

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT

FILED AGAINST

UNIFIED SCHOOL DISTRICT #260

ON DECEMBER 8, 2023

DATE OF REPORT JANUARY 9, 2024

This report is in response to a complaint filed with our office by ----- on behalf of her son, ----- For the remainder of this report, ----- will be referred to as "the student." ----- will be referred to as "the parent." USD #260 will be referred to as "the district."

Investigation of Complaint

On December 13 and 14, 2023 and on January 4, 2024, the investigator spoke by telephone with Dawn Gresham, Director of Special Services for the the district. The investigator spoke by telephone with the student's mother on December 21, 2023.

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

- Neuropsychological Evaluation dated June 23, 2022
- 504 Accommodation Plan for the student dated September 30, 2022
- IEP for the student dated October 11, 2022 (later amended on January 18, 2023)
- IEP Amendment Form for Minor Changes Not Requiring a Full IEP Team Meeting dated January 18, 2023
- Email dated September 15, 2023 from the special education department head to the student's parents
- IEP for the student dated September 19, 2023
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and/or Request for Consent dated September 19, 2023
- Email dated September 28, 2023 from the building principal to the student's parents
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and/or Request for Consent dated December 12, 2023
- Email dated January 4, 2024 from the student's case manager to the director of special education
- Daily toilet schedule for the student for the first semester of the 2023-24 school year

Background Information

This investigation involves a 14-year old boy who is in the 8th grade in his neighborhood middle school. By report of the parent, the student was adopted from an orphanage in Ukraine at age four and a half and arrived in the United States weighing 24 pounds. When his adoptive parents first met the student, he was nonverbal and could not feed himself. According to the parent, food insecurity was a major problem at the orphanage, and the student - though now well fed - continues to hoard food. Unless closely monitored, the student will seek out food from classmates and can become very sick from consuming too much food or food that is inappropriate for his dietary limitations.

The student has been diagnosed with RAD (Reactive Attachment Disorder) secondary to the care he received and environment he was raised in prior to his adoption. (RAD is a condition where a child does not form healthy emotional bonds with their caretakers (parents or parental figures), often because of emotional neglect or abuse at an early age.) The parent reports that she and the student have an especially conflictual relationship. In the school setting, however, the student's behaviors do not impede his learning or the learning of others. According to his September 2022 IEP, the student participates well in group social work settings and does what he is asked to do.

The student also has diagnoses of Spina Bifida and hydrocephalus. He has a VP (ventriculoperitoneal) shunt. His mobility is primarily supported through the use of a wheel chair. According to the student's September 2023 IEP, he has good functional mobility using his wheel chair and other adaptive equipment. He uses bilateral ankle foot orthotics. His left leg was broken multiple times before adoption, and his left ankle has been broken as well. His left femur head is detached.

The student wears glasses to correct his vision.

In her complaint, the parent states that the student has also been diagnosed with FASD (fetal alcohol spectrum disorders), a group of conditions that can occur in a person who was exposed to alcohol before birth. According to a neurological evaluation report completed in June 2022, the student was "probably exposed to alcohol prenatally." According to the parent, the student's social development is significantly delayed. The June 2022 neurological evaluation report stated that the student met diagnostic criteria for Mild Intellectual Disability.

The student has received services from the district since the Spring of 2016 when he transferred to the district from out of state and was determined to be eligible to receive special education services under the disability category of Other Health Impaired (OHI). Currently, the student receives special education services to address needs in the areas of reading, math, and written language.

Issues

In her complaint, the parent identified two special education-related issues. In outlining facts in support of her complaint, the parent also cited concerns related to the implementation of the student's Section 504 Accommodation Plan as well as the content of one of the accommodations in that plan.

Pursuant to federal regulations at 31.C.F.R. 300.153, a state department of education may only investigate allegations of a violation of special education laws and regulations. Special education statutes and regulations state that a formal complaint must allege that a district has - within not more than one year prior to the date the complaint is received and filed with the commissioner of education - violated a state or federal **special education** law or regulation. (See K.A.R. 91-40-51(b).) This investigator does not have the authority to investigate allegations related to Section 504, so only the special education issues contained within this complaint will be addressed in this report.

In the course of this investigation, an additional special education issue related to the provision of prior written notice was identified and will be addressed below under Issue One.

Issue One

The Assistant Director of Special Services refuses to put the 504 accommodations onto the IEP.

Parents' Position

The parent contends that the district has - perhaps in an effort to avoid IDEA-related implementation requirements - refused to include the accommodations listed in the student's 504 Accommodation Plan in his IEP.

District's Position

The district does not believe that the two accommodations specified in the student 504 Accommodation Plan reflect needs associated with the student's disability and should not be incorporated into the student's IEP.

It is the position of the district that the student's food obsession is a result of his early environmental deprivation during the years spent in the orphanage, not his disability. The district acknowledges that the parents have reported that a failure to follow dietary restrictions can lead to bowel problems for the student. However, the parents have not provided the district with any medical statement related to these bowel issues. The district believes that the need for a staff member to keep the student from trying to obtain food from classmates is not a special education issue but rather a health care need appropriately addressed through the student's Accommodation Plan.

While the 504 accommodation designed to restrict the student's unsupervised access to the internet was included in the student's Accommodation Plan at the request of the parents, the district asserts that this restriction is not required to address special education needs associated with the student's disability. The district further asserts that the student has spent only minimal time accessing non-academic sites on the internet while at school and notes that the student is currently a participant in a district pilot program that limits student access to non-academic YouTube content, so supervision would not be needed.

Applicable Statutes and Regulations

It is not unusual for all of a student's needs to be addressed through the development an IEP. As stated in the Kansas State Department of Education's July 2023 Eligibility Indicators:

"Once a child is identified as a child with a disability, determination of services to be provided are based on the child's needs, not on the child's label. In other words, children do not need to be identified with a label for each related service they receive. For example, a child with a learning disability does not need to have a secondary label as emotionally disturbed to receive counseling for emotional issues...For children determined to be eligible for special education and related services as a child with an exceptionality, the Present Levels of Academic Achievement and Functional Performance (PLAAFPs) of the IEP should contain the evaluation information that describes the child's needs. The PLAAFPs must include information regarding academic achievement, functional performance, and the impact of the exceptionality on the child's ability to access and progress in the general education curriculum."

However, special education laws do not specifically prohibit the development of both a 504 Accommodation Plan and an IEP for the same student. A student may have an IEP to address his/her special education needs and a 504 Plan for additional accommodations.

"Special education" means specially designed instruction (K.A.R. 91-40-1(kkk); 34 C.F.R. 300.39(a)(1)), and, that specially designed instruction means adapting the content, methodology or delivery of instruction to address the unique needs of a child that result from the child's exceptionality to ensure access of the child to the general education curriculum in order to meet the educational standards that apply to all children (K.A.R. 91-40-1(III); 34 C.F.R. 300.39(b)(3)(i), (ii)). 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 the general education curriculum.

When developing an IEP, the student's IEP team must consider his or her need for "supplementary aids and services." Federal regulations, at 34 C.F.R. 300.42 define "supplementary aids and services" as

"aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable

children with disabilities to be educated with nondisabled children to the maximum extent appropriate..."

Special education supplementary aids and services are sometimes referred to informally as "accommodations." The term "accommodation" is often used to describe an alteration of environment, curriculum format, or equipment that allows an individual with a disability to gain access to content and/or complete assigned tasks. Accommodations allow students with disabilities to pursue a regular course of study.

It is the responsibility of a student's IEP team to determine what - if any - supplementary aids or services the student needs. If accommodations or modifications needed by the child do not include specially designed instruction, the child's needs may be met through a Section 504 plan or other means instead of an IEP.

Kansas statutes, at K.S.A. 72-3404, identify the members of a properly constituted IEP team. The team should include, among other individuals, a representative of the local education agency (LEA) representative who:

- is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of exceptional children;
- is knowledgeable about the general curriculum; and
- is knowledgeable about the availability of resources of the agency. (See K.S.A. 72-3404(u)(4)).

The primary responsibility of the school representative or designee is to commit school resources and ensure that services written in the IEP will be provided. The school representative must have the authority to commit school resources and be able to ensure that whatever services are described in an IEP will actually be provided because the school will be bound by the IEP that is developed at an IEP meeting (Federal Register, August 14, 2006, p. 46670).

If, during the meeting, the IEP team cannot reach agreement on a given issue, then the LEA representative at the meeting has the ultimate authority to make a decision and then to provide the parents with appropriate prior written notice of the district's proposed action. By having a properly qualified LEA representative at the meeting, decisions regarding services for a student can be made by the team, obviating any need to discuss those decisions with parties outside of the IEP team.

Prior Written Notice must be provided 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 (FAPE) to the child (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.503(a)(2)). When parents make a request for an evaluation (whether oral or written), KSDE has determined that, unless there is an unusual circumstance, 15 school days is a reasonable time for providing parents with a Prior Written Notice of the district's

proposal to conduct the evaluation or the district's refusal to conduct the evaluation (See KSDE Memo, "Reasonable Time" to respond to parent request for evaluation, January 8, 2002, at <https://www.ksde.org/Default.aspx?tabid=614>). KSDE also applies this same standard with regard to any parent request related to identification, evaluation, placement, or the provision of FAPE. Accordingly, unless there is an unusual circumstance, districts must provide parents with a Prior Written Notice within 15 school days in response to any parent request regarding identification, evaluation, placement or the provision of a FAPE for their child.

Investigative Findings Regarding Accommodations

Both the district and the parent agree that at the student's annual IEP Team meeting on September 19, 2023, the team discussed the parent's request to incorporate the two accommodations included in the student's current 504 Accommodation Plan into the student's new annual IEP. These accommodations were designed to address two areas of parent concern: the student's food obsession and the parents' belief that the student has been "wasting time" watching prank videos during class time.

With regard to his food obsession, the student's Accommodation Plan includes the following statement:

"[The student] has difficulty not asking for food from his classmates. He is not allowed to eat sugary or fatty foods as it causes gastrointestinal issues. He does this anyway and will self-harm by sitting in a dirty diaper, leading to sores and potential sepsis...The impulsivity of taking food and getting things that can hurt him in other ways are of grave concern to the parents and the team."

The "Supplementary Aids and Services/Accommodations" section of the student's Accommodation Plan includes the following:

"[The student] will have a staff member accompany him to assist him with making good choices and avoiding actions that are harmful to self...at all times during the school day..."

The student has a daily toileting plan which is developed collaboratively each semester by the parent and the school nurse. The toileting plan is the "Health Care Plan" referenced in the student's October 11, 2022 amended IEP and in the IEP proposed by the district on September 19, 2023. The plan is designed to ensure that the student sees the nurse three times a day in the nurse's office. These visits provide the student with a private location for him to check for and when necessary to change soiled clothing in order to reduce the chances of the student developing sores. No evidence was provided to indicate that this plan has failed to meet the student's needs.

The student's Accommodation Plan includes the following accommodation related to computer access:

"[The student] will not have individual access to a computer without someone with direct supervision of him at all times. Computer access should be limited to course content only and NO YOUTUBE (sic)."

The Accommodation Plan does not contain any explanation as to why the 504 team felt an accommodation regarding computer access was needed. The parent stated in her complaint that the student has no access to computer or other devices in the home whereby he could access the internet. In her complaint and during a telephone conversation with the investigator the parent also reported that, during the 2021-22 school year, the student googled "girl abuse" when he was mad at his sister. The district made a report to CPS (Child Protective Services) regarding the situation.

According to the district, the student's computer searches during school hours were analyzed between the period of September 20 and December 11, 2023. During that period, less than 1% of the student's computer searches at school have been for YouTube and at least one of those searches appeared to be associated with a class assignment.

No meeting minutes, recordings, or contemporaneous notes from the September 19, 2023 IEP team meeting were provided by either party to reflect the content of the team discussion regarding the parent's request for the inclusion of 504 accommodations into the student's proposed IEP. Both parties report that no decision was reached by the team during the September 19, 2023 IEP team meeting regarding the inclusion of those accommodations. The building principal was in attendance at the IEP meeting and acting in the role of LEA representative. In an email to the director of special education dated January 4, 2024 the student's case manager stated that, during the meeting, the parent was told by the social worker that because the director of special education had "initially approved the 504 with the one-on-one para, we would need to discuss with [the director] about combining the two documents."

By report of the parent, she was subsequently told by the building principal that the assistant special services director was "not willing to put the 504 accommodations into the IEP." The parent stated in her complaint that she had asked to speak to the assistant director, but the assistant director did not reach out to the parent. The parent stated that she made no attempt to contact the assistant director.

On September 28, 2023, the building principal sent an email to the parent stating:

"I spoke to...the [district]Special Education Coordinator about your request to combine [the student's] IEP and 504. She shared back that combining them is not a possibility. Because of the rules and regulations with each we will not be able to combine them at this time."

To date, no additional IEP team meetings have been held to discuss the parent's request.

Investigative Findings Regarding Prior Written Notice

At the end of the September 19, 2023 IEP team meeting, the parent was provided with a copy of the student's revised IEP and prior written notice of proposed changes in placement and services reflected in that IEP. The prior written notice form did not, however, provide the parents with information regarding the district's refusal to incorporate the student's 504 accommodations into the student's IEP since no decision had been made on that action by the end of the meeting. The district stipulates that the parent was not provided with prior written notice of refusal of the request for inclusion of 504 accommodations until December 12, 2023, after this complaint was filed.

The amended prior written notice provided to the parent on December 12, 2023 included the following statements with regard to refusal:

"...Parents requested that [the student's] 504 document and IEP be combined. The district is not granting the request at this time. [The student] will still receive the benefits of both they will just not be combined into the same document (sic)."

Under the section of the prior written notice entitled "Explanation of Why the Action Is Proposed or Refused," the form states:

"[The student] will continue to receive the benefits of both the 504 and IEP accommodations and services."

Under "Options Considered and Why the Options Were Rejected," the form states:

"Combination of the 504 and IEP, this was considered and rejected. Based on [the student's] needs, the district felt it was not best to combine the documents at this time."

Summary and Conclusions

While it is not unusual to have all of the services an exceptional student might need spelled out in his or her IEP, special education statutes and regulations do not specifically require all of the accommodations specified in a student's 504 Accommodation Plan to be included in the IEP. It is up to the IEP team to determine what special education services - including supplementary aids and services (accommodations) - are needed to allow the student to access and progress in the general education curriculum and to be educated with nondisabled children to the maximum extent appropriate. When developing a student's IEP, the IEP team is required to consider the needs of the student but may choose to address some needs unrelated to a student's disability through an accommodation plan.

At the annual IEP review for the student, the team discussed the parent's request to incorporate the student's 504 accommodations into his IEP. However, the team did not reach a decision regarding those accommodations, determining that - although an LEA representative attended the meeting - the decision would need to be made by the director of special education who was not present. Once the director had made the decision not to incorporate the 504 accommodations into the IEP, the building principal sent the parent an

email to inform them. No prior written notice was provided to the parents until after this complaint was filed.

An IEP team's decision not to include the student's 504 Accommodations in his IEP would not in and of itself constitute a violation of special education statutes and regulations. Therefore, a violation of special education statutes and regulations *is not substantiated* on this aspect of this issue.

However, in this case, the decision to reject the parent's request was not made by the IEP team which had considered the request. Rather, the decision was made by the director of special education who was not present at the IEP team meeting. While the parent was subsequently informed via email of the director's decision, the parent was not provided with prior written notice of refusal in a timely manner. It was only after this complaint was filed that prior written notice of refusal was provided - months after the IEP decision was made. Additionally, the prior written notice form did not provide the parent with meaningful information regarding why the parent's request to include the 504 accommodations was refused, only that it was "not best to combine the documents at this time."

Because the district failed in a timely manner to provide the parent with prior written notice that clearly explained the reasons why the parental request was refused, a violation of special education statutes and regulations *is substantiated* on issues identified during the course of this investigation.

Issue Two

The district failed to provide the parent with a copy of a revised draft of the student's IEP within 10 days of the annual review meeting.

Applicable Statutes and Regulations

Special education statutes and regulations do not require districts to provide parents with a draft of a proposed IEP prior to an annual review, though many if not most districts find it helpful to do so. Districts are required, however, to - within a reasonable time (15 school days as described above under Issue One) - provide the parents with a copy of the IEP proposed by the district upon completion of the annual review.

Investigative Findings

In preparation for the annual review of the student's IEP scheduled for September 19, 2023, the special education teacher sent an email to the student's parents. Attached to the email was a copy of the Draft IEP to be discussed at the meeting as well as additional assessment information requested by the parent.

At the conclusion of the annual review meeting on September 19, 2023, the parent was given a copy of the completed proposed IEP, prior written notice regarding changes in services and

placement (not including the refusal of the parent's request to include the student's 504 accommodations in the student's new IEP), and a Medicaid consent form.

Because the parent did not provide written consent for changes to placement and services outlined in the proposed IEP, services to the student are currently being delivered as described by his October 11, 2022 IEP as subsequently amended on January 18, 2023.

Summary and Conclusions

The parent was timely provided with a copy of the district's proposed IEP at the end of the annual review meeting on September 19, 2023. A violation of special education statutes and regulations *is not substantiated* on this issue.

Corrective Action

Information gathered in the course of this investigation has determined that there was noncompliance with special education statutes and regulations on issues associated with this complaint. Specifically, a violation has been substantiated with regard to K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a)(2) which require that parents be provided with prior written notice when a district refuses a parental request for a change in services to their child. Therefore, USD #260 is directed to take the following actions:

- 1) Submit to Special Education and Title Services (SETS) within 21 calendar days of the date of this report, a written statement of assurance stating that it will comply with K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a)(2) by timely providing prior written notice of refusal when denying a parent's request for a change in services.
- 2) By no later than 21 calendar days of the date of this report, schedule an IEP team meeting to review the parent's request for the inclusion of the student's 504 accommodations into his IEP.
 - a. Attendees at the meeting should include all parties necessary to make a final decision as to whether or not the district will take the action requested by the parent.
 - b. At the conclusion of the meeting, USD #260 shall present to the parent prior written notice of the district's acceptance or refusal of the request.
 - c. If USD #260 opts to reject the parent's request, the prior written notice must clearly explain the specific reasons for the rejection of the request.
- 3) Within 5 school days of the IEP team meeting referenced above under Corrective Action 2, the district shall submit to SETS a copy of the notice of meeting for the scheduled IEP team meeting and the relevant prior written notice form showing either a rejection of the parent's request or a request for consent for proposed changes to the student's IEP.
- 4) By no later than February 2, 2024, provide to SETS verification that administrative and special education staff at the student's school have been provided training regarding

the proper refusal of a parental request for changes to their child's IEP. Training should specifically address the following:

- a. the importance of having an LEA in the IEP meeting who can make decisions regarding services to the student;
 - b. timelines for providing parents with prior written notice of refusal; and
 - c. content of the prior written notice, specifically the importance of clearly stating the reason(s) for the district's refusal.
- 5) Further, USD #260 shall, within 20 calendar days of the date of this report, submit to SETS 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(f).

Investigator



Diana Durkin
Complaint Investigator

Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, KS 66612-1212. The notice of appeal may also be filed by email to formalcomplaints@ksde.org The notice of appeal must be delivered within 10 calendar days from the date of this report.

For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f).

K.A.R. 91-40-51(f) Appeals.

(1) Any agency or complainant may appeal any of the findings or conclusions of a compliance report prepared by the special education section of the department by filing a written notice of appeal with the state commissioner of education. Each notice shall be filed within 10 days from the date of the report. Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect.

Upon receiving an appeal, an appeal committee of at least three department of education members shall be appointed by the commissioner to review the report and to consider the information provided by the local education agency, the complainant, or others. The appeal process, including any hearing conducted by the appeal committee, shall be completed within 15 days from the date of receipt of the notice of appeal, and a decision shall be rendered within five days after the appeal process is completed unless the appeal committee determines that exceptional circumstances exist with respect to the particular complaint. In this event, the decision shall be rendered as soon as possible by the appeal committee.

(2) If an appeal committee affirms a compliance report that requires corrective action by an agency, that agency shall initiate the required corrective action immediately. If, after five days, no required corrective action has been initiated, the agency shall be notified of the action that will be taken to assure compliance as determined by the department. This action may include any of the following:

- (A) The issuance of an accreditation deficiency advisement;
- (B) the withholding of state or federal funds otherwise available to the agency;
- (C) the award of monetary reimbursement to the complainant; or
- (D) any combination of the actions specified in paragraph (f)(2)