

The allegation that the district unreasonably delayed the IEP development process and thereby delayed the parent's ability to exercise her procedural safeguards is not substantiated.

The district failed to provide the parent with a written notice of an IEP meeting.

The district acknowledges that it failed to provide a written notice of an IEP meeting. However, the parent had actual notice, and attended the meeting. The investigator concludes that a procedural violation occurred, but that failure to provide a written notice of the meeting was not a substantive violation because it did not interfere with the parent's right to participate at the meeting.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Specifically, the district failed to provide the following comparable services regarding each of the transfer students who are the subjects of this complaint: (a) Consultation Parent Training Services for 60 minutes per 5-day cycle; (b) Social Pragmatics Services in small peer groups, two sessions per 5-day cycle; (c) Extended Day Services for Direct Parent Training, one 120 minute session per 5-day cycle; and (d) Consultations with the IEP team, including the parent. A review of the district's calendar indicates that there have been 64 school days since these students

began school in the district on October 6, 2014 to the date this complaint was filed. That period includes 13 5-day cycles.

The following corrective actions are issued:

1. Within 10 school days of the date of this report, and until such time as a final initial Kansas IEP is offered to the parent with a prior written notice, the district shall provide the parent with a schedule, and an offer to provide the following additional comparable services:
 - (a) one Consultation Parent Training Session for 60 minutes per 5-day cycle, for each student (total of two sessions);
 - (b) two Social Pragmatics sessions for 30 minutes each in a small peer group setting for each of the students (four total sessions). The remainder of the Social Pragmatics time may continue to be provided in other settings;
 - (c) one Direct Parent Training session for 120 minutes per 5-day cycle outside of regular school hours, for each student (total of 2 sessions); and
 - (d) consultation with the IEP team, including the parent, in the amounts specified in the Massachusetts IEPs for each of the students.
2. Within 15 school days of the date of this report, the district shall schedule and offer to provide the parent with the following compensatory services:
 - (a) thirteen 60-minute Consultation Parent Training sessions on behalf of each student (twenty six total sessions);
 - (b) twenty six Social Pragmatics sessions for 30 minutes each in a small peer group setting for each of the students (52 total sessions);
 - (c) thirteen Direct Parent Training sessions for 120 minutes outside of regular school hours for each of the students (total of 26 sessions);
 - (d) thirteen, 60-minute consultation sessions with the IEP team for each student (total 26 total sessions). These sessions must include a Board Certified Behavior Analyst, a school representative, a school psychologist, and the student's parent, special education teacher, speech/language pathologist, and occupational therapist. The investigator recognizes that the Massachusetts IEPs indicate that there will be separate consultations with the IEP team from each of these members. For compensatory services, however, these separate consultation sessions will be combined into the thirteen, 60-minute sessions for each student, as described above.

The parent may exercise the option to accept all, a portion or none of the offered compensatory services.

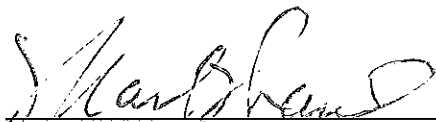
3. Within 10 school days of the date of this report, the district shall provide Early Childhood, Special Education and Title Services with a written statement of assurance that it will comply with the requirements of 34 C.F.R. 300.323(f) to provide comparable services to children with a disability who transfer into the district from another state and K.A.R. 91-40-17 to provide written notice of an IEP meeting at least 10 days in advance of the meeting.

Further, USD # shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education, and Title Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Early Childhood, Special Education and Title Services, Landon State Office Building, 900 SW Jackson St., Suite 620, Topeka, Kansas 66612-1212, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Mark Ward

Early Childhood, Special Education and Title Services

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).

Kansas State Department of Education

Early Childhood, Special Education and Title Services

Complaint Investigation Report

Complaint Investigator (CI):
Complaint Filed:
Report Completed:
Complaint Number:

Richard J. Whelan
September 23, 2014
October 8, 2014
15 FC

This report is in response to a complaint of noncompliance filled under K.A.R. 91-40-51.
, a resident of USD , filed the complaint on behalf of
her children, (J) [DOB:], and (C) [DOB:].
USD is a member district of the Special Education
Cooperative # which is located in , Kansas.

Background

During the current school year C is a first grade student [Other health impairment, K.A.R. 91-40-1 (uu)], and J is a seventh grade student [Intellectual disability, K.A.R. 91-40-1 (oo)] in USD Both students have effective IEPs for the 2014-2015 school year.

Complaint Allegation, Facts, and Conclusions

The first allegation was that the parent did not want a specific staff member to provide counseling for C and J. She also named the staff member she wanted to provide the counseling.

Federal and Kansas special education laws and regulations do not allow parents to determine the specific person to provide IEP services. The district/cooperative selects teachers and related service providers based upon their qualifications to do so. In this instance, the district/cooperative is within its rights to refuse the parent's request for a specific IEP service provider. There is no documentation that the person the district/cooperative selected to provide the service is not qualified to do so. Therefore, the CI did not investigate this allegation.

The second allegation was that C and J are not receiving the counseling services listed on their current IEPs.

J's current IEP contains the following statement: J "will receive counseling services (emphasis added) for 20 minutes weekly with the school psychologist" (emphasis added).

C's current IEP contains the following statement: "When school is in session C will meet with the school psychologist (emphasis added) for individual counseling on time every week for 20 minutes."

The teacher information pages for both students' specific special education and related services are coded as PS (school psychological services), not counseling services (CS). The provider on both documents is a school psychologist for USD [redacted], and, by special education laws and regulations may, if properly licensed, provide counseling services.

On May 12, 2014, the parent responded to a district/cooperative prior written notice (PWN) for each student that proposed discontinuing counseling during the 2014-2015 school year. This PWN was based upon the parent's oral and written statements that she did not want a specific staff member to provide the counseling, and wanted the person named on the teacher information pages to provide the counseling (see the first allegation). On both PWNs, the parent signed the "give consent" line but did not check the box by that line. Instead she checked the box by the "do not give consent" line. She told the CI that she wanted both students to receive counseling as written in their IEPs so she did not consent to the proposal to discontinue it; she made a mistake by signing the "give consent" line. The district/cooperative did not document that the IEP case managers for both students asked the parent on May 12, 2014 to clarify her responses to the PWN by marking an accurate and clear disposition of the matter. Instead, the IEP case managers assumed that the parent consented to discontinuing counseling for both students during the 2014-2015 school year. However, the effective IEPs and teacher information pages the district/cooperative submitted to the CI for the current school year still contained the counseling and the position of the provider, i.e., school psychologist.

Therefore, in as much as both IEPs stated that the students will meet with the school psychologist for individual counseling, the CI investigated if the services were provided as required by the students' IEPs.

On or before August 19, 2014, J was withdrawn from USD [redacted] and placed in a psychiatric residential treatment facility for diagnostic and intervention services. This is a temporary placement, and, according to the parent, J will return to USD [redacted] at a date to be determined. Therefore, the CI could not substantiate that the cooperative has failed to provide J with any of the counseling sessions required by his effective IEP. The cooperative's director told the CI that all of the IEP services on J's IEP will be provided, including counseling, when he returns.

The remaining part of the allegation was whether C received counseling one time per week as specified on his IEP since the start of school. On October 7, 2014, an administrator at USD [redacted] sent an email letter to the cooperative director in which he wrote that C has not received counseling this school year. Based upon this fact the CI concluded that the district has not provided the counseling service required by C's effective IEP.

Corrective Action

Based upon the Facts and Conclusions related to the second allegation, a corrective action is required.

The cooperative director shall, within 15 school days from the date of this report, send to the Early Childhood, Special Education and Title Services (ECSETS) Team at the address indicted below in the **Right to Appeal** section of this report written documentation that the following actions have been completed:

1. Send a written policy paper to the special education staff members, and school administrators at USD , regarding the requirements of a Prior Written Notice for responding to parental requests and district notices about special education services, especially verification that parental responses are correctly recorded on the notice and communicated to staff members who implement IEPs.
2. Written assurances that J's counseling service will be provided upon his return to the district by a properly licensed staff member, unless the service is removed by his IEP team and the parent gives written consent for that action.
3. Convene school members of C's IEP team and other school/cooperative staff members as determined by the cooperative to be necessary. The IEP team and school/staff members who are determined by the cooperative to be necessary, if any, shall then develop a written plan for compensatory counseling services to be provided by a properly licensed staff member that is reasonably projected to assist C to demonstrate skills he may have acquired if he had received IEP required counseling during the sessions he missed since the beginning of the current school year. The plan for compensatory counseling services shall be presented to the parent who may (a) accept or reject the plan in whole or in part; or (b) provide written notification to Mr. Mark Ward, ECSETS Team, that she believes the plan presented is not reasonably projected to assist C to achieve skills, along with a statement explaining why she believes the plan is inadequate. If the parent chooses option (b), the ECSETS Team will review the plan and make a final determination. The cooperative director shall submit a copy of the plan and a notice of whether the parent accepted it, in whole or in part, within 10 calendar days from the date the plan is provided to the parent, and shall send the plan and parent notice to Mr. Ward.

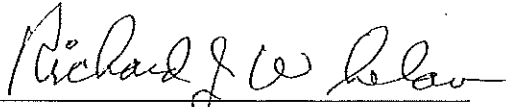
Finally, the cooperative director, within 10 calendar days from the date of this report, shall submit to ECSETS one of the following:

1. A statement verifying acceptance of the action or actions specified in this report;
2. a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
3. a written notice of appeal. Any such appeal shall be in accordance with K. A.R. 91-40-51(c).

Right to Appeal

Either party may appeal the findings of this report by filing a written appeal with the State Commissioner of Education; 900 SW Jackson Street, Suite 620; Topeka, Kansas 66612-1212 within 10 calendar days from the date of this report. A full description of the

appeal process is provided in Kansas Administrative Regulation K.A.R. 91-40-51(f). A copy of this regulation is attached to this report.

A handwritten signature in cursive script, reading "Richard J. Whelan". The signature is written in black ink and is positioned above a horizontal line.

Richard J. Whelan
Complaint Investigator

K.A.R. 91-40-51. Filing complaints with the state department of education.

(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).

KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION, AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
PUBLIC SCHOOLS #
ON DECEMBER 16, 2014

DATE OF REPORT: JANUARY 12, 2015

This report is in response to a complaint filed with our office on behalf of _____ by his mother, _____ will be referred to as "the student" in the remainder of this report. Ms. _____ will be referred to as "the parent."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Ms. _____, Director of Special Education for USD # _____ on December 22, 2014 and January 5, 2015.

The investigator spoke by telephone with the parent on January 5, 2015.

Background Information

This investigation involves a 3 year-old boy who is currently in the custody of the Department for Children and Families (DCF). He is living in a foster placement in the home of his paternal grandparents and has a caseworker assigned through KVC.

The student's biological parents are divorced. They are allowed supervised visits with the student. According to the student's mother, a custody hearing will be held on January 27, 2015; the mother states that she expects to regain custody of her children at that time.

Prior to his transfer to district Part C programming in _____, the student received services through Tiny-K under an IFSP (Individual Family Service Plan).

By report of the parent, the student has physical disabilities and developmental delays. He has been seen by a neurologist and cardiologist, has used a wheelchair and eyeglasses, and has been placed on a specialized diet.

Issue

In her complaint, the parent raises the following issue:

The district denied the established rights of the parent by allowing the student's foster parent – not the student's biological parent – to give written permission for special education action.

School personnel must determine the appropriate person(s) to make educational decisions on behalf of the child. Federal regulations, at 34 C.F.R. 300.30, define "parent" as:

- A natural (biological) parent;
- An adoptive parent;
- A person acting as a parent;
- A legal guardian;
- An education advocate; or
- A foster parent, ***only if*** the foster parent has been appointed the education advocate of an exceptional child and if the appointment has been documented with a Letter of Appointment from Families Together.

If there is more than one party qualified to act as a parent, and the biological or adoptive parents attempt to act as the parent, the biological or adoptive parents must be presumed to be the parents and legal decision makers, unless they do not have legal authority to make educational decisions for the child. A judge may decree or order a person acting as a parent or a legal guardian or persons to act as the "parent" to make educational decisions for the child. The school would then recognize this person(s) as the legal decision maker for the child (K.A.R. 91-40-27(c); 34 C.F.R. 300.30(b)(1)(2)).

If no judicial order specifies to the contrary, a school shall recognize the biological or adoptive parent of an exceptional child who is a minor as the educational decision maker for the child, even if other persons meet the definition of a parent for the child.

If parents are divorced, the school must provide Prior Written Notice of any special education action to both parents, even if only one parent has the right to consent, unless a court order precludes this from happening. This applies to all special education notice requirements including notice of an IEP meeting. If the school is only aware of one parent's address, the school must make reasonable efforts to locate the other parent in order to provide notice. However, consent from one parent is sufficient. In the event that the school receives consent forms from both parents, with one parent providing consent for the action and the other denying consent, the school is deemed to have received consent and must fulfill its obligation to provide FAPE to the student. The parent who denies consent has the right to request mediation or file for due process.

Parents are to be provided notice of meetings related to eligibility, evaluation,

reevaluation, IEP development, provision of a free appropriate public education (FAPE) for their child and educational placement decisions, to ensure that they have the opportunity to participate in the meetings. Kansas regulations, at K.A.R. 91-40-17, direct school districts to take steps to ensure that one or both of the parents of an exceptional child are present at each IEP meeting and that parents are given 10-days prior written notice of the meeting.

Federal regulations, at 34 C.F.R. 300.300, require that Prior Written Notice be provided to the parent for the initial provision of services on the IEP. The parent must agree in writing to the action for which his or her consent is sought (K.A.R. 91-40-27(a); 34 C.F.R. 300.300).

According to the parent, she contacted the student's elementary school on December 10, 2014 to determine whether or not the student was enrolled there. The parent alleges that the district confirmed that the student was in attendance and had an IEP but denied her access at that time to information related to the student's placement and services. According to the parent, she was not previously aware that the student had an IEP.

On December 15, 2014, the parent states that she was able to obtain a copy of the student's October 24, 2014 IEP. She reports that she asked why she had not been notified and was told that the district had obtained consent for placement from the student's foster parent.

The parent states that her parental rights have not been severed, and she is in the process of regaining custody of the student.

According to the district, the team that was anticipated to be working with the student upon his transfer to district services made a visit to the home of the student's foster parents in September of 2014. The district was aware at that time that neither of the student's biological parents was allowed unsupervised visits with the student.

The district reports that it subsequently conducted an IEP Team meeting on October 24, 2014 in order to have services in place for the student when he turned 3 on November 3, 2014. While the foster parent was given notice of the meeting and was in attendance, neither of the student's biological parents was provided with prior written notice of the meeting. The foster parent gave written consent for the placement and services outlined in the October 2014 IEP.

The district states that it did not have current contact information for the biological parents when preparing for the student's transition into the district and stipulates that no effort was made at that time to obtain contact information for either of the student's biological parents. The district assumed that the grandmother/foster parent had the legal authority to make decisions for the student but stipulates that no effort was made to confirm the grandparent's decision-making authority.

The district failed to provide either biological parent – the educational decision makers for the student – with prior written notice of the October 24, 2014 IEP Team meeting. Neither biological parent was given prior written notice of the actions proposed by the district with regard to the services and placement for the student. The written consent of a biological parent was not obtained before initiating placement and services in the district. Under these circumstances, a violation of special education laws and regulations is substantiated.

Additional Information

On December 12, 2014, the parent went to the district Special Education Annex where she requested and was given a copy of the student's October 2014 IEP. In a phone call later that afternoon, the Director of Special Education answered questions from the parent regarding the document and obtained contact information from the parent.

Since the filing of this complaint, the Director of Special Education has spoken with both biological parents regarding the scheduling of an IEP Team meeting. Because of the father's work schedule, it was determined that the meeting would be held on a Friday, and the dates of January 16 and 30, 2015 were offered to the parents. The student's mother initially told the district she could not meet on January 16th because of scheduling conflicts, and the IEP Team meeting was set for January 30th. In a telephone conversation with the investigator on January 5, 2015, the parent indicated that she would be willing to try to rearrange her schedule to allow for a meeting at 3 PM on January 16th.

The parent told the investigator on January 5th that while she has concerns regarding the adequacy of the district's program as outlined in the student's IEP, she would be willing to give written consent to the district to allow the student to continue to receive services in the placement specified in the IEP until the IEP Team meeting.

On January 6, 2015, the district notified the investigator that the IEP Team meeting has been moved to January 16, 2015. The parent has agreed to try to rearrange her schedule to accommodate this change so long as the district agrees that the meeting date will revert to January 30th if she is unable to modify her schedule. According to the Director of Special Education, prior written notice of the January 16th meeting was sent to the parent via certified mail on January 6, 2015.

The Director has also reported to the investigator that the parent has indicated she would give written consent to allow the district to provide services and placement under the IEP developed in October 2014. By report of the Director, prior written notice of the district's proposal was mailed to the parent on January 6, 2015.

Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on issues presented in this complaint. Specifically, violations were substantiated with regard to

- K.A.R. 91-40-17(a)(2), which requires that parents be given 10-days prior written notice of an IEP Team meeting, and
- 34 C.F.R. 300.300, which requires that prior written notice be provided to the parent for the initial provision of services on an IEP, and that the written consent of the parent be obtained before placement and services are initiated.

Therefore, USD # [redacted] is directed to take the following actions:

- 1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Early Childhood, Special Education and Title Services stating that it will comply with
 - a. K.A.R. 91-40-17(a)(2) by providing 10-days prior written notice to parents of an IEP Team meeting,
 - b. 34 C.F.R.300.300 by providing written notice to the parent of proposed placement and services, and by obtaining the consent of the parent before initiating such placement and services.
- 2) Within 10 school days of the receipt of this report, provide to Early Childhood, Special Education and Title Services
 - a. Copies of the prior written notice of the IEP Team Meeting scheduled for January 16, 2015 sent to both biological parents. If the meeting is subsequently rescheduled at the request of the student's mother, copies of the prior written notice of the rescheduled IEP Team meeting should also be submitted.
 - b. A copy of the prior written notice regarding services and placement sent to the student's mother on January 6, 2015.
- 3) Submit to Early Childhood, Special Education, and Title Services, within 5 days after the IEP meeting described in paragraph 2, above:
 - a. A copy of the IEP developed at the meeting,
 - b. A copy of prior written notice of the district's proposed placement and services provided to each of the student's biological parents, and

- c. If at least one of the biological parents consent to the proposed placement and services, a copy of the signed consent form.
- 4) Until completion of the IEP meeting referred to above, the district shall continue to implement the student's IEP. However, if neither biological parent consents to the placement and services finally proposed at the meeting, special education services shall cease immediately, and Early Childhood, Special Education and Title Services shall be provided written notice of that occurrence within 5 school days.
- 5) Within 10 school days of the receipt of this report, submit a copy of a plan developed by the district to ensure that training has been provided to staff regarding the establishment of educational decision-making authority in the case of students in foster placement.

Further, USD # shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education, and Title Services one of the following:

- a) A statement verifying acceptance of the corrective action or actions specified in this report;
- b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or
- c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (c).

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.



Diana Durkin
Diana Durkin, Complaint Investigator

(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).

15FC17

KANSAS STATE DEPARTMENT OF EDUCATION EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
PUBLIC SCHOOLS USD #
ON JUNE 17, 2015
DATE OF REPORT: JULY 14, 2015

RECEIVED
JUL 20 2015
KSDE

This report is in response to a complaint filed with our office by [redacted] on behalf of their son, [redacted] will be referred to as "the student" in the remainder of this report. Mr. and Mrs. [redacted] will be referred to as "the parents."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with [redacted] Director of Special Education for USD # [redacted], on June 24 and July 12, 2015.

On July 7, 2015, the investigator spoke by telephone with the student's parents.

On July 7, 2015, the investigator spoke by telephone with the Elementary Gifted Facilitator for the district. In a separate telephone conversation that same day, the investigator spoke with the student's 3rd grade general education teacher.

The investigator spoke by telephone on July 11, 2015 with the School Psychologist who facilitated the eligibility team meeting. On July 13, 2015, the investigator spoke by telephone with the Counselor at the student's school who served as the Local Education Agency (LEA) Representative at the eligibility determination meeting.

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

- Initial Evaluation Referral Packet for Student Assistance Team dated January 12, 2015
- Student Data Form dated January 12, 2015
- Gifted Intervention Checklist
- Gifted General Education Intervention Strategies dated January 12, 2015
- Student performance reports for the AIMSweb reading and mathematics for the 2014-15 school year
- Correspondence from the parents to the building principal and the Director dated March 26, 2015 requesting an evaluation of their son for the Gifted program

- Prior Written Notice for Evaluation and Request for Consent dated April 3, 2015
- Approval of Referral form dated April 3, 2015
- Kaufman Test of Educational Achievement, Third Edition (KTEA-3) test report dated April 15, 2015
- Notice of Meeting dated April 24, 2015
- Eligibility Report dated May 13, 2015
- Evaluation Team/IEP Team Signature Page dated May 13, 2015
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated May 13, 2015
- District response to the complaint dated June 26, 2015

Background Information

This investigation involves an 8 year-old boy who was enrolled in the third grade during the 2014-15 school year. The parents report that he attended Kindergarten and 1st grade in Texas before moving to Garden City for 2nd grade.

The parents report that as a young child the student demonstrated surprising problem solving and language skills and note that he enjoys the enrichment opportunities he currently experiences in a local community program. Both the student's mother and his grandfather are math teachers, and the student has expressed to them his interest in being taught math skills beyond his grade level.

According to the parents, the student's general education teachers for both 2nd and 3rd grade expressed a belief that the student had the "potential" to qualify for Gifted services.

The parents state that after telling them that their son did not qualify for Gifted services, the district failed to offer any meaningful strategies to help the student close the gap between his ability and his effort. Parents report that the student rarely has homework, finishes assignments quickly and accurately, earns A grades and demonstrates skills beyond grade level with little apparent effort. They fear that the student may become bored with school and worry that unless their son is challenged academically and intellectually he may fail to develop the coping strategies he will need to face future challenges.

Issue

In their complaint, the parents raise a single issue. They challenge the district's decision to determine their son to be ineligible for Gifted services, stating,

“After our son met the three prongs exhibiting exceptionalism, he was disqualified by ‘not showing exceptional effort all the time.’”

There is not a uniform standard across Kansas' districts for determining the criteria that are used to determine if a child meets the definition of "Gifted." However, each district is required to have local Policies, Practices and Procedures in place that describes how the district gifted services are determined and delivered.

The State of Kansas has provided a resource to districts for use in deciding whether or not a student will be determined to be a special education student. In a document entitled "Eligibility Indicators" published in August 2012, the State emphasizes that an eligibility determination team must consider *two* separate prongs of identification:

- 1. Does the child exhibit an exceptionality, and**
- 2. Does the child need special education?**

The initial evaluation of a student must include a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. This includes information provided by the parent that may assist in determining whether the child is an exceptional child, the educational needs of the child, including information related to enabling the child to be involved, and progress in the general education curriculum (K.S.A. 72-986(b)(1)). Evaluation teams will use existing and/or new data that comes from a variety of sources. The richest source of this information comes from the data collected in the provision of interventions. Interventions typically occur as a part of the General Education Intervention process, but may also be collected from interventions conducted during the initial evaluation process.

When considering the first prong of the two-prong test of eligibility, the team must review the initial evaluation and other data to determine whether or not the child is a child with an exceptionality. To do this, team members compare the data about the child to see if there is a match to one of the exceptionality categories defined in the regulations.

Kansas regulations define "exceptional children" as "children with disabilities and gifted children (KAR 91-40-1 (w)). At KAR 91-40-1 (cc), the regulations define "Gifted" as "performing or demonstrating the potential for performing at significantly higher levels of accomplishment in one or more academic fields due to intellectual ability, when compared to others of similar age, experience and environment."

In determining whether a student meets the definition of "Gifted," the team must consider information and have data to support at least 1 indicator from *each* of the three following categories:

1. Evidence of performing or demonstrating the potential for performing at significantly higher levels of accomplishment in one or more academic fields.

For children of this student's age, this can involve:

- record reviews, interviews, and/or observations that indicate the student demonstrates superior reasoning and problem solving ability
- student progress monitoring that indicate skill level in one or more academic areas is much above that of peers
- GPA, classroom, portfolio, or rubrics that indicate a significantly high level of intellectual ability and excellence in academics
- district, state, and national assessments that indicate a significantly high level of intellectual ability and excellence in academics
- a rank of not less than 95%ile on national norms on a standardized, norm-referenced achievement test in one or more of the academic fields (mathematics, language arts – including reading – science , and social science), or evidence that such test scores do not adequately reflect the child's excellence in academics

2. Evidence of intellectual ability.

This can include:

- record reviews, interviews, and/or observations that show persistent intellectual curiosity and/or initiative and originality in intellectual work
- ease of completion of tasks, rate of acquisition and/or products from home or school that suggests a significantly higher level of intellectual ability and excellence in academics
- a composite rank of not less than 97%ile on an individually administered, standardized, norm-referenced test of intellectual ability, or evidence that the child's standardized intelligence test score does not adequately reflect the child's high intellectual potential

3. Evidence regarding performance comparisons when matched to others of similar age, experience and environment

These indicators include:

- multiple characteristics of giftedness exhibited when interventions provide adaptations, enrichment, or acceleration
- persistence to task and generalization of knowledge gained indicating a remarkably high level of accomplishment
- coursework analysis indicating a significantly high level of intellectual ability and excellence in academics when provided with interventions
- performance significantly higher than peers on one or more areas of benchmark assessments, curricular objectives, or state assessments

The second prong of the test of eligibility is to determine whether or not the child **needs** special education and related services as a result of the exceptionality. A child may meet the definition of an exceptionality category – in this case Gifted – but may **not** demonstrate a **need** for special education and related services, and thus may be determined to be ineligible to receive such services.

It is helpful for teams to remember that by definition special education means "specially designed instruction" (KAR 91-40-1(kkk)). "Specially designed instruction" means adaptation to the content, methodology, or delivery of instruction to address the unique needs of a child that result from the child's exceptionality. These adaptations are necessary to ensure access of the child to the general education curriculum in order for the child to meet the educational standards that apply to all children (KAR 91-40-1 (III)). This implies that in order to have a need for special education, the child has specific needs which are so unique as to require specially designed instruction in order to access and progress in the general education curriculum.

Indicators of need include the following:

- Student progress monitoring data indicate intense or sustained resources are needed in order for the student to demonstrate appropriate progress.
- Evidence of student's mastery of successive levels of instructional objectives or course requirements indicates the need for intensive adaptations or acceleration.
- Student progress monitoring data show that targeted supplemental interventions are insufficient for student to demonstrate appropriate progress.
- Student progress monitoring data of increasingly customized and individually tailored instruction and interventions indicate that the student needs specially designed instruction to access the general curriculum at appropriate levels of instruction.
- Intensive changes or modifications are needed in instruction, curriculum, grouping, assignments, etc. for the student to demonstrate appropriate progress.
- Evidence of student's frustration with enriched instructional environments indicates the need for intensive adaptations or acceleration.
- General education interventions such as alternative course selections or cross-age grouping are insufficient to support student progress

The team must determine the extent of the child's **needs** with regard to specially designed instruction. Teams should be able to use the data to describe the intensity of the support needed to assist the child in accessing and progressing in the general education curriculum. It is only through this discussion that the team can determine whether or not the child's need for having adapted content, methodology, or delivery of instruction is so great that it cannot be provided

without the support of special education.

If the team determines that the child's need for having adapted content, methodology, or delivery of instruction is so great that it cannot be provided in regular education without the support of special education, the team may determine that the child needs special education and related services (Prong 2 of the eligibility test). If the data suggest the child's needs for instruction can be provided within regular education ***without the support of special education*** and related services, the team must determine that the child is ***not*** in need of special education and related services and is therefore ineligible to receive such services.

An "Initial Evaluation Referral Packet" for the Student Assistance Team dated January 12, 2015 indicates that the parents were "interested in pursuing the gifted program." According to the form, the teacher had "no concern" regarding the majority of the behavioral markers listed but did express "moderate concern" regarding how the student "responds to individual instruction" and how he works in teams.

According to a "Student Data Form" dated January 12, 2015, the student scored above the class average on "DRA" assessment with regard to both "Instructional Level" and "Fluency" but below the class average in the area of "Comprehension."

Six-Trait Writing assessments reflected "Satisfactory" or "B" level skills for "Ideas & Content, Organization, Voice, Word Choice, Sentence Fluency, and Conventions."

The student's scores on AIMSweb during the 2014-15 school year placed the student in the "above average" range for both Reading (Curriculum Based Measurement – R-CBM) and MAZE (Comprehension). He demonstrated "above average" skills in the area of Mathematics Concepts and Applications (M-CAP) and "well above average" skills in Math Computation (M-COMP).

According to a "Gifted Intervention Checklist," the amount of drill and repetition type of assignments was reduced for the student for 18 weeks. For that same length of time, the student was encouraged to use school and public libraries, and was allowed to use his leadership ability.

The form entitled "Gifted General Education Intervention Strategies" indicates that as of January 12, 2015 the following strategies had been implemented and considered to be "Moderately Effective" with the student:

- "Allow opportunities for the student to share talents with peers and/or younger students
- Expand vocabulary skills

- Use alternative activities/materials to enrich curriculum
- Assign high level questions: Minimize recall questions and emphasize application, analysis, synthesis and evaluation questions
- Provide problem-solving opportunities along with computation in class
- Enrich the curriculum "horizontally" with materials and activities which extend a topic"

The same form also shows that the student was allowed opportunities to develop leadership skills but that strategy was deemed to have proven "Ineffective."

On March 26, 2015, the parents made a written request that their son be tested for the district's Gifted program.

On April 3, 2015, the Director of Special Education approved the student's referral for evaluation for the Gifted program. According to the approval form,

- "Learning experiences which are appropriate for the student's age and ability levels have been provided to the student.
- Records of age/ability appropriate interventions tried in the regular classroom with the student....(were available)
- Potential for learning has not been achieved in the regular education environment
- Records of appropriate preassessment interventions and the effect of these interventions on the performance of the student (were available)
- A record of the dates the preassessment team met, the names and positions of the preassessment team members and the team recommendations have been completed
- Names and positions of members of the preassessment team, dates the preassessment team met and the team recommendations for the student (were available)."

On April 8, 2015, parents gave informed written consent for the student to be evaluated. According to the consent form, the team would use both new and existing data to assess vision, hearing, general intelligence, and academic performance.

The student's cognitive skills were assessed on May 7, 2015. Portions of two assessment measures were utilized: The Kaufman Assessment Battery for Children, Second Edition (KABC-II) and the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). Results were as follows:

From the KABC-II

- Fluid-Crystallized Index: 99%ile
- Fluid Reasoning: 99%ile

- Long-Term Memory: 98%ile
- Delayed Recall: 99%ile
- Crystallized Knowledge: 97%ile
- Visual Processing: 90%ile
- Short-Term Memory: 50%ile

From the WISC-IV:

- Processing Speed: 66%ile

Results of an academic assessment using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) administered on April 15, 2015 were as follows:

- Reading Composite: 81%ile (average range)
- Math Composite: 86%ile (above average range)

On May 13, 2015, the Evaluation Team met to review the results of the evaluation. It was noted in the evaluation report that parents were concerned about the student's "motivation towards school work (and) would like to see his effort become more consistent." In the "Behavioral/Emotional Assessment Results" section of the report it is noted that while the student was "not reported to be a significant behavior concern at school, he was reported to put forth little effort at times (and to require) encouragement to try his best and complete classroom assignments. His social/behavior skills were reported to be slightly under developed for his grade level."

According to the evaluation report, the student earned A grades in "social studies, communication, science, and math." Standard assessments completed in the classroom setting indicated that the student was performing above class averages in both reading and math.

The report reflects that no language, speech, fine motor, or gross motor concerns were noted and no educationally relevant medical findings were evident. Under the question, "Does the child have an exceptionality?" the evaluation report states, "Results from this assessment do not support the presence of an exceptionality. According to the Individuals with Disabilities Act (IDEA) and Kansas Department of Special Education standards and indicators, (the student) does not meet initial eligibility criteria for special education services under the eligibility category Gifted." Further, the report states that the student "does not demonstrate need for special education or related services at this time."

The "Final Page of the Reevaluation Eligibility Report" states, "It is the judgment of the undersigned members of the multidisciplinary team, including parents, that a sufficiently comprehensive evaluation has been completed and the student does not meet eligibility criteria as a child with an exceptionality." Both parents signed to show their agreement with the above statement.

The "Evaluation Team/IEP Team Signature Page" shows that both parents were present at an Evaluation Team meeting on May 13, 2015 as was a Special Education Teacher, General Education Teacher, LEA Representative, and a Person to Interpret Evaluation Results. Parents were provided with written notice that the student "did not meet initial eligibility criteria for Gifted services" because "results of standardized testing (was) not supporting the presence of an exceptionality." The form also noted that the student was not "consistently applying himself in the classroom setting and putting forth effort on assignments."

On a "Prior Written Notice" form dated May 13, 2015, both parents provided written consent with the district's proposal to decline services.

It is the contention of the parents that the district determined that the student was ineligible to receive special education services as a Gifted student solely because he did not show "exceptional effort all the time." They believe that their son has demonstrated skills that make him eligible for support and that he should be identified as Gifted.

The district asserts that while the student has demonstrated superior intellectual ability and is achieving at an above average level, he does not demonstrate a *need* so unique as to require specially designed instruction in order to access and progress in the general education curriculum. It is the district's position that at the present time the student's educational needs are effectively being addressed in the general education environment.

The general education teacher reported to the investigator that the student showed little if any interest in enrichment opportunities she offered him. The student was able to complete assignments with apparent ease but neither pushed the teacher for more challenges nor did he require intensive instruction on the part of the teacher to customize or individually tailor instructions or interventions to keep him focused or engaged. At no time has the student evidenced frustration with the curriculum or appeared interested in acceleration.

District participants in the eligibility determination meeting all report to the investigator that there was considerable discussion about the student's eligibility for Gifted services. The Evaluation Report and the Prior Written Notice form indicate that the team did not believe that the student met the categorical definition of a gifted student and that special education services were not necessary to enable the student to receive educational benefits in accordance with his abilities or capabilities. The student's reluctance to do more than what was required to earn A grades was talked about as was his limited interest in enrichment opportunities. While the subject of "effort" was covered in the team discussion and on the Prior Written notice form, team members all report that "effort" was not the sole reason the student was deemed ineligible for special education service.

The district conducted an initial evaluation of the student using a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Parental input was solicited. Existing and/or new data from a variety of sources was collected, including information regarding the provision of interventions. The team then used this information to determine whether the student met the two prongs of identification for special education as a Gifted student and determined that the student was ineligible. Parents were provided with prior written notice of the team's decision. Under these circumstances a violation of special education laws and regulations is not substantiated.

Corrective Action

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.


Diana Durkin, Complaint Investigator

(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).

15FC18

KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #
PUBLIC SCHOOLS
ON DECEMBER 3, 2014

DATE OF REPORT: DECEMBER 16, 2014

This report is in response to a complaint filed with our office by _____, the parent of _____ is the subject of this complaint, and will be referred to as "the student" in the remainder of this report. The complaint alleges that the student should have the protections of the Individuals with Disabilities Education Act (IDEA) with regard to his long-term suspension.

Investigation of Complaint

The investigator spoke with the Director of Special Education by telephone on December 4, 2014, and to the parent by telephone on December 10, 2014. In addition, the investigator reviewed the district's written response to the complaint, which included a cover letter, written statements from the student's teachers, written statements from two special education teachers, the student's high school transcript and the student's first 9-weeks grade report.

Background Information

The student is a 17 year-old boy. He is a senior attending _____ High School. The student is a general education student, and has not been identified as a child with a disability. On November 5, 2014, the student was involved in an incident that resulted in a ten-day suspension beginning November 6, and subsequently a long-term suspension for the remainder of the school-year, beginning November 21.

Allegations

ISSUE 1: The parent alleges that although the student has not been identified as a child with a disability, he should have the protections afforded children with disabilities who have been suspended for more than ten consecutive school-days.

The parent cites federal regulation 34 C.F.R. 300.534, which says a child who has not been determined to be eligible for special education and who has engaged in behavior that violated a school code of student conduct may assert any of the protections of special education law, including the disciplinary protections, if the school district had knowledge that the student was a child with a disability. This regulation specifies that there are three ways that a school is deemed to have knowledge that the child was a child with a disability. They are:

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to Sec. Sec. 300.300 through 300.311;
- (3) The teacher of the child, or other personnel of the school district, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the school or to other supervisory personnel of the school.

An important part of this regulation is that the student may assert the protections of the IDEA only if one or more of the three events listed above occurred before the behavior that resulted in suspension.

The behavior that resulted in suspension occurred on November 5, 2014. The parent acknowledged that she had not, prior to November 5, 2014, expressed a written concern to school personnel that her son was in need of special education or requested a special evaluation.

The parent stated that she did not have evidence that the teachers of the child, or other personnel of the school district, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the school or to other supervisory personnel of the school. In its written response to this complaint, the district included written statements from the student's teachers stating that they had not expressed these kinds of concerns about the student's conduct.

Because none of the three methods by which a child may assert the protections of the IDEA occurred before the behavior that resulted in suspension in this case, the allegation of a violation of law or regulation is not substantiated.

ISSUE 2: The district did not refer the student for an evaluation before the incident that resulted in a long-term suspension.

The parent believes the district should have made an offer to evaluate the student for special education eligibility, without being asked by the parent. School districts do have a "child find" obligation, which requires them to take steps to identify, locate and evaluate children who are suspected of having a disability and needing special education services (34 C.F.R. 300.111).

According to the parent, the student has been diagnosed as having anxiety and psychosis. However, the parent acknowledged that she did not provide that information to the school district prior to the incident which resulted in a long-term suspension. The district reports that, although the student has received failing grades in some classes, he has been accumulating adequate credits toward graduation, has participated in extra-curricular activities, has never been brought to a student intervention team, and, as indicated in the discussion of Issue 1, no teacher has expressed a specific concern about a pattern of behavior directly to the director of special education or to other supervisory personnel. Under these circumstances, the investigator finds that the district did not have sufficient reason to suspect the student both had a disability and that the student was in need of special education that would have required the district to refer the student for an evaluation. The allegation of a

violation of special education law or regulation is not substantiated.

The complaint investigator notes that the parent requested a special education evaluation on November 17, 2014, and the district is conducting an expedited evaluation.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education laws and regulations. Therefore, corrective action is not required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Ave., Topeka, Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulation 91-40-51(f), which is attached to this report.



Mark Ward

Early Childhood, Special Education and Title Services

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).

**KANSAS STATE DEPARTMENT OF EDUCATION
EARLY CHILDHOOD, SPECIAL EDUCATION, AND TITLE SERVICES**

**REPORT OF COMPLAINT
FILED AGAINST
PUBLIC SCHOOLS #
ON NOVEMBER 20, 2014**

DATE OF REPORT: DECEMBER 22, 2014

This report is in response to a complaint filed with our office on behalf of _____ by his mother, _____ will be referred to as "the student" in the remainder of this report. Ms. _____ will be referred to as "the parent."

Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Dr. _____, Director of Special Education for USD # _____ on December 4 and 15, 2014. The investigator spoke by telephone with the parent on December 5, 8, 12 and 15, 2014.

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

- Conference Summary dated February 12, 2013
- Functional Behavior Assessment and Positive Behavioral Intervention Planning Form dated February 7, 2013
- Teacher Information Page dated July 29, 2013
- Functional Behavior Assessment and Positive Behavioral Intervention Planning Form with note dated January 11, 2014
- IEP for this student dated April 17, 2014
- Written statement dated December 12, 2014 from the primary implementer of the student's April 2013 IEP during the 2013-14 school year
- Written statement dated December 16, 2014 from the School Social Worker who was assigned to the student's school for the 2013-14 school year
- Written statement dated December 15, 2014 from the School Psychologist who served the student's school during the 2013-14 school year
- On-line version of the Student Handbook
- Written statement from the Principal of the student's school in 2013-14 regarding a bus incident of April 23, 2014
- Bus Misconduct Notice dated April 23, 2014
- Incident report dated May 1, 2014
- Attendance records for the student covering the 2013-14 school year

Background Information

This investigation involves a 10 year-old boy who is currently enrolled in the 5th grade. The student was determined to be eligible for and in need of services under the primary exceptionality of Specific Learning Disability.

Scope of Investigation

Formal complaint is one of the dispute resolution methods available to parents if they believe that a school district has violated a state or federal law or regulation relating to special education. Kansas regulations, at K.A.R. 91-40-51, outline requirements related to the complaint process including the condition that the complaint must allege "a violation that occurred not more than one year before the date the complaint is received (by Early Childhood, Special Education, and Title Services)."

This complaint was received on November 20, 2014. Therefore, the investigation of issues outlined in the complaint has been limited to those related to violations that are alleged to have occurred on or after November 20, 2013.

Issues

In her complaint, the parent raises the following issues:

Issue One: Because the student's Behavior Intervention Plan (BIP) was never incorporated into the electronic version of his April 2013 IEP, staff members – including his classroom teacher – were unaware of his having such a plan.

Federal regulations, at 34 C.F.R. 300.341 require that a student's IEP be implemented as written.

At 34 C.F.R. 300.323(d)(1), federal regulations state that the IEP for a student receiving special education services must be "accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation." All individuals who are providing education to the child (regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for implementation of the IEP) must be informed by the IEP team of

- his or her specific responsibilities related to implementing the child's IEP, and
- the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

According to the parent, a BIP was developed for the student on February 7, 2013. The parent reports that when the annual review of the student's IEP was completed on April 12, 2013, the IEP Team determined that the student required a Behavior Intervention Plan and that the February BIP was to have been made a part of the April 2013 IEP.

It is the parent's position that on January 17, 2014, a School Social Worker wrote on a copy of the student's February 2013 BIP that the plan was "not uploaded in WebKIDSS (the student's web-based IEP)." The parent therefore contends that the student's IEP did not include a BIP until an annual review in April of 2014. The parent believes that as a result of the district's failure to include a BIP in the electronic version of the April 2013 IEP, that the student's general education teacher for the 2013-14 school year was unaware that the student had a behavior plan and was therefore unable to implement the plan.

The district stipulates that the student's April 2013 IEP did indicate that the student required a Behavior Intervention Plan and further stipulates that the district did not use "WebKIDSS" when developing the BIP. The district maintains, however, that the BIP that had been developed by the team in February 2013 using a different format than the one found in WebKIDSS was attached to the student's April 2013 IEP.

The student's fourth grade teacher is no longer employed by the district and was not contacted for this investigation. However, in a written statement dated December 12, 2014, the special education teacher who was the primary implementer for the student's April 2013 IEP asserts that during the first week of the 2013-14 school year she reviewed the Teacher Information Page of the student's IEP with his general education teacher. The two teachers also went through the student's IEP and BIP. According to the special education teacher, she frequently checked in with the general educator regarding the student's behavior, both teachers noting an absence of the behaviors that had been of concern during the 2012-13 school year and noted in the student's BIP.

The School Psychologist and School Social Worker assigned to the student's school for the 2013-14 school year have both provided the investigator with written statements in support of the district's contention that the student's BIP was implemented during that year.

WebKIDSS is one of the many available electronic programs used by districts across the state of Kansas for the development of IEPs and BIPs. Regulations do not mandate the use of any specific program when developing IEPs so long as the content of the documents meets established requirements. If the IEP Team determines that a student is in need of a behavior plan, then a BIP must be developed and implemented, but there is no prohibition from using different formats for the development of the IEP and the BIP.

The district has provided evidence to support its contention that while the student's BIP was not uploaded into the WebKIDSS program, a plan was nonetheless developed and was being implemented between November 20, 2013 and April 17, 2014 when the IEP was revised. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Two: There has been a denial of FAPE (Free Appropriate Public Education) because of the actions of school staff.

The law is clear that children with disabilities have the right to participate in nonacademic and extracurricular services and activities with children who do not have disabilities (34 C.F.R. 300.117). School districts must provide these activities in a way that gives children with disabilities an equal opportunity to participate (34 C.F.R. 300.107). Such services and activities include:

- lunch
- recess
- athletics
- health services
- counseling services
- transportation
- recreational activities
- special interest groups or clubs

Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with an exceptionality, to benefit from special education services. It is up to the IEP Team to determine what additional services are necessary for the child to benefit from the special education services. K.A.R. 91-40-1(ccc) identifies special education transportation as a related service.

Run Club Participation

The parent contends that during the first semester of the 2013-14 school year the student was prohibited from participating in a school-wide program designed to promote good general health.

According to the parent, a grant sponsored program at the student's school – called "Run Club" – allowed students to earn tokens that could be traded for products from the Run Club Store. These tokens were awarded for running laps at the end of the recess period after a signal whistle was blown.

It is the parent's contention that there had been some issues when students were lining up to come in from recess. As a result, her son was not allowed to run laps with his peers but was instead directed to go to the school office and then to an

entrance area of the building where he was to wait alone while his classmates completed their laps and returned to the classroom. The student was to remain in the entrance area until the school counselor gave him permission to walk back to his classroom alone.

The parent asserts that she did not give her permission for the district to implement this plan and was not aware that it was in place until December 2013. While the student was able to earn a Run Club token for having "followed directions," the parent contends that the district's approach set her son apart from his peers by prohibiting him from taking part in an activity in the same manner as his classmates.

According to the district, student participation in Run Club was not limited to the period of time when a whistle was blown to signal the end of recess. It is the district's position that students were able to run laps throughout the recess period and to collect tokens to reflect the number of laps they completed. Students were able to earn a certificate for completing 100 miles, were allowed to purchase t-shirts and record the date they joined the "100 Mile Club." The district contends that the student opted not to participate in Run Club during recess but instead preferred to engage in other activities.

The district stipulates that a management strategy was implemented in the Fall of 2013 when staff observed that behavioral issues often arose when the student was required to line up in order to return to the classroom after recess. An intervention was put in place whereby the student would immediately line up when the whistle was blown signaling the end of recess. Most other students would walk the track before lining up, but the student and some others were asked to line up without taking a lap.

According to the district, the student had complied with the plan without argument until the week before Winter Break in December 2013. For two days during that time period, the student opted not to follow the established routine and became agitated. As specified in the student's BIP, the parent was contacted when – on the second of these two days – the student could not calm himself.

The district reports that upon his return to school after Winter Break, staff resumed the student's previously established recess routine. On January 14, 2014, the parent notified the district that she did not want the modified recess routine implemented, but the recess supervisor was not made aware of the parent's request. The parent approached the supervisor at the end of the recess period on January 15, 2014 and informed the supervisor that she wanted the student to line up in the same manner as other students. The supervisor assured the parent at that time that the student would no longer be asked to line up immediately after hearing the end-of-recess signal. According to the district, staff complied with the parent's request.

The student could have used any or all of his recess period to join his peers in running laps to accrue Run Club miles and earn tokens and recognition. The management strategy implemented by the district did not in the opinion of the investigator substantially limit the student's opportunity to participate in Run Club and did not deny him FAPE. Under these circumstances, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

Suspension From Riding the School Bus

According to the parent, the district unfairly kept her son from riding the general education school bus following a behavioral incident.

The student's April 17, 2014 IEP does not list transportation as a related service required by the student. The district reports that general education transportation has been available to the student and that he has never required special education transportation.

According to the Student Handbook for the district, "The privilege of free transportation is contingent on reasonable behavior by the student and will be withdrawn, as necessary, to correct behavioral problems." It is the district's position that the student lost his bus privilege as a consequence of his actions.

A Bus Misconduct Notice dated April 23, 2014 shows that the student threatened to hit a "special needs" student because the other student touched his arm. According to documents provided by the district and the parent, the student refused to comply with requests from the bus driver to take a seat.

An incident report dated May 1, 2014, shows that the building principal was called to the bus when it was reported that the student had thrown a chair that hit another student. According to the report, the bus driver and the building principal attempted to calm the student but were unsuccessful. The student was asked to get off the bus but refused to do so for approximately 15 minutes. The student's actions caused a delay in the departure of the bus, which was carrying other students. A video of the incident captured the event; that video was shared with the parent.

As a consequence of his actions on these two occasions, the student lost the privilege of free transportation for the period of May 6 through 9, 2014 – a total of 4 school days.

Attendance records for the student show that he was in school on May 6, 7, and 8, 2014 and had an excused absence for May 9th. According to the parent, she opted to pull the student out of school for the remainder of the year after an incident on May 8, 2014.

The actions of the district in enforcing a disciplinary removal from the general education bus did not deny the student access to FAPE. The student attended school for 3 of the 4 days of his exclusion from the bus. The decision to keep the student out of school on the fourth day of his bus removal was made by the parent for reasons unrelated to the bus incident. Under these circumstances, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

Corrective Action

Information gathered in the course of this investigation has failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no corrective action is required.

Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, 120 SE 10th Avenue, Topeka Kansas 66612, within 10 calendar days from the date the final report was sent. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which is attached to this report.

Diana Durkin
Diana Durkin, Complaint Investigator

(f) Appeals.

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