Due Process & Formal Complaint Reports

For Review by Kansas SEAC – 4/16/13

(Laura Jurgensen and Mark Ward)

For your convenience, we have summarized the points we wanted to emphasize in this expedited due process hearing decision and in these formal complaint reports. Underlined text indicates the issue involved, and bold text is used for emphasis.

DUE PROCESS HEARINGS:

12EP___-001 (Hearing took place on May 16, 2012)

I believe this is the first time in Kansas that a hearing has been held in which a school district is asking a hearing officer to order a child into a 45 school day alternative educational setting because the student's behavior is alleged to be substantially likely to result in injury. The case involved an 8 year-old boy in the second grade (four feet tall and 130 pounds) who lives with his grandmother. The boy had been diagnosed with: Post Traumatic Stress Disorder; Attention Deficit Hyperactivity Disorder; Opposition Defiance Disorder; Anxiety Disorder; Pervasive Developmental Disorder; and Reactive Attachment Disorder. The student had a history of abuse and neglect. His category of disability under the IDEA is Emotional Disturbance. The student's grandmother indicated she would consent to the homebound placement only if the student was able to come to school to play with other children before school and at recess.

The student was in a self-contained classroom and was frequently out of control. When out of control, the student yelled and cursed and threw items, and spit on, bit, hit, scratched and pulled the hair of staff members. The district produced pictures of staff members with claw marks on arms and bruises on faces. In addition, the student often attempted to hurt himself by hitting his head on walls, floors or other objects. He frequently stated that other people hated him and wanted him dead and that he wanted to give them what they wanted by killing himself. He often banged his head against desks, walls and floors and said he was trying to make his head explode.

The student's grandmother did not attend the hearing. The hearing officer said: "The uncontroverted facts in this case are that [the student] has already caused injury to self, others and property while at the [student's] program. The **hearing officer ordered the student placed in a 45 school day alternative educational program located in his home**.

FORMAL COMPLAINTS:

13-FC-001

The principal of a private school filed a complaint alleging that the school district was not fully implementing the IEPs of twelve students with disabilities enrolled in the private school, but was receiving additional funding because it was reporting to the state that all the IEP services were being provided.

The investigator explained that school districts have no funding incentive to report to the state that it is providing a specific special education service. The investigator also noted that **districts are not required to implement all of the services specified in the IEP of a child with a disability who has been placed in a private school by his or her parent. Instead, districts are only required to provide those children with the services on the IEP that are requested by the parent.**

However, the investigator concluded the district was not in compliance with special education laws and regulations because it **failed to document the services requested by the parent with a Prior Written Notice and Request for Consent**. Corrective action required the district to develop and implement a plan to provide Prior Written Notice to the parents and obtain informed written consent from the parents of nine students regarding the services these children are to receive at the private school or at a public school site.

13FC-002

In this case there was a long history of contentious encounters between the parent and school administration. At an IEP meeting, according to the superintendent, the parent became particularly boisterous and made statements indicating he would take legal action. Accordingly, the superintendent used his cell phone to make an audio recording of the meeting. Another IEP meeting was scheduled to take place. The parent requested that he be permitted to view his child's education records. When the parent discovered the previous meeting had been recorded, he also requested a copy of the audio recording. The superintendent denied the parent's request for a copy of the audio recording. The parent filed a formal complaint alleging that the district refused to provide access to his child's education records, failed to provide access to the records before the next IEP meeting, and that his child's education records, which were being kept in the superintendent's cell phone, were not properly stored.

The complaint investigator said, "Federal regulations at 34 CFR 300.613 (a) require that a **parent must be permitted to inspect and review education records without unnecessary delay and before any meeting regarding a student's IEP**. This regulation does not require a parent to specifically request access to the records because of a pending IEP meeting. Also, the parents in this instance did not waive their right to have access to the records before the IEP meetings even though they attended both. Rather, it is the **district's responsibility to comply with the records inspection and review request even if pending IEP meetings must be**

rescheduled by providing the parent a new notice of a meeting. Upon receiving that notice, the parent may waive the right to inspect and review the education records prior to the rescheduled IEP meeting. That did not occur in this case." Accordingly, **the allegation was substantiated.**

With regard to the recording being stored on the superintendent's cell phone, the investigator said: "Federal regulations, at 34 C.F.R. 300.623, **require schools to protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction**. … In this case, the CI has determined that the confidentiality rights of the student have not been breached for two reasons. First, there was no evidence presented to support the allegation that storing information on a cell phone made the information more susceptible to disclosure than using other electronic means of storage; and second, as explained in the CI's discussion in the Fifth Concern below, the audio recording in question does not include personally identifiable information regarding the student and the recording is, therefore, not an education record." Thus, this allegation was not substantiated.

With regard to whether the recording of the IEP meeting was an education record, the investigator said: "Federal special education regulations state that the term "Education Records" means the type of records covered under the definition of "**Education Records**" in the regulations implementing the Family Educational Rights and Privacy Act (FERPA) [See 34 C.F.R. 300.611]. The FERPA regulations, at 34 C.F.R. 99.3, define the term "Education Records" as "**those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution**." Thus, in order to qualify as an education record, the record must have within it some personally identifiable information of a particular student. Or, put another way, **if the record does not contain information identifying a particular student, it is not an education record even though it is maintained by an education agency**.

The CI listened to the audio recording during the on-site visit. Disregarding the general content of the recording, except to note that it did not pertain to IEP subject matter, **the CI did not detect a student or parent name or reference to an IEP meeting, or any other information that is linked or linkable to a specific student**. That is, there was no disclosure in the audio recording of "Personally Identifiable Information" as defined in 34 CFR 99.3. Therefore, this audio recording is not an education record as defined in 34 CFR 99.10 and 300.613 so the **district is not required to provide it to the parent for inspection and review."** Again, the investigator did not substantiate this allegation.

12FC-003

This complaint included several allegations, none of which were substantiated. One of the allegations was that the parent did not receive a 10-day written notice of an IEP meeting. The student's file included a copy of a notice of meeting, more than 10 days in advance of the meeting, and an e-mail from the parent indicating she would attend. The **parent argued that the notice of meeting relied upon by the district did not have her signature**. The complaint

investigator determined that the law did not require the notice to have the parent's signature. Rather, all that is required is that the **district must have documentation that the notice was sent on a particular date**.

12FC-004

The parent alleged that the student's teachers had told her they were not providing accommodations specified in the student's IEP, and, in fact were unaware the student had an IEP. **All teachers denied saying that to the parent** and, all but one, produced **signed, written statements** that they were aware the student had an IEP, they had reviewed the student's "IEP at a glance" and were providing the accommodations in the IEP. In addition, the school produced evidence that the **student's teachers attended a meeting in which they were provided instruction on technological devices used by the student** (primarily an iPad). The complaint **investigator did substantiate** that certain services in the IEP had not been provided.

12FC-005

The parent reported that when the student was preparing for bed, he began to cry and told her that he did not want to go back to school following a week-long spring break because he did not want to go into the time-out room again. The student told his mother was sent into the time-out room alone and without any materials. In the complaint, the parent alleged that this use of the time-out room was contrary to the behavior intervention plan (BIP) in the student's IEP.

The student's BIP said when the student is at the "Rumbling" stage, which may look like punching, panic, whining or aggression, the district staff will:

"not try to talk him out of it and will instead give him a chance to find a quiet place to calm down and/or give his staff member a 'I need a break' card or learn the script. Another plan which is working is to supply a 'think card' which he supplies on how he is feeling instead of using a physically aggressive action. We will also give him an alternative to kicking…(and) will continue to give him 'scripting' which he can use instead. This request will be honored whenever appropriate. It is important for staff to be trained to step away from physical aggression and give him enough space that he does not have access to pulling hair or landing a kick or hit. We will always try to change aggressive behavior before using any NCI hold. During the beginning of the 2010-11 school year we have found that when [the student's] behavior starts to escalate we use gentle encouragement and sensory support within the time out room with the assistance of a staff member (books and scatter toys have proven successful…)."

The parent alleged that use of the time-out room did not comply with this description because the time-out room did not include sensory materials and was not used as a de-escalation technique. The school acknowledged that sensory materials were not provided in the time-out room and that staff members only entered the room when necessary for the student's safety. The school agreed that use of the time-out room did not strictly align with the description in

the IEP, but the school had made several efforts to rewrite the BIP, but the parents would not consent to the proposed changes, and the parent acknowledged that she refused to consent to the proposed changes.

The investigator said **the BIP, as it relates to a time-out room reads "more like a set of observations regarding techniques previously used to address the student's behavior than a required procedure to be used to address future behaviors**." That is apparently how school staff read this part of the BIP, although the parent perceived it to dictate required practice for the student. The investigator said she could not substantiate a failure to implement the IEP, but did find **corrective action was necessary to "develop a behavior intervention plan which removes observational language and replaces it with the specific interventions which are to be used by school staff members."**

In a **second allegation**, the parent alleged that the school had refused her request for an IEP meeting. The parent made a request by e-mail for an emergency IEP meeting before school started after the spring break, and waiving her right to a 10-day notice. The principal left several voice mails asking the parent why she wanted an emergency IEP meeting, that went unanswered. The principal then wrote a letter indicating school staff did not see a need for an emergency meeting and that the meeting tentatively set in two days had been canceled, unless the principal was apprised of the specific reasons for the meeting. The principal was told by the student's grandparents that the student would not be attending school until the emergency meeting had taken place. The principal sent the parent a letter stating that the student had now been out of school for four days and was considered to be truant. On the same afternoon, the parent delivered a note from the student's psychiatrist stating that he recommended the student be excused from school until an IEP meeting was held and the parent's concerns were resolved. The next day the parent sent the principal an explanation that the student had informed her he had been secluded and was afraid to come to school and that she was not sending him to school until she had an opportunity to talk to the student's IEP team. She also informed him that due to the denial of her request for an IEP meeting, she had sought legal counsel and filed a formal complaint with KSDE. The principal responded that morning thanking the parent for informing her of the nature of the problem and setting up a meeting. By the time of the meeting, the student had been held out of school for ten days.

The investigator stated that **if a school refuses a parent's request for an IEP meeting, it must notify the parent of the refusal with a Prior Written Notice within 15 school days of receiving the request**. The investigator said the principal's letter did not fulfill this requirement. However, the investigator also found that the principal had not refused to have a meeting, but had, instead delayed the meeting until the parent stated the reason she wanted the meeting. The **investigator also noted that parents are not required to state why they want a meeting, although providing a statement would probably benefit all involved**. **Because the meeting actually took place within 15 school days of the parent's request, the investigator did not find a violation of law on this issue.**

12FC-006

The parent alleged that the principal refused the parent's request for an IEP meeting before the start of school. The **principal said he did not refuse the request**. However, **there was a letter in the file from the parent to the principal requesting an IEP meeting, but no meeting occurred and no Prior Written Notice refusing the request was issued**. A violation was substantiated.

The parent also alleged that she had requested all of the student's teachers be present at the IEP meeting, but only three attended. The investigator found that the **law required only that not less than one special education teacher of the child and one general education teacher of the child need attend an IEP meeting**. A violation was not substantiated.

In addition, in the "special considerations" portion of the student's IEP, it said the student's "teachers will notify [the parent] on a weekly basis if any of her grades drop below a C…" The parent alleged this was not happening because the parent had computer access to the student's class assignment grades, and found grades varying from A through F. The parent said she had never been notified of the low grades. A general education teacher said she was using "average weekly grades" to determine whether grades were below a C. The investigator determined that **there was a violation of the requirement to state supplementary aids and services with frequency and duration in a manner that is clear to the parent and other IEP team members who are involved in both the development and implementation of the IEPs**, from Federal Register, vol. 64, 3/12/1999 p. 12479.

12FC-007

On June 13, 2012, the investigator met with school officials regarding this complaint. School officials indicated they would propose a resolution to the complaint to the Department of Education. So, the investigation was postponed until June 20. On June 20, the **Cooperative hand delivered a five page letter from its attorney stating that the district was in full compliance with the law on each of the three issues, but would abide with any resolution action required by the Department of Education.** Because this letter constituted neither a stipulation nor a resolution proposal, on June 21 the Department informed all parties that the proposed resolution did not resolve the complaint and that the investigator was to resume the investigation. The Department noted that when a proposed resolution was deemed insufficient, it would normally make suggestions as to how the proposal may be modified to achieve resolution. In this case, however, the Department said because the Cooperative did not believe it was in non-compliance with the law and where it was not immediately clear what actions the Cooperative could take to resolve the parent's concerns, the **Department directed the investigator to reinstate the investigation**.

The first allegation was that the Cooperative did not have an IEP in place by the child's 3rd birthday. The child's 3rd birthday was January 15, 2012. The district had **evaluated the student, found him eligible and proposed an IEP at an IEP meeting on January 12, 2012**. However, the

parent refused to consent to the proposed IEP. The investigator, without making any judgment regarding the parent's concerns, acknowledged that consent was voluntary and the **parents had a right to withhold their consent to the proposed IEP. But, by exercising that right, there were two resulting legal consequences: First, the school was precluded from providing the services in the IEP; and Second, the school was no longer required to make a FAPE available – or to develop an IEP**. These consequences relieve the district of the duty to have an IEP in place at any time, including on the child's 3rd birthday.

The second allegation was that the school had not treated the parents as part of the IEP team. The investigator said his finding of facts did not support this allegation because there had been **multiple meetings with the parents and the school had made multiple placement and location options and had adopted some of the parent's proposals**. The investigator said **"The fact that the parents have decided not to give written consent for the district's proposed services and placement is not substantial documentation that they did not have the opportunity to participate as a team member."**

The third issue was that the building where the student was to receive services had a **sign on it, which stated: "This building is not a designated accessible building for the disabled.**" The investigator toured the building and found it to be comparable to facilities for nondisabled children, as required by K.A.R. 91-40-52, and that **it was fully accessible to the student**.

Appeal

The student's grandparent, who was a retired attorney, filed an appeal, which stated in full:

"Dear sirs,

I wish to appeal all findings of the investigator in this Complaint. I also request that I be provided as part of this appeal process any notes of the investigator and the case file.

I would also request any notes and thoughts of the investigator in determining that the school where [the student] was placed was safe. The investigator indicated that because the School District intentionally placed handicapped children in a location the district itself marked as unsafe; using permanent signs in English; that the location became safe."

The Department issued a letter, stating that it **would not hear the appeal of issues 1 and 2** because the appeal regulation, K.A.R. 91-40-51(f), states that "**each notice shall provide a detailed statement of the basis for alleging that the report is incorrect**." The Department's letter said the complainant's notice of appeal provided no basis for alleging the report was incorrect. The letter indicated that **there was at least a brief basis for alleging the report was incorrect with respect to issue 3**, and so the appeal would proceed on that issue alone.

The appeal committee found no violations with regard to the IDEA because **there was no factual basis to determine that the student was denied an equal opportunity to participate in**

any academic or nonacademic program, nor was there any basis to determine that the child was not in the least restrictive environment because of any limitation of the building. The appeal committee noted that under federal regulations regarding the American's with Disabilities Act, at 28 C.F.R. 35.150, the act does not require a public entity to make each of its existing facilities accessible and usable by individuals with disabilities. However, if a public entity has inaccessible buildings, one of the ways it may comply with the law is to reassign services to a designated alternative site that is accessible. The committee went on to explain that the mere presence of a sign on a school building stating that the building is not one of the district's designated alternative accessible buildings, does not make the building unsafe and does not violate any special education law or regulation.

13FC-008

This complaint was filed on behalf of a gifted student. The parent alleged that the student had initially been denied eligibility for a gifted IEP due to a single criteria, a cut score in the 97th percentile on an IQ test. The parent acknowledged that the denial of eligibility for this student had occurred more than one year ago, but alleged that the cooperative was continuing to use this single criteria to determine eligibility for giftedness. The investigator reviewed all of the special education records of students in the district who were evaluated and determined to be ineligible for special education services under the category of gifted during the past year. After the review the investigator determined that **multiple sources of information were included in the evaluation reports and in team meeting notes, and most importantly were also included in the Prior Written Notice** given to the parents advising them that the students were not eligible.

The other allegation was that the gifted student was not allowed to test out of Pre-Calculus, and that decision was made by the Calculus teacher, not the IEP team. Kansas regulations, at K.A.R. 91-40-3, say that "each gifted child **shall be permitted to test out of, or work at an individual rate**, and **receive credit** for required or prerequisite courses, or both, at all grade levels, **if so specified in that child's individualized education program** (emphasis added)." The parent alleged that her request for the student to test out of pre-calculus was denied before the IEP meeting because the head of the math department did not think it would be good for the student to miss some of the basic information supplied in that course. The investigator noted that the parent was able to discuss the proposal at the meeting, and also noted **"a parent is not denied an opportunity to initiate a discussion at an IEP meeting just because an IEP team member asked for an opinion from a colleague** (See 34 C.F.R. 300.501(b)(3), stating that the word **"meeting" does not include preparatory activities in which school personnel develop a proposal or a response to a parent's proposal – that will be discussed later at an IEP meeting).**

The student's mother alleged that a placement proposal had been predetermined prior to an IEP meeting. The student's mother said she was informed that the student's IEP team would meet on September 4, 2012, to discuss a possible change of placement to a Day School. The student's mother contacted the secretary of the Day School to arrange a tour. The student's mother stated that the secretary informed her that she knew the student's IEP meeting was set for September 4, that the student would be coming to the day school and that a classroom had already been selected.

In its written response to the investigator, the Cooperative stated that an IEP meeting was scheduled for September 4, 2012. A written notice of meeting was prepared and a box in the notice was checked, adjacent to the statement "Discuss possible changes in your child's individualized education program." The **staff at the Day School were notified of this meeting, as their attendance was requested because placement at the Day School was one option the District considered proposing to the IEP team**. The Cooperative correctly pointed out to the investigator that state regulations, at K.A.R. 91-40-25(e)(2), expressly **permit districts to meet in order to conduct preparatory activities in which school personnel develop a proposal that will be discussed at an IEP meeting**. At these preparatory meetings, school personnel may develop a proposal to discuss at an IEP meeting **as long the final decision on whether to adopt the proposal is made at the IEP meeting.**

The secretary of the day school submitted a written statement to the investigator stating that it was the student's mother who told her the student was going to be placed at the day school. The Day school principal also submitted a written statement stating that the Day School secretary informed him the student's mother had requested an opportunity to visit the Day School. The principal's written statement says he called the student's mother on August 29 and informed her a visit would not be permitted because visits are not allowed until an IEP team makes a final decision to place a child at the Day School. The principal's statement says the student's mother told the principal that the secretary indicated to her that she already knew who the student's teacher would be at the Day School. The principal's written statement states that the principal responded by saying that decision had not yet been made. The Cooperative also provided a copy of the logs of a school psychologist, with an entry on 8/30/12, indicating that the school psychologist had a telephone conversation on that date with the student's mother in which the student's mother stated that she had contacted the Day School in Goddard and they had informed her they had already viewed the student's records and knew the student was going to be attending school there. The psychologist's log for 8/30/12 also indicates that the psychologist reassured the student's mother that no placement decision had been made, that such a decision could not be made outside an IEP meeting, and that the Day School staff had been invited to the 9/4/12 meeting because the Day School was being considered as a placement option.

At the conclusion of the 9/4/12 IEP meeting the team determined that it would not change the student's placement.

It is apparent that there was a miscommunication between the secretary of the Day School and the student's mother. There were multiple examples of documentation that the student's mother believed she had been informed that the decision to change the student's placement had already been made and multiple examples of documentation that the student's mother had been informed before the 9/4/12 IEP meeting that the decision had not been made. The investigator cited K.A.R. 91-40-25(e)(2), stating that it is permissible for district personnel to prepare a proposal for a change of placement (or a response to a parent's proposal) in advance of an IEP meeting, as long as that proposal will be discussed at a meeting and the ultimate decision will be made at a meeting with the parents. In the end, this student's placement was not changed. Therefore, the allegation of a violation of special education laws and regulations was not substantiated.

13FC-010

The parent alleged that the IEP was incomplete because it did not include the class schedule of the student. The investigator determined that the **class schedule of the student was not a required component of an IEP**.

13FC-011

The parents alleged that the district proposed a change in placement without notice. The **notice of meeting indicated that the purpose of the meeting was to discuss the student's IEP services and placement**. However, **at the meeting, the parents said the special education director suggested the student be moved from regular education classes to a self-contained classroom at a day school, and they were not prepared for that kind of proposed change**. The investigator determined that the mere suggestion of a possible change of placement was not a violation of special education regulations. The investigator said special education laws and regulations (34 C.F.R. 300.322), requiring **a notice of meeting which states the purpose of the meeting does not restrict the specific content of discussions during IEP meetings as long as those discussions relate to the purpose of the meeting, as stated in the notice of the meeting**. The investigator also stated that, pursuant to 34 C.F.R. 300.503, the school must give parents a **Prior Written Notice "a reasonable time before the public agency (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.**

But, **this requirement does not mean the notice must be provided before making a proposal**. **The intent of this regulation is that parents will receive written notice of proposals and refusals a reasonable time before implementation of the proposal or refusal** (Also see, Letter to Chandler, 112 LRP 27263 (OSEP 2012).

12FC-012

This complaint involved a student who lives with her father. An IEP meeting was held to discuss the student's upcoming Kindergarten year. At the meeting, the speech therapist proposed eliminating speech services for the student. The father agreed and gave written consent. When the student's mother, who had not received notice of the meeting and was not in attendance, learned of this change, she filed this complaint. The investigator cited 34 C.F.R. 300.322 in stating that **both parents have a right to have an opportunity to attend an IEP meeting and to receive notice of an IEP meeting**, and that the student's mother was not provided with this opportunity. However, **the investigator stated that the mother's proposed resolution to the complaint (require the IEP team to reinstate the speech services to the IEP) was not an appropriate remedy in this instance** because the decision to withdraw the speech services was reasonably supported by data supplied by the speech therapist, the student was continuing to progress and the student's father had consented to the change. Corrective action required the district to: (a) develop and disseminate a memorandum to school personnel clarifying that the rights of parents under the IDEA belong to both parents, including parents who are divorced, regardless of custody arrangements; and (b) make a written offer to the student's mother to schedule an IEP meeting to discuss her concerns.

13FC-013

In this case, the grandparent (who was the student's legal guardian) alleged that the **student claimed to have been hit by his special education teacher and so was afraid to go to school**. The school conducted a thorough investigation and determined there was no evidence to support the allegation. Moreover, there was substantial evidence indicating the alleged act could not have happened because the student was attended by additional adult staff from the time the student stepped off the arriving bus until the time he stepped on the departing bus. The grandparent removed the student from school. Subsequently, the **grandparent requested an intra-district transfer** and was told to complete the district form for requesting an intra-district transfer. The grandparent completed the form and was notified the next day that her **request had been denied due to a lack of space at the requested school**. The grandparent filed a complaint, through an attorney, alleging that: (a) her request for transfer was denied without prior written notice; and (b) that the district was not, and under the circumstances, could not provide FAPE to the student.

The investigator cited federal regulations, at 34 C.F.R. 300.503, stating that prior written notice must be given a reasonable time before the district initiates or changes anything relating to identification, evaluation, placement or the provision of FAPE. The investigator said the request for transfer was not a matter related to identification or evaluation, and because the request did not involve the special education and related services in the student's IEP, it did not involve FAPE. Finally, the investigator determined the request for an intra-district transfer also was not related to placement because it was a request for a change in the physical location of services, not a change in the educational environment or point along the continuum of alternative placements listed in 34 C.F.R. 300.115 (regular classes, special classes, special schools, home

instruction, hospitals and institutions). Thus, **because the request for an intra-district transfer was not related to identification, evaluation, placement or FAPE, the school was not required to give the grandparent an answer with a prior written notice**. In support of this position, the investigator cited Letter to Trigg, 50 IDELR 48 (OSEP 2007), and also Wilson v. Fairfax County Sch. Bd., 372 F.3d 674 (4th Cir. 2004), which said "**the touchstone of the term 'educational placement' is not the location to which the student is assigned, but rather the environment in which educational services are provided." The court went on to explain that placements differ not from different physical locations, but to the extent the movement of children results in a departure from the main stream environment of a general education classroom**.

With regard to the FAPE allegation, the grandparent's attorney argued that even if the alleged abuse event had not occurred and the student's fear of coming to school was irrational, the department of education must order the district to transfer the student because the transfer was necessary in order for the student to receive a FAPE. The **investigator disagreed**. Noting that the analysis in the first issue resulted in a determination that the issue presented was not an issue related to placement, the investigator again cited the OSEP Letter to Trig, saying that when considering only a change to the physical location of services, **"a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement."** The investigator said, **"Thus, as long as the physical location where services are provided to a child is not inconsistent with the placement option (or educational environment) specified in the child's IEP, school administrative personnel have authority to designate the physical location for services."** In this case the **investigator conducted an on-site investigation and determined the student's IEP had been, and could continue to be, implemented as written in the school building where the student was assigned**.

In addition, the investigator determined that **this was not a case in which a school district had refused or neglected to implement the student's IEP. Rather, the student's IEP was not being implemented because of the unilateral action of the student's grandparent to withdraw the student from school, for a reason unrelated to the student's IEP**. Moreover, the district had written a **letter to the grandparent confirming that the grandparent had removed the student from school, and that the school stood ready, willing, and able to provide services in conformance with the student's IEP, should the grandparent choose to enroll the student back in school.** Accordingly, the investigator determined there was no factual basis to conclude that FAPE was not available to this student.

13FC-014

The parent filed a complaint consisting of **8, typed, single spaced pages of allegations**. Because the parent did not include a factual basis for the allegations, as required by K.A.R. 91-40-51(a)(2), the **department declined to investigate all but two issues**. The first allegation was that the IEP team refused all of the parent's requests at an IEP meeting and therefore, it had

been pre-determined by the team to say "no" to all of her requests. The investigator said the **meeting was at least two and one-half hours in length and the meeting notes specifically cited 60 different statements made by the parent at the meeting**. The investigator determined that the **parent was a full participant at the meeting and the team fully considered all of her input and concerns**. During the investigation, the investigator attempted to determine what requests the parent had made at the meeting, as the seven pages of typed notes did not indicate any specific request by the parent. In doing so, **the investigator asked whether any Prior Written Notice had been issued as a result of the meeting. The director responded that no Prior Written Notice had been issued because there were no changes to the IEP.** The investigator noted in the report that the need for a Prior Written Notice is not limited to situations in which an IEP is changed. Prior Written Notice is also required when a team refuses to make changes to an IEP which have been requested. In this case, however, **the investigator could not substantiate that the parent had made any specific requests.**

Because it could not be substantiated that the parent had made any requests at the meeting, the **investigator did not order corrective action, but noted that the parent could take action on her own** to get the information she wanted. That is, the **parent could give the district a written list of specific requests and ask the district conduct an IEP meeting and then respond to each request with a prior written notice of acceptance or refusal, which would include providing the reason for the acceptance or refusal of each request**.

In another issue, the **IEP included accommodations requiring immediate feedback, positive feedback, checking for understanding and help with organization**. The IEP went on to say the accommodations would be provided "**daily throughout the duration of this IEP unless otherwise noted.**" The parent alleged that the accommodations were not being provided. In the **district's written response to the complaint, the district stated that it provided those accommodations when the student was involved in new instruction or unfamiliar tasks, but not when given a task on which he has been previously successful. This strategy was adopted to allow the student an opportunity to complete the task without assistance. This was done to make the student more independent and to help assess progress**. The investigator said this method of delivering these accommodations appeared to be **"perfectly reasonable."** However, the investigator also noted that **this method of delivery was inconsistent with the description of the frequency of the accommodations in the student's IEP**. A violation of law was substantiated.

13FC-015

The parent alleged that the student was provided with a licensed special education teacher for only 8 weeks during the first half of the school year. The allegation was confirmed. However, the investigator determined there was **no violation of special education requirements** because: (a) the district provided **appropriately licensed substitute teachers for all but approximately six school days**; (b) the district actively engaged in **recruiting** a special education teacher; (c) the district **offered to relocate the student to another high school classroom staffed by a licensed special education teacher (which was declined by the parent);** and (d)

there was **no evidence presented to show that the approximately 6 school days without a properly licensed special education teacher or substitute teacher resulted in educational detriment to the child**. In Letter to Clarke, 48 IDELR 77 (OSEP 2007), the Office of Special Education Programs (OSEP) issued a guidance letter stating that it is not always necessary for a school district to make up missed services. OSEP said that **whether a service needs to be made up is a matter which must be addressed on a case by case basis with emphasis on the impact of the missed service on the child's ability to continue to progress and meet the annual goals in the IEP.**

In another allegation, the parent alleged that school personnel were not taking the student to the bathroom every two hours as required by the student's IEP. The **allegation was confirmed** as a violation of special education regulations. **Corrective action** included sending a **written statement of assurance** to Special Education Services and the parent that the student will be taken to the bathroom every two hours, as specified in his IEP. In addition, the district is also required to keep **a written, daily record documenting each time the student is taken to the bathroom and is to send a copy of the record at the end of each month, for the remainder of the school year, to Special Education Services and to the parent**.

Louisburg (KS) Unified School District #416, 113 LRP 6036 (OCR 2012)

Louisburg, USD #416, has a separate high school degree program for students over 16 years of age called Peoria Street Learning Center. The complainant alleged that the program required students with disabilities to waive their right to a FAPE in order to enroll. Before completion of OCR's investigation, the district submitted a signed agreement designed to resolve the allegations. OCR stated that it had made no findings of fact or conclusions of law, and the **district's voluntary action does not constitute, nor should it be construed as, an admission of any action that is a violation of a law** or regulation enforced by OCR. OCR also stated that this resolution letter and agreement are **not formal statements of OCR policy and should not be relied upon, cited, or construed as such.**

Even so, I think the resolution proposal of the district, and the fact that OCR accepted, it is still instructive with regard to how **schools with special programs**, such as the Peoria Street Learning Center, or perhaps a virtual school, should respond to requests for admission from children with disabilities.

Most notably, the district agreed to offer to convene the student's **IEP team or 504 team to determine whether the placement at the special program, with the provision of appropriate special education and related services, is an appropriate placement option for the student seeking admission**. If so, the **team will determine the services which will be needed for the student to be successful. If the team believes the placement, even with appropriate special education and related services, is not an appropriate placement, the district will provide the parents (or adult student) with a copy of the district's Section 504 or IDEA procedural safeguards** (although not mentioned in the agreement, the district should also provide a **Prior**

Written Notice for any change to the student's IEP or for refusal of the request to attend the program). The district also agreed to **discontinue using any forms requiring children with disabilities to waive their rights under Section 504 or the IDEA**.