

## Special Education Formal Complaint Decisions 2014 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 14FC01 signifies a Formal Complaint filed in the 2014 fiscal year (July 1, 2013 to June 30, 2014). The case citation of 14FC01 Appeal Review signifies the decision of the state appeal committee for case number 14FC01. All files are PDF.

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**KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES**

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REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #  
ON JANUARY 15, 2014  
AND AMENDED ON FEBRUARY 5, 2014

DATE OF REPORT: FEBRUARY 12, 2014

This report is in response to a complaint filed with our office on behalf of \_\_\_\_\_ by his guardians, \_\_\_\_\_ and \_\_\_\_\_. \_\_\_\_\_ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. \_\_\_\_\_ will be referred to as "the complainants."

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_, Director of Special Education for USD # \_\_\_\_\_, on January 24 and 30 and February 6 and 7, 2014. On February 10, 2014, the investigator met on-site with the Director of Special Education at \_\_\_\_\_ High School. Also in attendance at that meeting were:

- the student's English teacher,
- the student's U.S. History teacher,
- the student's Earth Science teacher,
- the student's Special Education teacher for 2012-2013,
- the student's current Special Education teacher,
- the student's Case Manager,
- School Psychologist,
- the Assistant Principal for \_\_\_\_\_ High School,

The investigator spoke by telephone with the complainants on February 3, 2014. On February 4, 2013, the investigator spoke via conference call with Mrs. \_\_\_\_\_ and advocate Susan Johnson.

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

- Emails from the student's 10<sup>th</sup> grade teachers to the student's Case Manager for 2012-13 regarding student behavior
- IEP for this student dated November 14, 2012

- Prior Written Notice For Evaluation or Reevaluation and Request for Consent dated October 10, 2013
- Contact Log kept by the student's Case Manager teacher covering the period of October 28 through December 18, 2013
- Email from the complainant to school staff dated December 9, 2013 regarding a request for records
- Email from the complainant to school staff dated December 13, 2013 regarding a request for records
- Email from the complainant to Assistant Principal dated December 13, 2013 regarding a request for records
- Email from the Case Manager to the complainant dated December 13, 2013 regarding progress reports
- Email correspondence dated December 16, 2013 between the complainant and Assistant Principal regarding the Manifestation Determination meeting scheduled for the afternoon of December 16<sup>th</sup> and a rescheduled meeting for December 18, 2013
- Manifestation Determination Review dated December 16, 2013
- Email from the Assistant Principal to the complainant dated December 17, 2013 including the Notice of Meeting for the December 18<sup>th</sup> Manifestation Determination meeting
- Email from the Assistant Principal to the complainants dated December 20, 2013 notifying the complainants of the interim services meeting to be held on January 3, 2014
- Email from the complainants to the Assistant Principal dated January 1, 2014 mentioning an attached reading evaluation
- Email from the Assistant Principal to the complainants sent at 2:06 PM on January 8, 2014 notifying them of an interim placement meeting at 3:15 PM on January 9, 2014
- Meeting Notes dated January 2, 2014
- Staffing Committee Report dated January 3, 2014
- Email from the Assistant Principal to the complainants dated January 8, 2014 notifying them of the interim services meeting
- Notice of Meeting dated January 8, 2014
- Email from the complainants to school staff dated January 8, 2014 asking that homework assignments be provided
- Staffing Committee Report dated January 9, 2014
- Email from the Assistant Principal to the complainants dated January 9, 2014 notifying them that an interim placement meeting had been held
- Email from the Assistant Principal to the complainants dated January 10, 2014 summarizing the interim placement plan developed by the IEP Team on the preceding day
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Educational Placement, Change in Placement, and Request for Consent form dated January 9, 2014

- Letter to the complainants from a district School Psychologist dated January 10, 2014
- Letter to the complainants from the Assistant Principal dated January 10, 2014
- Reading probes sent by the district to the complainants
- Writing samples sent by the district to the complainants
- Discipline Report for this student from August 2008 through December 2013
- Progress Notes for Annual Goals 1-3 from the student's November 2012 IEP
- Learning Center Log covering the period of August 15 through December 17, 2013
- Notice of Meeting dated February 10, 2014

### **Background Information**

This investigation involves a 16 year-old boy who is enrolled in the 11th grade. The student has lived with the complainants – his biological aunt and uncle – since he was six years old. He first began receiving special education services as a second grader at which time he was determined to be an exceptional child under the category of Learning Disability.

The student has been suspended from school because of a violation of the district code of conduct associated with the possession and use of a banned substance on school grounds. A short-term suspension was initiated on December 12, 2013. A long-term suspension began on December 20, 2013 and will continue until April 7, 2014.

### **Issues**

In their initial filing, received by Special Education Services on January 15, 2014, the complainants outlined fourteen issues. On February 5, 2014, they submitted to the investigator via email an amendment to that initial complaint. That amendment included additional facts and clarifications regarding the original fourteen issues and added a fifteenth issue.

**Issue One: The district failed to report progress toward attainment of the student's IEP goals on the same schedule as educational progress is reported for non-disabled students.**

Kansas statutes at K.S.A. 72-987(c)(3) state that a student's IEP must include a description of how and when the child's progress toward meeting annual goals will be measured and when the parent's will be provided periodic reports about their child's progress. Reporting may be carried out in writing or through a meeting with the parents. Whatever the method chosen, progress toward the attainment of goals must be monitored in the method indicated on the IEP and progress reports should include a description of the child's progress toward his/her measurable annual goals.

Each of the goals specified in the November 14, 2012 IEP for this student includes the following statement:

"The child's progress was reported to the parent at least as often as general education teachers report non-exceptional student's progress."

The Director of Special Education confirmed on February 10, 2014 that the district's expectation is that the progress of exceptional students toward attainment of their IEP goals will be monitored quarterly, and parents will receive IEP- related progress reports at the same time grades are sent to parents.

Complainants contend that they did not receive reports of student progress in January and May of 2013 and that they have not been provided with any progress reports during the 2013-14 school year.

Progress notes presented by the district show that with regard to Goal #1, monitoring was completed in January and May of 2013. No evidence was provided by the district to show that progress was monitored at the end of the third quarter of the 2012-13 school year or during the first or second quarter of the 2013-14 school year.

Progress notes provided by the district with regard to Goal #2 show that the student was making adequate progress toward attainment of the goal in January 2013 but progress was not adequate in May, September, and November of 2013. There is no indication that progress was assessed at the end of the third quarter of the 2012-13 school year or at the end of the first and second quarter of the 2013-14 school year. Short-term Objectives/Benchmarks establish timeframes that do not coincide with grade reporting dates for non-exceptional students. There is no evidence to show that the progress notes developed by the district have been provided to the complainants.

Progress notes for Goal #3 again show monitoring in January and May of 2013 but not for the third quarter of 2012-13 or the first and second quarters of 2013-14.

The district acknowledges that progress toward attainment of goals was not reported to complainants at the end of the third quarter of the 2012-13 school year.

The district states that the student's Case Manager for the 2013-14 school year did not share the first quarter monitoring with complainants at the time student grades were sent to the parents of non-exceptional children because the Case Manager intended to provide that update during the IEP review in November 2013. The Case Manager met with the complainants during Parent/Teacher Conferences on October 17, 2013 and discussed grades and the Notice of Meeting for the upcoming November IEP. Because October 2013 was the fourth

monitoring period for the November 2012 IEP, the Case Manager opted to retain the monitoring form and present it during the November IEP meeting. However, no IEP meeting was held in November.

On December 18, 2013, the student's Case Manager emailed copies of reading and writing probes to the complainants but did not send formal progress monitoring reports.

Because complainants were not provided with reports regarding the student's progress toward meeting annual goals at least as often as general education teachers report the progress of non-exceptional students, a violation of special education laws and regulations is substantiated on this issue.

**Issue Two: The district failed to review and revise the student's IEP at least annually.**

Kansas statutes at K.S.A. 72-987(f) state that a student's IEP must be reviewed "periodically, but not less than annually to determine whether the annual goals for the child are being met."

The current IEP for this student was developed on November 14, 2012. The complainants stipulate that they did ask the district to reschedule a proposed Annual IEP Review meeting scheduled for October 28, 2013. They reported to the investigator that they have made this type of request in the past because the student's IEP review falls at a very busy time of year for their family business. According to the complainants, their schedule is less hectic in December and January, and they anticipated that the IEP could be scheduled in that timeframe.

According to the complainants, they verbally agreed to a 30-day extension of the IEP and anticipated that the student's IEP would be reviewed in early December. The complainants contend that at the time of the filing of this complaint, the student's performance on his IEP goals had not yet been reviewed with them and no new goals had been developed. The complainants further contend that no post-secondary goals have been written for the student who is expected to graduate in May of 2015.

The district stipulates that services are still being provided to the student under the November 2012 IEP. While the complainants gave verbal agreement to a 30-day extension of the IEP in October 2013, written consent for that extension was not obtained.

According to the district, several attempts were made to reschedule the student's Annual IEP review meeting first scheduled for October 28, 2013. The district reports that the complainants requested that the meeting be rescheduled for November 12, 2013. The Case Manager emailed the complainants a draft copy of the district's proposed IEP on November 8, 2013. On November 11<sup>th</sup>, the

Case Manager received a call and an email indicating that the complainants needed to reschedule the meeting for a second time. On November 20<sup>th</sup>, the Case Manager emailed the complainants to ask whether the complainants had determined a meeting date that would work for them, but the complainants did not respond. On December 3, 2013, the Case Manager called the complainants again in an attempt to reschedule the IEP meeting, but no date was agreed upon.

It is clear to this investigator that several attempts have been made by the district to convene an IEP Team meeting for the purpose of conducting an annual review of the student's IEP. Records indicate that parents have requested that at least two meetings be rescheduled. However, it is ultimately the responsibility of the district to conduct at least annual reviews of a student's IEP, and in this case the district has not done so. A violation of special education laws and regulations is therefore substantiated on this issue.

**Issue Three: The student's reading fluency goal (Goal #1) was not implemented in the learning center during the first and second quarter of the 2013-14 school year as was called for in the student's IEP.**

Issues Three, Four, and Five allege a violation of federal regulations, which – at 34 C.F.R. 300.101 – require that a student's IEP be implemented as written.

Goal #1 of the student's November 2012 IEP states, "By November, 2013, when presented a reading passage on a (sic) 8<sup>th</sup> grade level, (the student) will read 125 words per minute with 98% accuracy, with flexible monitoring based on his performance." Short-term objectives state that the student's progress will be assessed using "DIBELS, daily reading assignments, classroom materials."

The complainants report that the student has told them he has not worked on this goal in the Learning Center this year. As evidence that this goal was not implemented during the first and second quarter of this school year, the complainants point to the fact that they were not provided with any data related to Goal #1 prior to IEP meetings and that data from only 3 measures of reading fluency conducted during the first quarter were ever provided when many more should have been taken.

The district contends that this goal was addressed during the first quarter using classroom materials and assignments as well as the Read Naturally program. The Case Manager reports that Goal #1 had been met by the end of the first monitoring period, and she was prepared to propose a new reading goal in November 2013. However, no Annual Review Meeting has yet been held.

As evidence that the goal was addressed and met, the district provided the investigator with copies of 8<sup>th</sup> grade level reading probes completed in October 2013. Those probes indicated that the student was reading between 110 and

121 words per minute with reading fluency improving to up to 152 words per minute on a rereading of the same probe.

Because the student's reading goal (Goal #1) was addressed and met by the end of the first quarter of the 2013-14 school year, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Four: The student's writing goal (Goal #2) was not implemented during the first and second quarter of the 2013-14 school year.**

Goal #2 of the student's May 2012 IEP reads as follows:

"By November 2013, (the student) will complete and turn in assignments by due date in his four core subjects with 100% accuracy."

In telephone conferences on February 3 and 4, 2014, Mrs. . confirmed that Concern #4 in her complaint relates to the student's writing goal – Goal #3 – not to the assignment completion goal – Goal #2.

In the amendment of February 5, 2014, the complainants then clarified that this issue actually relates to Goal #3 of the student's November 2012 IEP, which reads as follows:

"By November 2013, when (the student) is given a writing assignment, he will use a prewriting strategy (brainstorming, listing, webbing) to generate expository text and develop a cohesive piece that contains an engaging introduction, multiple developed body paragraphs that clarify the thesis statement, and a conclusion that reinforces the thesis statement and leaves the reader with a sense of completion at the Meets Standard level of the on grade level writing rubrics."

Progress toward attainment of short term objectives for Goal #3 is to be evaluated using "teacher made materials, district assessments, gen ed (sic) writing assignments."

The complainants contend that the student has never been provided with writing rubrics and has not worked on this goal in the Learning Center or English classroom during the first two quarters of the 2013-14 school year. They state that they have not received any progress reports showing that this goal has been addressed this year. According to complainants, the writing products provided by the district as evidence of student progress contain only single paragraphs rather than the multiple paragraph products called for in Goal #3 and therefore do not meet the standards established by the goal and short term objectives.

The student's Case Manager/Special Education teacher for the 2012-13 school year reports that she based the development of this goal upon the structure of



the student's sophomore English class where multi-paragraph compositions were written quarterly. According to the student's current English teacher only one multi-paragraph composition was required during the first semester of this school year. The teacher reports that a second multi-paragraph writing assignment will be given later in the school year.

The student's Case Manager – who is responsible for monitoring this goal – states that while she has assisted the student as he developed the short answer responses required as a part of English writing assignments, she has not actively addressed the skills called for in the student's current writing goal.

Because the district has not during the 2013-14 school year implemented the student's writing goal, a violation of special education laws and regulations is substantiated.

#### Modification of English Composition Assignments

In their February 5<sup>th</sup> amendment, the complainants expanded the facts associated with this issue to state that it is their opinion that English composition assignments should – as specified in the "Program Modifications" section of the November 2012 IEP – have been "modified as deemed appropriate by the English teacher based upon the difficulty of the assignment and (the student's) performance on the previous compositions." The complainants believe that the student has demonstrated the ability to develop a higher quality product than indicated by the writing samples sent home by the Learning Center teacher and feel that these products do not reflect individualization and modification based upon previous performance.

The student's English teacher reports that all students in his English 11 class were asked to complete a multi-paragraph writing exercise in August. That exercise provided the teacher with baseline information regarding his student's writing skills. The score earned by the student on this assignment fell one point above the class average.

The English 11 teacher states that the single paragraph writing samples shared with the complainants by the student's Case Manager do not represent lessened expectations for this student but rather reflect the short answer assignment structure of the course curriculum. The teacher states that he has been well aware of the student's IEP and his educational needs and has dialogued with special education staff about those needs. While the student has at times been allowed extra time to work on a given assignment, the student's overall performance has not indicated to the teacher that curricular modification is needed. The teacher reports that he considers the student to be an "average" writer whose products place him above the classroom average.

Because the English 11 teacher has considered the student's past – and ongoing – performance when making decisions regarding the need for curricular modifications, a violation of special education laws is not substantiated.

**Issue Five: Assistance with writing assignments was not provided to the student in U.S. History during the first quarter of the 2013-14 school year, and a “read aloud” option was not made available to the student for his semester final in that course in December 2013.**

#### Assistance With Writing Assignments

In the Supplementary Aids and Services section, the student's November 2012 IEP states, “Support to be provided during English classes (at a minimum) when class time is provided to read silently or to compose a writing assignment and if Teen Leadership is taken during class time when students are researching/ composing their speeches.” According to the complainants, the student did not receive any assistance with writing assignments in U.S. History during the first quarter of the year.

According to the student's U.S. History teacher, he was aware that the student was exceptional and that he had an IEP. The teacher had met with special education staff and knew that the student might need assistance. However, the teacher reports that the student has not demonstrated a need for help to develop the short answer responses called for by the course curriculum. No lengthy writing assignments have been given this year, and the student has been able to provide all the written responses required of him. And, as will be discussed later in this report, this accommodation does not specifically require assistance with writing assignments in U.S. History. Under these circumstances, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

#### Read-Aloud Accommodation

The “Accommodations” section of the student's November 2012 IEP states under “Reading” that “assessment questions and answer choices are read to student.” It is also noted in the “Accommodations” section that “a student who needs a read-aloud accommodation, in any area, is one whose ability to convey knowledge of the subject/content area is **severely** limited by his/her ability to read the assessment materials. This accommodation must be made on all assessments and on all classroom instructional practices (per KSDE Read Aloud Policy) (and the student) should have reading goal on his/her IEP.”

The student's November 2012 IEP does contain a reading goal.

The complainants contend that the student did not receive the above-mentioned reading support for the open book semester final in his U.S. History course.

According to the complainants, the student was – while suspended from school – in December – allowed to come to the school to take exams. One of those tests was his semester final in U.S. History. The student reported to the complainants that the Assistant Principal was in the room with him while he was taking the exam. The complainant reports that the student told her he believed that the administrator was present to monitor him as he completed the test. The student told the complainant that the administrator did not offer to read the exam questions to the student, and the student said he did not feel he could ask the administrator to provide that accommodation.

The Assistant Principal states that he was well aware of the “read-aloud” accommodation reflected in the student’s IEP. In fact, he had alerted another test monitor that the student might need such an accommodation during the administration of another exam.

According to the Assistant Principal, he asked the student twice during the test if he wanted to have the test read to him, but the student declined that offer. While it may have been the perception of the student that he should not ask the Assistant Principal to read the test aloud, the option was made available to him. Under these circumstances, a violation of special education laws and regulations is not substantiated on this aspect of this issue.

#### IEP Development

In their February 5<sup>th</sup> amendment, the complainants contend that the November 2012 IEP was poorly developed because the team failed to specify those 11<sup>th</sup> grade courses in which writing assistance would be provided.

The student’s Case Manager for the 2012-13 school year reports that when developing the student’s November 2012 IEP, it was the Team’s understanding that the student would be supported **beyond** the minimum settings of English class and Teen Leadership, even though the IEP does not specifically state that support will be provided in other settings. According to the Case Manager, the team was not sure which classes the student might be in and opted to write this statement in a more open-ended manner to provide writing assistance in other applicable classroom situations.

An appropriately constituted team of which the complainants were participating members developed the IEP. There is no indication that there was confusion on the part of staff as to the intent of this accommodation. A violation of special education laws and regulations is not substantiated on this issue.

**Issue Six: The re-evaluations conducted by the district in 2012 and 2013 did not address all of the student’s needs.**

### November 2012 Reevaluation

In their initial filing, complainants contend that the 2012 reevaluation of the student did not include a psychological evaluation related to behaviors which resulted in disciplinary actions. Kansas regulations at K.A.R. 91-40-5 (b)(1) state that a complaint "shall allege a violation that occurred not more than one year before the date the complaint is received." This complaint was received in the offices of Special Education Services on January 15, 2014. The complainants allege that a reevaluation conducted by the district in November 2012 did not include a psychological evaluation. Because the alleged violation occurred more than one year prior to the date this complaint was received, this issue was not investigated.

### October 2013 Reevaluation

In the February 5<sup>th</sup> amendment, the complainants allege that the reevaluation conducted by the district in October of 2013 failed to address all the student's needs. They allege that the reevaluation did not include a thorough reassessment of his reading skills or any assessment of the student's keyboarding abilities. They state that without assessment of keyboarding skills there is no way to determine whether the informal access to keyboarding opportunities afforded the student while he was in the Learning Center allowed the student to make meaningful progress with regard to that skill.

Kansas statutes at K.S.A. 72-986 require that districts conduct a reevaluation of each exceptional child at least every three years, unless the parent and the agency agree that reevaluation is unnecessary. The purpose of reevaluation is

- to determine if the child continues to be a child with an exceptionality,
- the educational needs of the child,
- the present levels of academic and functional performance of the child,
- whether the child continues to need special education and related services, and
- whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the child's IEP and to participate in the general education curriculum.

When proposing to conduct a reevaluation, districts must provide Prior Written Notice to the parents that describes any evaluation procedures they propose to utilize in the reevaluation (K.S.A.72-986(b)). Notice must also include the following:

- A description of the action proposed by the agency.
- An explanation of why the agency proposes the action.
- A description of each evaluation procedure, assessment, record, or

- report the agency used as a basis for the proposed action.
- A statement that the parents have protection under the procedural safeguards and how a copy of the procedural safeguards is to be obtained.
- Sources for parents to contact to obtain assistance in understanding their procedural safeguards.
- A description of other options considered and why those options were rejected.
- A description of other factors that are relevant to the agency's proposal.

Districts must obtain parental consent prior to conducting any reevaluation of the child (K.A.R. 91-40-27(a)(1)).

### **Reading Assessment:**

According to the district, the complainant gave her written consent on October 17, 2013 for the district to complete a re-evaluation of the student. The consent form contained all required elements as specified above. The form indicated that existing data was to be used with regard to the student's academic performance, his transition skills, and his vision and hearing needs. The form also indicated that new data would be collected with regard to academic performance. As stated on the form, this data "may include assessment of academic or preacademic skills and achievement levels in relation to the general curriculum such as oral or written expression, **reading skills or comprehension** (emphasis added), mathematical calculation or reasoning..."

The district reports that the Woodcock Johnson III Normative Update Tests of Achievement (WJ-III-NU) was administered to the student on October 24, 2013. That test assessed the student's reading skills in the areas of Letter-Word Identification, Word Attack, Reading Fluency, and Reading Comprehension. The instrument also assessed the student's skills in the area of writing – specifically with regard to spelling and writing fluency.

The district asserts that to date, the reevaluation of this student has not been finalized because the IEP Team has yet to meet to complete the process. It is also the contention of the district that the results of the WJ-III-NU represent only a portion of the data that will be considered when determining the student's reading needs.

The district provided the complainants with prior written notice of the proposed reevaluation that contained the written consent of the complainant before initiating the reevaluation process. The reevaluation has not been completed because the IEP Team has not yet met to complete the process. This investigator has no way of knowing what additional information may be considered by the team in determining the reading and keyboarding needs of the student. To support a state complaint, the complainants must allege that the

district ***has already*** violated the IDEA. Thus, this allegation is premature. A violation of special education laws and regulations is not substantiated on this issue.

**Keyboarding:**

The 2012-13 Case Manager for the student reports that the team did not develop a goal for keyboarding for the student when developing the student's November 2012 IEP because keyboarding was not a prioritized need. The student had been successful in building keyboarding skills on his own through exposure to keyboards in the school setting. He had not demonstrated a need for specialized instruction in keyboarding nor did he show that he needed to use any special keyboarding programs to enhance his skills in that area. The team set no specific targets for keyboarding feeling that giving the student opportunities to keyboard in the Learning Center and other settings was sufficient.

There is no evidence that the complainants had, prior to the filing of this amendment to the complaint, expressed to staff a specific request for the assessment of the student's keyboarding skills. There is no evidence that the complainant requested such an assessment at the time the complainant gave consent for the 2013 re-evaluation.

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

**Issue Seven:** The complainants were not able to fully participate in the student's January 2014 IEP Team meetings because the district failed to provide the parents with IEP progress reports and a reevaluation report prior to that meeting.

The Family Educational Rights and Privacy Act (FERPA) of 1974, as amended (2006) as well as State special education laws and regulations require schools to have reasonable policies in place to allow parents to review and inspect their child's educational records. "Educational record" means those records that are directly related to a student and maintained by an educational agency and may include (but are not limited to) records associated with academic work completed and level of achievement. Federal regulations, at 34 C.F.R. 300.613, require that a district provide a parent, upon request, access to the child's records, and under certain circumstances, a copy of the records. Regulations state that the district must comply with a request such as this "without unnecessary delay ***and before any meeting regarding an IEP*** (emphasis added)...and in no case more than 45 days after the request has been made."

The "Procedural Safeguards" document used by USD # is available on the district website. Under the section labeled "Access Rights," it is noted that the district must provide parents with the opportunity to "inspect and review any

educational records” relating to their child “before any meeting regarding an...IEP, or any impartial due process hearing (including a resolution meeting or a hearing regarding discipline), and in no case more than 45 days after you (the parent has) made the request.”

According to the complainants, they sent several emails to school staff requesting copies of progress monitoring reports and other records but have not yet received those documents. An email from the complainant to school staff dated December 9, 2013 states, “Please send the following: Copy of the Progress Monitoring for the 2012 & 2013 IEP, summary of progress since the 1<sup>st</sup> quarter monitoring, result of (the student’s) practice ACT from sophomore year.”

On December 13, 2013, the complainant again emailed school staff requesting the same records as outlined in the December 9<sup>th</sup> request as well as a “copy of 2012-13 IEP.” Also on December 13<sup>th</sup>, the complainant emailed the Assistant Principal. In that message the complainant asked for all the special education documents she had requested from other staff as well as documents related to the student’s discipline referral.

The district states that it did not provide the complainants with the progress monitoring documents because staff planned to share them with the complainants at the IEP meeting. On December 13, 2013, the Case Manager sent the parents copies of reading probes and writing samples and in an email that date said, “I can better explain the PLAN, and a lot of this progress monitoring, as well as how I used it when we meet.”

With regard to the results of the 2013 re-evaluation of the student, the district states that while staff had begun to develop a draft re-evaluation report, that report has not been completed because no team meeting has been held to discuss and finalize the re-evaluation. Further, no evidence was provided to the investigator by the complainants with regard to a specific request for re-evaluation results or the failure of the district to provide specific results. An email dated January 1, 2014 from the complainants to the Assistant Principal indicates that the complainants were in possession of a reading evaluation performed by the district’s reading specialist.

Because the district did not – prior to convening IEP Team meetings on December 16, 2013 and on January 3 and 9, 2014 – comply with the complainants’ request for copies of progress monitoring reports, a copy of the student’s 2012-13 IEP, and ACT practice results (PLAN), a violation of special education laws and regulations is substantiated.

**Issue Eight: Teachers in the student’s core classes did not implement the student’s IEP because they failed to collect behavioral data as specified in the document.**

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

The "Supplementary Aids and Services" section of the student's November 2012 IEP states, "Teachers will give (the student) non-verbal and verbal cues when necessary to stay on task. Teachers will document when they give prompts and how many times they have to re-direct him per class period."

The complainants contend that the student's Core teachers failed to document when they prompted the student and the number of times they needed to re-direct him during each class period. According to the complainants, these teachers did not have a full copy of the student's IEP, and the IEP Snapshot with which they were provided did not inform the teachers that they were to collect this data.

The district stipulates that teachers did not collect data on prompts and redirections. It is the district's contention that the student did not require more prompting and redirection than other students and neither the Case Manager nor classroom teachers believed these were issues of concern.

In an interview with the investigator on February 10, 2014, the student's 11<sup>th</sup> grade U.S. History teacher reported that he was unaware that the student had an IEP until being given that information at the Fall Parent Teacher Conferences in October 2013. The teacher reported he had not seen the color-coded tag in the district's student information system indicating that the student had an IEP. Further, the teacher did not participate in the day-long August 28, 2013 meeting with special education staff designed for the purpose of reviewing IEP Snapshots and discussing student needs.

The student's English 11 teacher indicated he was well aware that the student was exceptional and in need of accommodations. The student's Earth Science teacher also said that he had been informed of the student's needs by special education staff.

Because teachers did not collect behavioral data on prompting or redirection as called for in the student's November 2012 IEP, a violation of special education laws and regulations is substantiated on this issue.

**Issue Nine: The district failed to implement the student's November 2012 IEP because it did not keep a log summarizing the skills he worked on in the Learning Center.**

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



The "Least Restrictive Environment" portion of the student's November 2012 IEP contains the following statement:

"Learning Center will be utilized for IEP goal activities such as reading skill development, writing, re-teaching, keyboarding and homework completion. A log will be kept to summarize the skills (the student) has worked on during Learning Center."

According to the complainants, no log has been kept.

The district contends that staff did keep a log but that there was no requirement in the IEP that the log be shared with the complainants. A log developed by the student's special education teacher covering the period of August 15 – December 17, 2013 was shown to the investigator on February 10, 2014. The Case Manager for the student for the 2012-13 school year also reported that she kept an informal log but did not maintain it after the student moved on to 11<sup>th</sup> grade.

There is evidence that a log has been kept by staff. A violation of special education laws and regulations is not substantiated.

**Issue Ten: District administration had predetermined the interim placement for the student prior to the January 3, 2014 IEP Team meeting, and would not allow discussion of options.**

When a child has been removed to an interim alternative educational setting (IAES), **the IEP Team**, including the student's parents, must determine what special education and related services are needed and where the services will be provided during the removal. Parental consent for the disciplinary change in placement is not required.

The complainants contend that district administration had predetermined where and how services would be delivered to the student before the IEP Team meeting to discuss the interim placement on January 3, 2014 and blocked discussion of alternative options during the meeting.

The district contends that the team discussed several options and in fact made no decisions at the January 3<sup>rd</sup> meeting. The Staffing Committee Report dated January 3, 2014 indicates that the Assistant Principal presented an interim plan proposed by the district that would allow the student to acquire graduation credits and progress toward attainment of IEP goals. The report shows that the advocate for the family voiced concerns about the proposed plan and suggested alternatives for the team to consider. According to the report, the Transition Coordinator for the district offered input, as did the student himself. The advocate requested that an FBA be conducted, that a reading assessment be completed, and that the student be allowed to retake his U.S. History final. The

team discussed details related to the student taking the ACT and talked about how the student's work with the A+ program could affect his athletic standing.

The minutes of the January 3, 2014 IEP Team meeting reflect that the team considered many options regarding the provision of services to the student. While the Assistant Principal did propose a plan for where and how those services would be delivered, there is no evidence to support the complainants contention that placement had been predetermined or that district administration blocked discussion of options. A violation of special education laws and regulations is not substantiated on this issue.

**Issue Eleven: The LEA representative had no decision making authority and would not allow the IEP Team to make decisions during the January 3, 2014 IEP Team Meeting regarding the student's interim educational placement.**

Federal regulations at 34 C.F.R. 300.321 identify required members of an IEP Team. One of those required team members is a school representative or designee. K.S.A. 72-962(u)(4) states that the school representative must be "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of exceptional children...(be) knowledgeable about the general education curriculum, and (be) knowledgeable about the availability of resources of the agency."

The complainants contend that the building administrator serving as the school representative had no decision-making authority and would not allow the team to make any final decisions at the January 3, 2014 IEP Team meeting regarding interim placement and services for the student. According to the complainants, the Assistant Principal indicated that he needed to check with someone else before decisions could be made, and as a result the team meeting was adjourned without any final recommendations.

The district stipulates that the LEA – the Assistant Principal who is new to his position – did want to seek additional information regarding topics discussed by the team. The Staffing Committee Report of January 3<sup>rd</sup> shows that the Assistant Principal "indicated that he would need to get additional information to consider requests being made." Exercise of such caution by a school administrator, however, is often reasonable and does not, by itself, indicate that the school representative lacked the authority to commit school resources.

An individual, by virtue of having met the requirements to be certified for employment as an Assistant Principal in the state of Kansas, is qualified to serve as a school representative on an IEP Team. There is nothing in federal laws or regulations that would prohibit a school representative from adjourning an IEP Team if he/she believes that additional information is needed in order for

decisions to be made. Under these circumstances, a violation of special education laws and regulations is not substantiated on this concern.

**Issue Twelve: The district has failed to develop a behavior plan for the student.**

When developing an IEP, Kansas statutes at K.S.A. 72-987(d) require that the IEP Team must consider – among several special factors – whether or not the child's behavior impedes his/her learning or that of others. If learning is impeded, the team must further consider the use of positive behavior interventions and supports and other strategies to address the impeding behavior.

The complainants contend that a behavior plan is necessary in order for the student to receive a free appropriate public education (FAPE), but the district has not developed such a plan.

The district contends that the IEP Team did consider the student's behavior when developing the November 2012 IEP and determined that identified needs with regard to off-task behavior could be adequately addressed through an action statement. The team identified no other behavioral needs. The complainants were members of the IEP Team and participated in the development of the IEP.

Input regarding the student's behavior was solicited from the student's 10<sup>th</sup> grade teachers prior to the November 2012 IEP meeting. Emails from four of those teachers to the student's Case Manager show that staff had no concerns regarding his behavior.

According to the November 2012 IEP – developed when the student was in 10<sup>th</sup> grade – he had been involved in “6 behavior incidents since 7<sup>th</sup> grade that have resulted in office referrals and/or school based discipline (from) conferences with teachers to brief out of school suspensions. (The student) has responded appropriately to consequences in each situation.” A review of the discipline reports covering that period show that the student's discipline referrals have related to “horseplay,” using an i-Pod at school, use of bad language on the bus, and possession of alcohol on school property. That latter incident was the only discipline referral made during the 2012-13 school year.

The district contends that since the development of the November 2012 IEP, there has been no indication that the student was in need of a behavior plan. The investigator interviewed five of the student's 11th grade teachers on February 10, 2014. None of those teachers reported observing off-task behaviors or any other classroom behavior that suggested a need for a behavior intervention plan.

During the Manifestation Determination meeting of December 16, 2013, teachers were asked to contribute their observations regarding the student's behavior. The report of that review contains the following statements:

- From the science teacher: "Doing great, gets along with others, has chatty moments but rarely needs to correct him."
- From the English teacher/track coach: "Great maturity over the years, is easily redirected through a glance, seated near teacher, occasional redirect."
- From the math teacher: "Not a distraction; pays attention during notes and takes notes or knows how to access online. During work time, he occasionally talks with a peer about non-assignment, asks questions as needed."
- From the seminar teacher: "Occasionally (leaves the class) with a pass or phone call, attends chess club."
- From the history teacher: "No behavior concerns. Allowed to go out in hallway 1 time when visibly upset about a situation outside the school setting; parent called."
- From the Learning Center teacher: "Usually takes a seat and has work to work on. Compared to peers in the classroom, (the student) is considered to be one of the more on-task and uses time well. Redirects once or twice a class period."
- From the art teacher: "Very impressed with polite demeanor and is doing a great job on projects. Have never had any behavioral challenges."
- From the CWC English teacher: "Always compliant, does what is asked of him, great to have in class."
- From the transition specialist: "Has always been willing to do research asked of him, works well with (the transition specialist)."
- General observations that the student does well with adults and less well with peers and less-structured settings.
- From the counselor: "Have seen maturity curve, behavior and interactions now appropriate enough that he does not show up in the office anymore."
- From the Assistant Principal: "Has seen growth and works very well with adults."

There is evidence to show that the team considered the student's behavior when developing his November 2012. That team did not determine the student to be in need of a behavior plan. No evidence has been presented to this investigator that would indicate that behaviors have arisen which are currently impeding the student's learning or the learning of others. Under these circumstances, a violation of special education laws is not substantiated.

#### Social Emotional Goal

In their February 5, 2014 amendment, the complainants expanded this issue to include the assertion that the district failed to develop a goal to address the

statement in the "Considerations" section of the student's November 2012 under "Social/Emotional Status" which reads:

"(The student) needs to continue to work on increasing on task behavior in all of his classes."

The complainants contend that the "Action Statement" related to on-task behavior that is included under the "Supplementary Aids and Services" section of the November 2012 IEP is not written as a measurable statement of student performance. That statement reads, "Teachers will give (the student non-verbal and verbal cues when necessary to stay on task. Teachers will document when they give prompts and how many times they have to re-direct him per class period." The complainants again state – as they did in Issue Eight – that teachers failed to collect the data specified in this action statement.

According to the November 2012 IEP, the team did consider the student's social/emotional status. The IEP notes under the "Strengths" portion of this section of the document that, "(The student) is a very social young man who gets along well with adults and peers. He works well in groups and participates in several sports and extracurricular activities."

In addition to the citation provided by the complainants and quoted above, the "Needs" portion of this section includes the following statement:

"Teachers have recognized improvement this area (on task behavior)."

The district contends that the team determined that the student's needs related to on task behavior did not impede his learning or the learning of other students. While the team noted that the student should continue to work on increasing on task behavior, it was observed as well that he had made improvements in that regard.

There is evidence to indicate that the team did consider the student's behavior when developing the November 2012 IEP and determined that the need could be addressed through an action statement. There is no indication that the properly constituted IEP Team – which included the complainants – felt that a goal was needed. A violation of special education laws and regulations is not substantiated on this aspect of this issue.

However, as stated above with regard to Issue Eight, a violation of special education laws and regulations has been substantiated with regard to the district's failure to collect data regarding on-task behavior.

**Issue Thirteen: Complainants were not given reasonable notice of an IEP Team meeting scheduled for January 9, 2014.**

Kansas regulations at K.A.R. 91-40-38(d) require districts to convene meetings regarding manifestation determination and interim services “as expeditiously as possible.” Therefore, districts are allowed to waive the standard 10-day prior written notice of meetings and are “required to give only 24 hours’ prior notice of a meeting to a child’s parent.”

According to the complainants, they were given only 1-day prior written notice of a scheduled IEP Team meeting and therefore did not have sufficient time to prepare for that meeting in order to participate meaningfully. The complainants state that they received a call from the district at 2:00 PM on January 8, 2014 informing them that a meeting would be held at 3:15 PM on January 9, 2014 to discuss interim services for the student. The complainants asked the district to schedule the meeting later in the afternoon – at approximately 3:45 PM – so that they and their advocate could attend. According to the complainants, the district declined to change the established meeting time.

The district agrees that the complainants were notified of the meeting via the 2:00 PM telephone call from the Assistant Principal. The district states that the Assistant Principal sent an email regarding the scheduled meeting to the complainants at 2:06 PM on January 8<sup>th</sup> and reports that a certified letter providing notice of the meeting was also sent to the complainants on the 8<sup>th</sup>.

Complainants state that they received the certified letter when they returned home on January 9<sup>th</sup> – after the time of the meeting.

Because the complainants were provided with more than 24 hours prior notice of the January 9, 2014 IEP meeting to develop a plan for the provision of services to the student while he was suspended from school, a violation of special education laws and regulations is not substantiated.

**Issue Fourteen: The district gave the student an inflated grade on a writing assignment thereby falsely representing that he has passed a course that is required for graduation. By this action, the district intends to interfere with the student’s right to attend school until he is 21.**

Assignment of grades is not an issue addressed under the IDEA. In this issue, the complainants are anticipating a future violation of IDEA by alleging that the district is planning to end the student’s eligibility for special education services at a future date. To support a state complaint, the parents must allege that the district ***has already*** violated the IDEA. Thus, this allegation is premature and was not investigated.

#### Modified Composition Assignments

In an amendment to their initial complaint sent to the investigator on February 5, 2014, the complainants added an additional aspect to this concern. They

contend that the district did not implement the student's IEP because his English teacher did not modify his English composition assignments based upon his previous performance on composition assignments.

This issue is discussed above under Issue Four. As stated on page 9 of this report, a violation of special education laws was not substantiated with regard to this aspect of the amended complaint.

**Issue Fifteen: The student is not during his long-term suspension being provided access to the general education curriculum provided to his general education peers in English, Geometry, U.S. History, and Earth Science.**

School officials may remove a child with a disability to an interim alternative educational setting (IAES) for up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child "knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the school district or the State Board of Education..." If the IEP Team determines that the behavior was not a manifestation of the child's disability, the district may proceed with suspension and expulsion proceedings under K.S.A. 72-8901 and may order a change of placement to an interim alternative educational placement for not more than 186 school days.

At 34 C.F.R 300.11, federal regulations define a "school day" as "any day, including a partial day that children are in attendance at school for instructional purposes.

While in the interim placement, the student must – as required by K.S.A. 72-991(b) "continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting and to progress toward meeting the goals set out in the child's IEP." At 34 C.F.R. 300.320 (a)(1)(i), federal regulations refer to general education as "the same curriculum as for nondisabled children."

The comments to the federal regulations clarify that the services to be provided to the child do not have to "replicate every aspect of the services that a child would receive if in his or her normal classroom (Federal Register, 2006, p. 46716)." The act "modified 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." Federal and state laws grant an IEP Team the authority to make decisions regarding interim placement and service that supersede district or classroom policies. A district is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same settings as they were receiving prior to the imposition

of discipline. It is important, however, that the child at least have the opportunity to continue to progress toward meeting graduation requirements.

The student was given a 6-day short-term suspension beginning December 12, 2013 because of a violation of the school's code of conduct related to the possession of drugs. At a Manifestation Determination meeting on December 16<sup>th</sup>, the district determined the student's conduct was not a manifestation of the student's disability and was not a direct result of the school's failure to implement the IEP.

A long-term suspension of the student was initiated on December 20, 2013. The student is scheduled to return to school on April 7, 2014. It should, however, be noted that the district has canceled school for 4 days thus far during the period of the student's suspension due to inclement weather which would allow the district to extend the suspension through April 11, 2014. Any additional inclement weather cancellations that result in the loss of a school day could extend the period of the student's suspension.

According to the complainants, the student was given access to homework assignments and to testing during his short-term suspension prior to the semester break. The complainants have requested that he be given continued access to homework and testing now that he is on long-term suspension, but the district has not provided those opportunities. The complainants contend that the student should be provided with the same or parallel assignments in each of his core classes and course grades should be calculated based upon those assignments.

The complainants point to the "Make-Up Work" section on page 7 of the 2013-2014 student handbook that states, "Students absent due to suspension will have the opportunity to make up work missed for credit." They also cite the syllabus for the student's 11<sup>th</sup> Grade English class, which indicates that students who are suspended from school will have the opportunity to "make work (sic) for credit."

At the time of his suspensions in December, the student was enrolled in English 11, Earth Science, U.S. History, Geometry, Junior Seminar, Athletic Development, Jewelry, and Sculpture. The district stipulates that the student was allowed to complete a semester final examination and some homework assignments in December 2013 prior to interim services meetings January 3 and 9, 2014. The student was awarded credit for all of his first semester classes.

For the second semester, the student would – had he not been suspended – have been enrolled in English 11, Earth Science, U.S. History, Geometry, Athletic Development, Learning Center, Consumer and Personal Finance, and Physical Education.



In a letter to the complainants dated January 10, 2014, the Assistant Principal outlined the district's plan for interim services, finalized in the IEP Team meeting on January 9, 2014. The plan involves the use of the "A+ Program," a curricular program adopted by the district for use with both general and special education students. Through A+, the student would be afforded the opportunity to work towards 1.5 high school credits including .5 English 11B credit, .5 U.S. History credit, and .5 Learning Center elective credit. The time the student was to receive special education services was increased to 240 minutes per week, and the plan specified how the student would continue to work toward attaining his IEP goals. The plan developed by the district did not address how the student would access general education curriculum for Earth Science, Geometry, Athletic Development, Consumer and Personal Finance, and Physical Education.

Although the syllabus for the student's English 11 course and the student handbook for the High School indicate that suspended students may make up for credit any work missed due to a suspension, federal and state regulations make it clear that the IEP Team has the ultimate responsibility for determining a student's interim placement and services. As long as interim services decisions allow a student to participate in the general education curriculum and to progress toward meeting his/her goals, the services need not replicate in every way those services the student would have received in the normal classroom setting.

The IEP Team on January 9, 2014 established a plan that would allow the student to work on the goals established in his November 2012 IEP. That plan also sets forth opportunities for the student to progress in the general education curriculum in the areas of English and U.S. History and would allow him to earn an elective credit. The plan did not, however, offer opportunities for the student to access the general education curriculum covered by all of his second semester courses. Under these circumstances, a violation of special education laws and regulations is substantiated.

#### **Follow Up:**

In a telephone call on February 10, 2014, the Director of Special Education notified the investigator that the district has provided the complainants with notice of a meeting to be held on February 12, 2014 for the purpose of modifying the student's interim service plan and developing strategies to address compensatory services. The Director has provided the investigator with a copy of the meeting notice that was sent to the complainants and will provide the investigator with a copy of the revised interim services plan.

#### **Additional Comments**

Investigation of this complaint has uncovered numerous violations of special education laws and regulations. However, in the opinion of the investigator, there is no indication that the student's conduct with regard to his possession and

use of a banned substance was a direct result of the district's failures in implementing the student's IEP.

### **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. Violations have occurred in five areas:

- K.S.A. 72-987(c)(3), which requires districts to provide reports of a student's progress toward attainment of his/her annual goals in the manner described in the IEP,
- K.S.A. 72-987(f), which requires districts to review the IEP of an exceptional child at least annually,
- 34 C.F.R.300.341, which requires that a student's IEP must be implemented as written,
- 34 C.F.R. 300.613, which requires that a district provide a parent with copies of educational records requested by the parent before any meeting regarding an IEP, and
- K.S.A. 72-991a, which requires that a student with a disability be provided with opportunities to advance in the general education curriculum while suspended from school.

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 Special Education Services stating that it will comply with
  - a. K.S.A. 72-987(c)(3) by reporting the progress of this student toward attainment of his IEP goals in the manner described in his IEP,
  - b. K.S.A. 72-987(f) by reviewing the student's IEP at least annually,
  - c. 34 C.F.R.300.341 by implementing this student's IEP as written,
  - d. 34 C.F.R. 300.613 by providing the complainants with educational records which they have requested before convening any IEP Team meeting, and
  - e. K.S.A. 72-991a by – during the remainder of his suspension – providing opportunities for the student to advance in all the

curricular areas in which he was enrolled at the time of his suspension.

- 2) Upon receipt of this report, immediately schedule an IEP Team meeting to review and revise the IEP for this student and to complete the reevaluation process. The district should provide the parents with notice of the proposed IEP Team meeting, using at least two methods. The meeting shall be scheduled to take place no later than March 21, 2014.
- 3) Provide Special Education Services with a copy of the notice of the meeting referenced above in Item 2 and with copies of the IEP and the reevaluation report developed at that meeting.
- 4) Prior to the IEP Team meeting specified above in Item 2, provide the complainants with copies of the progress reports provided to the investigator, with a copy of the student's November 2012 IEP and with the report of the ACT practice test.
- 5) Provide to Special Education Services a copy of the revised interim services plan referenced in the "Follow Up" section of Issue Fifteen (which will include compensatory services) unless a copy of that plan has already been sent to the investigator by the time this report is received by the district. Compensatory services included in this plan shall be subject to review by Special Education Services.
- 6) By no later than April 1, 2014, (a) develop a plan to document that general education teachers have been notified that a student with an IEP is enrolled in their classroom and to ensure that teachers are aware of any accommodations or modifications needed by those students or of any responsibilities to be carried out by the teacher on behalf of the identified students; and (b) send a copy of the plan to Special Education Services.

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).

# 14FC01A

In the Matter of the Appeal of the Report  
Issued in Response to a Complaint Filed  
Against Unified School District No. \_\_\_\_\_,  
\_\_\_\_\_

## DECISION OF THE APPEAL COMMITTEE

### BACKGROUND

This matter commenced with the filing of a complaint on January 15, 2014, and amended on February 5, 2014, by \_\_\_\_\_ and \_\_\_\_\_, guardians of \_\_\_\_\_, against Unified School District No. \_\_\_\_\_, \_\_\_\_\_. The complaint (14FC\_\_\_\_-001) alleged fifteen separate 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 Programs team at the Kansas State Department of Education. Following the investigation, an Initial Report, addressing the allegations, was issued on February 12, 2014. That report concluded that there were violations of special education laws and regulations in five separate areas.

Thereafter, on February 25, 2014, the guardians filed an appeal regarding two issues addressed in the Initial Report (Issue 10 and Issue 11). Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the report, the guardian's letter of appeal, information requested from the school district, and information contained in the KSDE file regarding this matter. 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 10: "District Administration had predetermined the interim alternative educational placement for the student prior to the January 3, 2014 IEP Team meeting and would not allow discussion of options."

In the Initial Report, the complaint investigator stated that there was insufficient evidence to substantiate that the placement decisions regarding the interim alternative educational setting for this student had been made prior to the January 3 IEP Team meeting, or that district administration would not allow discussion of options at the meeting.

The committee agrees with the complaint investigator. The evidence presented shows that the IEP meeting on January 3 lasted approximately two hours; a significant amount of discussion took place at the meeting; the guardian's advocate was actively involved in those discussions; and a variety of options were discussed. Therefore, the committee sustains the complaint report with respect to this issue.

ISSUE 11: “The LEA representative had no decision making authority and would not allow the IEP Team to make decisions during the January 3, 2014 IEP Team Meeting regarding the student’s interim educational placement.”

In the Initial Report, the complaint investigator stated that there was insufficient evidence to substantiate the guardian’s allegation that the Local Education Agency (LEA) representative at the January 3, IEP meeting had no decision making authority regarding the student’s interim alternative educational setting.

The committee agrees with the complaint investigator. The evidence presented does not indicate the January 3 meeting was adjourned in order for the LEA representative to obtain approval from another individual before the IEP team decision could be finalized. Rather, the evidence indicates that the meeting was adjourned because the LEA representative believed more information was needed in order for the team to make an informed decision. The complaint investigator correctly noted that: “There is nothing in federal laws or regulations that would prohibit a school representative from adjourning an IEP Team if he/she believes that additional information is needed in order for decisions to be made.” The Committee would only add that there is also nothing in state law or regulation that would prohibit such action by the LEA representative on an IEP team.

For the reasons stated above, the committee sustains the complaint report with respect to this issue.

In addition to the two issues on appeal, the guardians also made two additional requests.

First, the guardians requested that the school district be required to provide compensation in the amount of \$300.00 for fees they paid to an attorney. The Committee notes guidance from the Office of Special Education Programs (OSEP), stating that: “the State complaint process is not an administrative proceeding or judicial action, and, therefore, the awarding of attorney’s fees is not available under the Act for State complaint resolutions.” Federal Register, Aug. 14, 2006, p. 46602. Accordingly, the Committee cannot, and will not, require payment of attorney’s fees.

Second, the guardians requested that the investigator’s statement of opinion, under the heading “Additional Comments,” on pages 24 and 25 of the report be removed from the report. The Committee notes that complaint investigators generally have discretion to provide comments or recommendations in their reports when they believe such comments or recommendations will be helpful. However, such comments are not a necessary part of an investigation report, and because these particular comments referred to a matter that was not an issue raised in this complaint, the Committee concludes they should be removed from the report.

## CONCLUSION

The investigator's conclusions regarding Issues 10 and 11 in the Initial Report issued in this matter are sustained. The request for attorney's fees is denied. The investigator's comments on pages 24 and 25, under the heading "Additional Comments" are stricken from the initial report. This is the final decision on this matter, there is no further appeal.

This Final Report is issued this 11th day of March, 2014.

### APPEAL COMMITTEE:

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Colleen Riley

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Jana Rosborough

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Laura Jurgensen



RECEIVED

MAR 26 2014

KSDE

**KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #  
ON FEBRUARY 19, 2014**

DATE OF REPORT: MARCH 24, 2014

This report is in response to a complaint filed with our office on behalf of \_\_\_\_\_ by his guardians, \_\_\_\_\_ and \_\_\_\_\_ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. \_\_\_\_\_ will be referred to as "the complainants."

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_ Director of Special Education for USD # \_\_\_\_\_, on February 24 and March 7, 2014. The investigator communicated with the complainants via email on March 14, 15, 18, and 19, 2014.

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

- IEP for this student dated November 14, 2012
- Email from the Assistant Principal to the complainants sent at 2:06 PM on January 8, 2014 notifying them of an interim services meeting at 3:15 PM on January 9, 2014
- Email from the Assistant Principal to the complainants dated January 8, 2014 notifying them of the interim services meeting
- Notice of Meeting dated January 8, 2014
- Email from the complainants to the Assistant Principal dated January 8, 2014 asking for the meeting to be rescheduled
- Email from the complainants to the Principal dated January 9, 2014 regarding participation in the scheduled interim services meeting
- Email from the Principal to the complainants dated January 9, 2014 regarding the interim services meeting
- Staffing Committee Report dated January 9, 2014
- Course schedule for the student for the 2013-24 school year
- District procedures for establishing schedule changes
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent form dated February 24, 2014

## Background Information

This investigation involves a 16 year-old boy who is enrolled in the 11th grade. The complainants are the student's biological aunt and uncle who have had guardianship of the student since he was six years old.

The student has been suspended from school because of a violation of the district code of conduct associated with the possession and use of a banned substance on school grounds. A short-term suspension was initiated on December 12, 2013. A long-term suspension began on December 20, 2013 and will continue until April 7, 2014.

## Issues

Three issues are outlined in this complaint.

**Issue One: The district failed to schedule the January 9, 2014 interim services IEP meeting at a mutually agreed upon date and time.**

Kansas regulations at K.A.R. 91-40-38(d) require districts to convene meetings regarding manifestation determination and interim services "as expeditiously as possible." Therefore, districts are allowed to waive the standard 10-day prior written notice of meetings and are "required to give only 24 hours' prior notice of a meeting to a child's parent." However, districts should take steps to ensure that a parent of an exceptional child is present at these meeting or is afforded the opportunity to participate. These steps include scheduling meetings **at a mutually agreed upon time** (K.A.R. 91-40-17) and place and providing written notice in advance of the meeting.

According to the complainants, they received a call from the district at 2:00 PM on January 8, 2014 informing them that a meeting would be held at 3:15 PM on January 9, 2014. The purpose of this meeting was to finalize a plan to address interim services for the student during the period of his suspension. A previous interim services meeting held on January 3, 2014 had ended with no decisions having been made.

The complainants asked the district to schedule the January 9<sup>th</sup> meeting for later in the afternoon – at approximately 3:45 PM – so that they and their advocate could attend. According to the complainants, the district declined to change the established meeting time.

The complainants report that they also received an email from the Assistant Principal on January 8<sup>th</sup> at 2:06 PM providing notice that the meeting would be held at 3:15 PM the following day. The complainants state that they replied via email at 5:54 PM requesting that the meeting be rescheduled for 3:45 or 4:00 PM on Thursday or Friday. According to the complainants they then received a

telephone call regarding the meeting on the morning of January 9<sup>th</sup> from the principal. The complainants told the principal that they would not be able to attend a meeting at 3:15 PM and again asked that the meeting be held at 3:45 PM so that they and their advocate could attend. At 12:02 PM on January 9<sup>th</sup>, the complainants sent an email to the principal informing him that they would not be available to participate in the meeting – even by conference call – until 4 PM. They wrote that by 3:30 PM they would “know if we can get there by 4:00 or if we’ll have to just listen in.” At 1:24 PM on the 9<sup>th</sup>, the complainants received an email from the principal stating that the meeting would be held as scheduled at 3:15 PM.

The meeting was held on January 9, 2014. Neither the complainants nor their advocate were in attendance, and the complainants did not participate via conference call.

The district confirms that the complainants were notified of the meeting via the 2:00 PM telephone call from the Assistant Principal. The district states that the Assistant Principal sent an email regarding the scheduled meeting to the complainants at 2:06 PM on January 8<sup>th</sup> and reports that a certified letter providing notice of the meeting was also sent to the complainants on the 8<sup>th</sup>.

According to the email message sent by the principal at 1:24 PM on January 9<sup>th</sup>, the school needed to have meetings “during the IEP teams (sic) contract day” which ends at 3:40 PM. The complainants were encouraged to email their ideas “so they (could) be shared with the team.” The principal went on to say, “If your work schedule gets lightens (sic) at 3:15 we can conference call the meeting with you.”

The district acknowledges that IEP meetings have on occasion been held outside of the teachers’ workday.

The district was within its rights to schedule the interim services meeting with less than 10 days prior written notice. The district suggested alternative strategies in order to secure the participation of the complainants without them being physically present, but the complainants made it clear that they and their advocate wanted to participate in the meeting in person. The district was unwilling to accommodate the complainants’ suggested meeting time and held the interim services meeting at a time that had not been mutually agreed upon.

The regulation requires the district to schedule meetings at a mutually agreed upon time. The Office of Special Education Programs (OSEP) has said that this regulation does not preclude a district from considering its own scheduling needs and contract agreements. OSEP added that when there is no agreement regarding a meeting time, a district is not required to meet at the time specified by a parent or guardian, but the regulation does require some flexibility by the district (See, Letter to Anonymous, 18 IDELR 1303 (OSEP 1992)). In a case

similar to this one, the United States Circuit Court of Appeals said the requirements of this regulation are not met by simply scheduling a meeting and offering participation in another manner such as by speakerphone. Drobnicki v. Poway Unified School District, 109 LRP 73255 (9<sup>th</sup> Cir. 2009). In this complaint, the district notified the guardians of a date and time for the meeting and made no other offer for a meeting time. This kind of rigid scheduling of a meeting does not provide the flexibility required by this regulation.

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

**Issue Two: Goal #1 of the student's November 2012 IEP related to reading fluency was not implemented during the 2<sup>nd</sup> quarter of the 2013-14 school year because staff was not provided with support from a reading specialist.**

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

Under "Support for School Personnel," the student's November 2012 IEP states that "the district reading specialist will be available vial e-mail or phone to help support the special education teacher and/or IEP team in regards to (the student's) reading skill development as well as to determine any reading assessment data and/or results."

The complainants contend that the district did not identify anyone to provide this service for the 2013-14 school year after the Reading Specialist position was eliminated at the end of the 2012-13 school year.

The district stipulates that the Reading Specialist position was eliminated prior to the start of the 2013-14 school year and that the support for personnel called for in the student's IEP was not provided.

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

As a resolution regarding this issue, the complainants suggested "a formal comprehensive reading evaluation be performed by a qualified reading specialist to assess present levels and appropriate IEP goals for reading fluency..." The district has provided the investigator with a Prior Written Notice form dated February 24, 2014 which indicates that the district has proposed to have a qualified reading specialist conduct an assessment of the student's skills. According to the district, that assessment is to be completed on March 19, 2014. The results of this evaluation are to be discussed at an IEP review meeting tentatively scheduled for late March of 2014. However, the statement that a reading specialist will be available by e-mail or by phone to support the special education teacher or IEP team remains in the student's IEP. Parent consent

would be required to remove it. Therefore, additional corrective action will be required, as indicated in the corrective action portion of this report.

**Issue Three: The district has failed to enroll the student during 11<sup>th</sup> grade in the Woods II and Power and Production (welding) classes specified under the Course of Study section of the November 2012 IEP as necessary for post secondary success.**

Federal regulations, at 34 C.F.R. 300.341, state that the IEP must be implemented as written.

Kansas statutes, at K.S.A. 72-987(8), calls for the IEP to include – beginning at age 14 and annually thereafter – “the transition services, ***including appropriate courses of study***, needed to assist the child in reaching the stated postsecondary goals...”

Courses of study are defined as a multi-year description of coursework to achieve the student’s desired post-school goals, from the student’s current to anticipated exit year. The courses of study may be identified on the student’s IEP as a list of courses of study or a statement of instructional program, as appropriate for the student.

The IEP team should review the required courses leading to graduation or completion of a school program, and help the student select courses and other educational experiences that are most likely to move the student toward his or her desired postsecondary goals (e.g., employment, education/training, independent living). The IEP team should work closely with the guidance counselor who keeps a transcript of required courses toward graduation. The IEP team should review the transcript and ensure that the courses identified support the student’s postsecondary goals. The guidance counselor may be involved in the IEP meeting should there be changes to the coursework.

Each year the IEP team, including the student, should reconsider the student’s postsecondary goals and align the courses of study with those desired goals. The decisions regarding the courses of study should relate directly to where the student is currently performing and what he or she wants to do after graduation.

The IEP team may take the following steps:

- Review elective courses available and identify courses of study based on student’s needs, taking into account preferences and interests.
- Consider other educational experiences: work study, community-based instruction, independent living, and self-determination.
- Consider whether any prioritization is necessary.

According to the student’s November 2012 IEP, his course of study for his 11<sup>th</sup> grade year was to include Woods II and Power and Production (welding). The

complainants contend that the counselor did not enroll the student in either of these classes. Instead – without any discussion by the IEP Team – the student was enrolled in Jewelry and Sculpture.

The district stipulates that at the time this complaint was received in the offices of Special Education Services, the student was not enrolled in either Woodworking II or Power and Production. According to the district, the student contacted the school counselor in the spring of 2013 to request a change in his schedule for the 2013-14 school year. The counselor reports that the student asked to be enrolled in Jewelry rather than in Woodworking II.

It is the practice of the district to notify parents when a student has requested a schedule change. While notification is provided, the consent of parents is not required before making schedule changes. The counselor reports that the change was made and paperwork was sent home in March of 2013 alerting the complainants to the student's requested change. It is important to note that a student's interests may change over the course of a school year. When a student requests a change in schedule that conflicts with transition courses specified in the IEP, however, the request involves more than merely a change in schedule. It also requires a change in the IEP. This kind of change does not necessarily require an IEP meeting, as the change may be made through the IEP amendment process.

The district stipulates that it did fail to convene the IEP Team to discuss how the student's requested change would impact the course of study outlined in his November 2012 IEP. That IEP continued to show that the student would be participating in both Woodworking II and Power and Production. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

On February 19, 2014, an IEP Team meeting was held to discuss changes to interim services required as a result of a previous complaint. The district subsequently presented to this investigator a Prior Written Notice form that outlined a plan for the student to be enrolled in Cabinet Making and Furniture Design II (formerly Woods II) while under suspension. Corrective actions associated with this issue will reflect that the student has been given the opportunity to earn a semester's credit in that course.

### **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, which requires that IEP Team meetings be conducted at a mutually agreed upon time, and

- 34 C.F.R.300.341, which requires that a student's IEP be implemented as written.

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 Special Education Services stating that it will comply with
  - a. K.A.R. 91-40-17 by conducting IEP Team meetings at mutually agreed upon times, and
  - b. 34 C.F.R.300.341 by implementing this student's IEP as written.
- 2) No later than April 7, 2014, submit to Special Education Services a written plan describing how the district will make a reading specialist available to the student's special education teacher and IEP team, within a reasonable time.
- 3) During the upcoming IEP Team meeting to review and revise the IEP for this student (tentatively scheduled for late March 2014), revise the student's Course of Study to reflect the student's current postsecondary interests and address the impact, if any, of the district's failure to enroll the student for one semester of Cabinet Making and Furniture Design II and for two semesters in Power and Production (welding). If the team determines the change in schedule impeded the student's progress toward achieving his current postsecondary goals, the team shall develop a written plan reasonably calculated to enable the student to make the progress he needs at this time to ultimately reach his postsecondary goals. Within 5 school days after this IEP Team meeting, the district shall send a written statement to Special Education Services addressing: (a) how the Course of Study in the IEP has been revised to reflect the student's current postsecondary interests; (b) whether the change in schedule impeded the student's progress toward achieving his current postsecondary goals; and if so, (c) a copy of the written plan to enable the student to ultimately achieve his postsecondary goals.

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).

# 14FC03

## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

### REPORT OF COMPLAINT

#### FILED AGAINST

\_\_\_\_\_ PUBLIC SCHOOLS #.

ON APRIL 9, 2014

DATE OF REPORT: MAY 7, 2014

This report is in response to a complaint filed with our office on behalf of \_\_\_\_\_ by his guardians, and will be referred to as "the student" in the remainder of this report. Mr. and Mrs. \_\_\_\_\_ will be referred to as "the complainants."

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_ Director of Special Education for USD # \_\_\_\_\_ on April 14, 25, and 28 and May 5, 2014. On April 17, 2014, the investigator met on-site with the Director, with the Principal of \_\_\_\_\_ School and with \_\_\_\_\_ Athletic Director. The investigator met on-site with the Director on April 22, 2014.

The investigator met with Mrs. \_\_\_\_\_ and with her advocate at the home of Mrs. \_\_\_\_\_ on April 30, 2014.

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

- Email from the complainant to the Associate Principal dated April 1, 2014
- Staffing Committee Report dated April 3, 2014
- Agenda for IEP Meetings of April 3 and 7, 2014
- First semester course schedule for the student
- Learning Center Log
- Manifestation Determination Review dated December 16, 2013
- Kansas State High School Activities Association (KSHSAA) Handbook 2013 - 2014 Edition
- \_\_\_\_\_ High School 2013-2014 student handbook

Background Information

This investigation involves a 17 year-old boy who is enrolled in the 11th grade. The complainants are the student's biological aunt and uncle who have had guardianship of the student since he was six years old.

The student returned to school on April 7, 2014 following a 61-day suspension resulting from a violation of the district code of conduct associated with the possession and use of a banned substance on school grounds.

The student was, at the time of the filing of this complaint, being provided with special education services under an IEP developed in November of 2012. Though meetings to review and revise that IEP had been held, the revision had not been completed.

## Issues

Five issues are outlined in this complaint.

Issue One: The district did not include at an April 3, 2014 IEP Team meeting the individual who had been providing the student's English instruction during the period of his suspension.

Federal regulations, at 34 C.F.R. 300.321, specify the required participants at an IEP Team meeting. Those participants include the following individuals:

- The parents of the child;
- Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- A representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency;
- An individual who can interpret the instructional implications of evaluation results, who may already be a member of the team;
- At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- Whenever appropriate, the child with a disability.

Comments regarding 34 C.F.R. Part 300 note on page 46670 of the Federal Register, August 14, 2006, that "It would be inappropriate to require that individuals with specific professional knowledge or qualifications attend all IEP Team meetings...Decisions as to which particular teacher(s) or special education

provider(s) are members of the IEP Team...are best left to...local officials to determine." These decisions should be made on a case-by-case basis in light of the needs of the child. The district makes the final decision as to which school personnel will attend IEP meetings.

Determination of "knowledge and special expertise" of any individual described above must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.

The complainants state that they sent an email to the Associate Principal on April 1, 2014 requesting that the person instructing the student in English while he was under suspension be in attendance at the April 3<sup>rd</sup> IEP Team meeting. The complainants contend that this instructor was the person who had the most knowledge of the student's present level of performance in the area of writing because she supervised the student as he developed a multi-paragraph writing assignment. The complainants report that the instructor was not present at the meeting and the student's writing product was not available for review.

The district contends that all required participants attended the April 3, 2014 IEP Team meeting. Those in attendance at the meeting included the following:

- the complainants (acting as parents of the child);
- two regular education teachers (English and Geometry) who instructed the student prior to his suspension and who would continue to provide instruction once the suspension ended;
- two special education teachers of the student (Case Manager and Learning Center);
- the Director of Special Education and an Associate Principal (both serving as representatives of the district);
- a School Psychologist and a Reading Specialist — both able to interpret evaluation results;
- a Transition Coordinator (since the student was more than 14 years old); and
- a school counselor.

The student was invited to the meeting but did not attend.

It is the position of the district that appropriate staff members attended the meeting and that the individual who had provided approximately 10 hours of interim English instructional services to the student was not a required IEP Team member. The district contends that the complainants were themselves free to contact the interim English instructor to invite her to attend the meeting, but the district did not believe her attendance to be necessary. (Had the complainants extended an invitation to the interim English instructor, any related costs for her participation would have been the responsibility of the complainants.)

The district further contends that the primary focus of the April 3<sup>rd</sup> meeting was the review of results of a re-evaluation of the student for the purpose of determining his continued eligibility for special education services. The results of a recent reading evaluation were reported by the Reading Specialist contracted by

the district to conduct the evaluation. The meeting agenda and the Staffing Committee Report dated April 3, 2014 show that the team also discussed the 3<sup>rd</sup> quarter monitoring of IEP goals, interim services for geometry and Learning Center, graduation and transition planning, planning for the student's reentry upon completion of his suspension, and the student's participation in track and

The district points out that the interim English teacher participated — at the invitation of the district — in the IEP Team meeting of April 7, 2014 when the team focused its discussion on the student's present levels of performance and on his IEP goals. The district also invited the interim English teacher to participate in an IEP Team meeting on April 29, 2014.

All required participants were in attendance at the April 3, 2014 IEP Team meeting. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Issue Two: The student was not provided with Special Education services for the first semester of the 2013-2014 school year.

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

The student's November 2012 IEP does not list any services under the section entitled "Special Education Services." However, the section entitled "ESY Services" indicates that the student would — between November 14, 2012 and November 14, 2013 — receive 85 minutes of special education services for two days a week and 42 minutes of special education services for 1 day a week in a special education setting.

The "(Least Restrictive Environment" section of the November 2012 IEP contains the following statement:

"The student utilizes one block of Learning Center, three days a week to get extra support outside of his gen ed classroom setting. Learning Center will be utilized for IEP goal activities such as reading skill development, writing, re-teaching, keyboarding and homework completion..."

According to the complainants, the student's November 2012 IEP did not specify the amount of special education services the student was to receive. However, the complainants report that during the student's sophomore year, he was assigned to a Learning Center wherein his Case Manager delivered his special education services. It was their understanding that the student would continue to receive services from his Case Manager in his Learning Center class during his Junior year. The complainants subsequently learned that the student's Case

Manager was assigned a planning period during the time the student attended the Learning Center and was not providing the student's special education services.

The complainants contend that because the student's Case Manager was on a planning period during the time that the student was enrolled in Block 9 Learning Center the student did not receive special education services during the first semester of the 2013-14 school year.

While the district stipulates that a clerical error in the development of the November 2012 IEP resulted in the description of services being entered in the wrong section of the document, the student was provided with 212 minutes per week of special education services during the first semester of the 2013-14 school year prior to his suspension from school in December. A certified special education teacher who shares a classroom with the student's Case Manager delivered those services to the student.

Although the investigation of a previous complaint has substantiated that the student's IEP goals were not fully implemented during the first semester of this school year, the log kept by Learning Center staff indicates that services did include assistance with homework completion as specified in the November 2012

Because the student did receive the special education services specified in his IEP during the first semester of the 2013-14 school year, a violation of special education laws and regulations is not substantiated on this issue.

Issue Three: The student was not provided with the necessary protection under IDEA during the Manifestation Determination meeting held on December 16, 2013.

Federal regulations, at C.F.R. 300.530(e)(1) state that as soon as practical, but not later than 10 school days after the date on which the decision is made to change the placement of a child with a disability because of a violation of a student code of conduct, the representative of the school, the parent and other relevant members of the child's IEP team, as determined by the parent and the school, must meet to determine if the conduct in question was:

- a) caused by, or had a direct and substantial relationship to the child's disability;  
or
- b) the direct result of the school's failure to implement the child's IEP.

If it is determined by the group that the conduct of a child was a result of either "a" or "b" above, then the conduct must be determined to be a manifestation of

the child's disability. Subsequent disciplinary actions by the district are driven in part by the manifestation determination.

In making a determination, the team must consider:

- relevant information in the child's file,
- the child's IEP, ● any teacher observations, and e
- any relevant information provided by the parent.

On December 16, 2013, following a code of conduct violation by the student on December 11, 2013, the district convened a Manifestation Determination meeting. It is the contention of the complainants that the district failed to consider relevant information in determining that the code of conduct violation was not a manifestation of the student's disability or of the school's failure to implement the student's IEP.

The complainants contend that they informed the team of behavioral needs of the student as reflected in his IEP and pointed to a previous code of conduct violation that had resulted in the student being suspended during his Sophomore year. According to the complainants, they told the team that the student did not have a behavior plan as they had previously requested and that teachers had not been taking data regarding behavior as required by the IEP.

The complainants maintain that progress monitoring on IEP goals was not reported so that the team could determine whether the IEP was appropriate or being implemented. The complainants point to findings of recent complaints in supporting their contention that the student's IEP was not implemented appropriately. The complainants contend that the Associate Principal acknowledged that the district may not have implemented the IEP to the letter of the law but made no efforts to gather additional information. They also assert that he unduly influenced the team by stating that he had seen growth in the student's behavior.

The district's position is that required procedures were followed when conducting the Manifestation Determination meeting. The Manifestation Determination meeting was held within 4 days of the student's code of conduct violation. The complainants (acting as parents for the student), the Associate Principal, 13 staff members, and two advocates for the family were in attendance.

The Manifestation Determination Review form shows that the team considered relevant information, the student's IEP, and teacher observations. The form also reflects that the advocate for the family made the team aware of the concerns specified by the complainants. Twelve meeting participants employed by the district indicated that they believed that the student's behavior was not a manifestation of his disability. One district employee indicated that she felt the student's behavior was not caused by nor did it have a direct and substantial

relationship to his disability but felt that the conduct in question was a direct result of the school's failure to implement the IEP. A second employee felt that the behavior was not a direct result of the school's failure to implement the IEP but that it was caused by or had a direct and substantial relationship to his disability. Both the complainants and their two advocates indicated that the behavior was a manifestation of the student's disability.

There is sufficient evidence to show that the district followed procedural requirements in conducting the December 16, 2013 Manifestation Determination meeting. While the findings of the related formal complaints were not available to the team at the time of the meeting, the team did consider all relevant information, including the concerns of the complainants, in making decisions. Under these circumstances, a violation of special education laws is not substantiated on this issue.

Issue Four: District level administration made a unilateral decision regarding the reconvening of a Manifestation Determination meeting.

A Manifestation Determination meeting requires the convening of an IEP Team. In the Federal Register, March 12, 1999, Appendix A, p. 12476-12477, Office of Special Education Programs (OSEP) responded to a question regarding how often IEP meetings must be held, and in that response stated:

"If a parent requests an IEP meeting because the parent believes that a change is needed in the provision of FAPE to the child or the educational placement of the child, and the agency refuses to convene an IEP meeting to determine whether such a change is needed, the agency must provide written notice to the parents of the refusal, including an explanation of why the agency has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student,"

When OSEP refers to the "agency" it is referring to LEA administration, not to the IEP team

The complainants state that at the conclusion of the IEP team meeting in February 2014 they requested that the Director of Special Services reconvene the IEP team to share the findings of a January 15, 2014 complaint report. The complainants assert that they were, on February 24, 2014, provided with prior written notice indicating that the district would not reconvene a Manifestation Determination IEP Team meeting. The complainants contend that the Director made that decision unilaterally and that the action was not a decision made by an IEP Team since the special education and general education teacher had been dismissed from the meeting by the time their request was made.

The district contends that the Director acted appropriately because she provided the complainants with the required written notice of the district's refusal to



reconvene an IEP Team meeting to further discuss the team's previous Manifestation Determination decision.

There is no requirement that an IEP Team be convened to make a decision regarding the convening of subsequent meetings. The Director followed appropriate procedures by providing the complainants with written notice of the district's refusal to reconvene an IEP Team meeting to review the Manifestation Determination meeting. A violation of special education laws and regulations is not substantiated on this issue.

Issue Five: The Director of Special Services is blocking the IEP Team recommendation that the student participate on the track team.

With regard to "Student Activities Code of Conduct," Section II, Part A of the Gardner Edgerton student handbook states, "a student shall not...use or consume, have in possession, buy, sell or give away any...controlled substance defined by law as a drug." According to Section II, Part B, "all student activities that are governed under the jurisdiction of Kansas State High School Activities Association (KSHSAA) and those that represent USD \_\_\_\_ ...are included in the policy." Track and field activities at USD \_\_\_\_ are governed by KSHSAA.

Penalties for violations of the Code of Conduct are outlined in section II, Part C of the handbook. For a 'Serious Violation,' the penalty is determined by the District Student Activities Director who may determine a student to be ineligible for "multiple seasons of activities not to exceed a period of one year from the date of the...violation. Seriousness of the violation may warrant movement to higher levels of consequences. Determination will be made from a panel comprised of Activities Director, student's building administrator, district administrator and immediate advisor, coach, director or sponsor of the activity." Under Section III, the handbook notes, "Students should understand that the written Code of Conduct is composed of minimal standards of expectations and consequences. Coaches, sponsors, and administration reserve the right to apply more stringent guidelines and consequences and may deem a student 'Not in Good Standing' at their own discretion."

Rule 14, Article 2 of the KSHSAA handbook states, "A student who is under penalty of suspension or whose character or conduct brings discredit to the school or to the student, as determined by the principal, is not in good standing and is ineligible for a period of time as specified by the principal."

The complainants report that the student met with the Activities Director for the district on March 13, 2014 to request permission to participate in track and field. According to the complainants, that request was denied.

At an IEP Team meeting on April 3, 2014, the complainants then requested that the student participate in track and field in order to facilitate his academic and

behavioral success through contact with the positive role models provided by coaches and athletes. According to the complainants, seven members of the IEP team agreed that the student should be a part of the track team (some with stipulations) and four members abstained from giving an opinion. The complainants report that the Director of Special Services stated she would not allow a vote on the student's track participation, because she would not change the decision of building administration.

The student committed a code of conduct violation on December 11, 2013. Track and field activities in the district began on March 3, 2014. The district contends that it followed procedures outlined in both KSHSAA guidelines and policies outlined in the High School student handbook when finding the student ineligible to participate in track and field activities during the 2013-14 school year. A panel comprised of the principal of the high school, the Activities Director/Associate Principal, Assistant Principal, Head Coach, and the district's Director of Secondary Services considered the violation that led to the student's suspension and determined the student to be "Not in Good Standing."

The Staffing Committee Report of April 3, 2014 reflects the team discussion of the complainants' request that the student be allowed to join the track team. The Director states that a clear consensus regarding the student's participation was not achieved. While the complainants, their advocates, and one staff member felt the student should participate in track, four staff members abstained from voting one way or the other. Three team members felt there should be some conditions placed on the student's participation.

According to the Director, she did not feel it would be appropriate, in the absence of a clear mandate from the IEP Team, to override the decision of building administration prohibiting the student's participation in track. The Director also indicated that the IEP team had discussed other avenues for peer interaction and access to good role models and that the student's participation in track was not essential for the student to receive FAPE.

An IEP team should work toward consensus. It is not appropriate for an IEP team to make IEP decisions based upon a majority vote. If the IEP team cannot reach agreement the LEA representative at the meeting — in this case the Director of Special Education — has the ultimate authority to make a decision and then to provide the parents with appropriate notice and request consent of the proposed action as appropriate. Prior Written Notice regarding the decision prohibiting the student's participation in track was given to the complainants on May 5, 2014. Consent was not required. Under these circumstances, a violation of special education laws is not substantiated on 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 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.

A handwritten signature in cursive script that reads "Diana Durkin". The signature is written in black ink and is positioned above a horizontal line.

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

**KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES**

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #  
ON APRIL 14, 2014**

**DATE OF REPORT: MAY 14, 2014**

This report is in response to a complaint filed with our office on behalf of \_\_\_\_\_ by his guardians, \_\_\_\_\_ and \_\_\_\_\_ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. \_\_\_\_\_ will be referred to as "the complainants."

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_, Director of Special Education for USD # \_\_\_\_\_, on April 14, 25, and 28, 2014. The investigator met on-site with the Director on April 17 and 22, 2014. On April 30, 2014 the investigator met with Mrs. \_\_\_\_\_ and the advocate for the family, Susan Johnson.

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

- IEP for this student dated November 14, 2012
- Report of Complaint dated March 24, 2014
- Corrective Actions related to the above complaint
- Staffing Committee Report dated April 3, 2014
- Staffing Committee Report dated April 7, 2014
- Progress Monitoring Reports for the 3<sup>rd</sup> Quarter of the 2013-14 school year
- Reading probes administered between October 8, 2013 and March 24, 2014

### **Background Information**

This investigation involves a 17 year-old boy who is enrolled in the 11th grade. The complainants are the student's biological aunt and uncle who have had guardianship of the student since he was six years old.

The student was suspended from school because of a violation of the district code of conduct associated with the possession and use of a banned substance on school grounds. A short-term suspension was initiated on December 12, 2013. A long-term suspension began on December 20, 2013 and ended on April 7, 2014.

The student was, at the time of the filing of this complaint, being provided with special education services under an IEP developed in November of 2012. Though meetings to review and revised that IEP were held on April 3 and 7, 2014, the revision was not completed. The revision was finalized during a third IEP Team meeting held on April 29, 2014.

### Issues

Four issues are outlined in this complaint.

**Issue One: The district did not include in the April 7, 2014 IEP Team meeting the Reading Specialist who performed the most recent assessment of the student's reading skills.**

Federal regulations, at 34 C.F.R.300.341, state that a student's IEP must be implemented as written.

At K.A.R. 91-40-17, Kansas regulations state that districts must take steps to ensure that parents are present at **each** IEP Team meeting or that they are afforded the opportunity to participate. These steps are to include scheduling the meeting at a mutually agreed-upon time and place and providing written notice of the meeting. That written notice shall include (among other elements) the titles or positions of persons who will attend on behalf of the district.

Federal regulations, at 34 C.F.R. 300.321, specify the required participants at an IEP Team meeting. Those participants include the following individuals:

- The parents of the child;
- Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- A representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency;
- An individual who can interpret the instructional implications of evaluation results, who may already be a member of the team;
- At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- Whenever appropriate, the child with a disability.

Comments regarding 34 C.F.R. Part 300 note on page 46670 of the Federal Register, August 14, 2006, that "It would be inappropriate to require that

individuals with specific professional knowledge or qualifications attend all IEP Team meetings...Decisions as to which particular teacher(s) or special education provider(s) are members of the IEP Team...are best left to...local officials to determine." These decisions should be made on a case-by-case basis in light of the needs of the child. The district makes the final decision as to which school personnel will attend IEP meetings.

Under "Support for School Personnel," the student's November 2012 IEP states that "the district reading specialist will be available via e-mail or phone to help support the special education teacher and/or IEP team in regards to (the student's) reading skill development as well as to determine any reading assessment data and/or results."

The complainants filed a complaint with the office of Special Education Services on February 19, 2014. As stated in a report of the investigation of that complaint dated March 24, 2014, the investigator determined that a violation was substantiated with regard to the district's failure to provide reading support. As a corrective action, the district was required to submit a written plan describing how the services of a reading specialist would be made available to the student's special education teacher and IEP team. The district submitted that plan on April 11, 2014.

As was also noted in the reporting of that complaint, the district secured the services of a qualified reading specialist who was not a district employee to conduct a "formal comprehensive reading evaluation." That evaluation was conducted on March 20, 2014, and the results of the evaluation were reported at an IEP Team meeting on April 3, 2014. The reading specialist also provided the district with a report of her findings.

The complainants assert that this reading specialist was not in attendance at a subsequent IEP Team meeting on April 7, 2014. According to the complainants, they sent an email to the Director of Special Education informing her that they would be late in arriving for the scheduled 3:15 PM meeting but indicated that the meeting could proceed in their absence as long as four specified individuals were in attendance: the student's Case Manager, his English teacher, the reading specialist, and the individual who had provided instruction to the student in the area of English while he was suspended from school.

The complainants confirm that they planned to attend the IEP Team meeting on April 7<sup>th</sup>. They contend, however, that they were not given prior written notice of who would be in attendance at the meeting and were not made aware in any correspondence from the district that the reading specialist would not be present. At the IEP Team meeting, the advocate for the family noted that the reading specialist was not present and expressed concern as to whether or not the meeting should proceed. The complainants state that despite the concerns voiced by the advocate, the Director proceeded with the meeting.

The district stipulates that the complainants were not given prior written notice of the April 7, 2014 IEP Team meeting because that meeting was a continuation of the April 3, 2014 IEP Team meeting for which the complainants were given notice.

The district contends that the reading specialist who conducted the evaluation of the student was not a required member of the IEP Team. (She was employed by the district to conduct the evaluation but is not the individual who will be providing ongoing reading specialist service to the student under the November 2012 IEP.) The reading specialist had attended the April 3, 2014 IEP Team meeting and presented the report of her evaluation. According to the district, the specialist's report was available for the team to review, and the Director had met with the specialist prior to the meeting to solicit additional input. This specialist was also invited by the district to participate in an IEP Team meeting on April 29, 2014.

Those in attendance at the April 7<sup>th</sup> meeting included:

- the advocate for the complainants;
- two general education teachers of the student (English and Geometry)
- one special education teacher of the student (his Case Manager);
- the Director of Special Education and an Associate Principal (both able to fill the role of district representative);
- the School Psychologist (able to interpret evaluation results);
- the school counselor;
- the Transition Specialist (for a child over the age of 16); and
- the individual who provided interim instruction in the area of English while the student was suspended from school

The complainants had notified the district that they would be 45 minutes late in getting to the meeting but they did not arrive before the two hour and fifteen minute meeting was adjourned.

While the district reading specialist who is now providing support for the student under his November 2012 IEP was not present, she did attend the February 3, 2014 IEP Team meeting and had met with staff to provide input prior to this meeting. She was (as required by the November IEP) available by telephone to answer questions from the special education teacher or the team.

The reading specialist who conducted a comprehensive evaluation of the student's reading skills is not a required member of the student's IEP team. Therefore, her absence from the April 7, 2014 IEP Team meeting does not constitute a violation of special education laws and regulations. However, the district should have provided the complainants with written notice of the April 7<sup>th</sup> meeting (and *all* IEP Team meetings) that includes a listing of the titles of those individuals who will be attending on behalf of the district, or obtained a signed



waiver of notice from the complainants. A violation of special education laws and regulations is substantiated on this aspect of this issue.

**Issue Two: The district failed to report progress toward attainment of the student's IEP goals on the same schedule as educational progress is reported for non-disabled students.**

Kansas statutes at K.S.A. 72-987(c)(3) state that a student's IEP must include a description of how and when the child's progress toward meeting annual goals will be measured and when the parents will be provided periodic reports about their child's progress. Reporting may be carried out in writing or through a meeting with the parents. Whatever the method chosen, progress toward the attainment of goals must be monitored in the method indicated on the IEP and progress reports should include a description of the child's progress toward his/her measurable annual goals. Federal regulations, at 34 C.F.R.300.341, state that a student's IEP must be implemented as written.

Each of the goals specified in the November 14, 2012 IEP for this student includes the following statement:

"The child's progress was reported to the parent at least as often as general education teachers report non-exceptional student's progress."

The Director of Special Education previously confirmed on February 10, 2014 that the district's expectation is that the progress of exceptional students toward attainment of their IEP goals will be monitored quarterly, and parents will receive IEP- related progress reports at the same time grades are sent to parents. Third quarter grades were sent to parents on March 14, 2014.

The complainants state that 3<sup>rd</sup> quarter monitoring reports were provided to them at the April 3<sup>rd</sup> IEP Team meeting. According to the complainants, the IEP Team agreed that the reporting of progress for the student's reading fluency and writing goals was not supported by data and should be revised.

The district stipulates that progress-monitoring reports were hand-delivered to the complainants on April 3<sup>rd</sup>, three weeks after grade reports were sent to the parents of non-disabled students.

The district contends that while there was discussion regarding differences in data collected by district staff and by the reading specialist hired by the district to conduct an assessment of the student's reading skills, there was no commitment on the part of the district to alter the third quarter monitoring report. The Staffing Committee Report dated April 3, 2014 states, "Team discussed discrepancy in collected data, possibly due to use of different materials. Include information from both (the special education teacher) and (the contracted reading specialist)

in writing new goals for reading.” The report contains no reference to any recommendation that monitoring forms be revised.

The district did not provide the complainants with a report of the student's progress toward attainment of his goals until nearly three weeks after grade reports were sent to the parents of non-disabled students. A violation of special education laws and regulations is substantiated on this aspect of this issue.

Because the complainants acknowledge that they were given a copy of progress monitoring reports on April 3, 2014, the district is not required to provide additional copies at this time. The district is not required to make any changes to those reports.

**Issue Three: The Director of Special Services did not follow the correct procedures in the development of the IEP at the April 7, 2014 IEP Team meeting.**

Federal regulations at 34 C.F.R. 300.320 denote the required content for a student's IEP. At 34 C.F.R. 300.321, the regulations identify the required participants for an IEP Team meeting. Parent participation is discussed under 34 C.F.R. 300.322. At 34 C.F.R. 300.323 the regulations specify when an IEP must be in effect for a student, and at 34 C.F.R. 300.324 the regulations list elements that must be considered when developing each child's IEP as well as procedures related to the review and revision of the document. Federal regulations do not, however, specify precisely an order in which an IEP Team meeting is to be conducted.

The complainants contend that the Director of Special Education did not follow the correct procedure in the development of the IEP. Specifically, they contend that:

- the advocate's request for copies of grade reports and for copies of "corrected" monitoring forms was not honored;
- the Director did not allow for discussion regarding the student's Course of Study as related to a corrective action for a complaint filed by the complainants on February 19, 2014;
- the Director did not follow the direction of the advocate with regard to the order of discussion of goals and supplementary aids and services; and
- the Director did not allow for discussion of a draft goal related to behavior prior to moving to a discussion of Least Restrictive Environment.

The Staffing Committee Report from April 7<sup>th</sup> reflects that the advocate asked questions regarding the availability of 3<sup>rd</sup> quarter grades for the student, a revision of his monitoring reports, and the proposed Course of Study.

### Copies of Grade Reports and Revised Monitoring Forms

The district maintains that the complainants were given copies of progress monitoring reports at the April 3<sup>rd</sup> IEP Team meeting. Because the student's course grades for the third quarter were to be determined based upon work completed during the period of his suspension (which ended on the day of the April 7<sup>th</sup> IEP Team meeting), those grades had not yet been calculated and entered into the district's student management system and were not available at the time of the IEP Team meeting.

### Course of Study

The Staffing Committee Report of the April 7, 2014 IEP Team meeting indicates that the advocate expressed disagreement with the listing of Power and Production I and voiced concern that the student would be a half credit short of meeting NCAA requirements. The school counselor noted that Physics is recommended for 12<sup>th</sup> grade students rather than Chemistry and that semester credit could be met by replacing an elective.

According to the district, it has proposed a revision to the student's Course of Study that reflects his current postsecondary interests and continues to keep him on track to earn credits toward graduation with his class.

### Meeting Agenda

The district asserts that the order of discussion at the April 7<sup>th</sup> meeting was driven in part by the anticipated arrival of the complainants who had notified the Director that they would be delayed in getting to the IEP Team meeting. It was expected that the complainants would arrive within 45 minutes of the start of the meeting, so it was suggested that goals be discussed once the complainants were present.

### Behavior Goal

The Staffing Committee Report of April 7<sup>th</sup> shows that input from the team was considered and incorporated in developing present level statements regarding the student's behavior. The team considered whether interventions were needed with regard to off-task behavior but determined that the student was no more off-task in the classroom than his general education peers. The team did agree that a goal would address identified behavioral needs, but did not develop such a goal in the absence of the complainant who did not arrive before the meeting was adjourned at 5:30 PM.

It should be noted that at the time of the filing of this complaint, the team had yet to finalize the annual review and the district was not yet ready to propose a completed IEP to the complainants.

Federal regulations do not establish a prescribed order for the discussion in an IEP Team meeting. While the district may not have agreed to all requests made by the advocate, there is evidence to show that the team considered her concerns at the April 7<sup>th</sup> meeting. The agenda for that meeting was affected by the absence of the complainants who are the educational decision-makers for the student. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Four: The IEP has identified the need for positive behavioral interventions, strategies, and supports, but no goals or positive behavioral interventions, strategies or supports are in place for the student now that he has returned to school following his 61-day suspension.**

The complainants contend that the district has failed to take action on their request that counseling and other supports be put in place for the student upon his return to school on April 7, 2014 following a 61-day suspension for a code of conduct violation. According to the complainants, they sent an email to the Director of Special Education on March 31, 2014 making this request and subsequently emailed the Director asking that transition support be discussed toward the beginning of an IEP Team meeting scheduled for April 3<sup>rd</sup>. In an April 3<sup>rd</sup> email, the complainants reiterated their request regarding the discussion of transition support.

According to the complainants, the district placed the discussion of transition supports last on the agenda for the April 3<sup>rd</sup> meeting and did not allow sufficient time for any planning beyond what was needed for his first day back at school.

The complainants state that although the IEP Team has identified behavioral needs for the student, no supports have been put in place despite two IEP Team meetings, and a goal to address behavior has not been discussed.

According to the district, the Annual IEP review for this student was not completed until April 29, 2014. At the time of the filing of this complaint, two IEP Team meetings had been held. The primary focus of the first meeting was a review of recent reading assessment and the completion of the reevaluation process. The complainants were not present for the second team meeting, and the discussion of goals was delayed in order to allow the complainants to participate.

Before changes can be made to a student's IEP, parents must be given prior written notice. The review/revision of the student's IEP had not been completed at the time this complaint was filed, and the district was not yet prepared to provide the complainants with written notice of proposed changes. Discussion of the student's behavioral needs had yet to be completed. Under these circumstances, a complaint with regard to the services outlined in a yet-to-be-

finalized IEP would be premature. A violation of special education laws and regulations is not substantiated.

### **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, which requires that districts provide parents with prior written notice of every IEP Team meeting, and
- 34 C.F.R.300.341, which requires that a student's IEP, be implemented as written.

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 Special Education Services stating that it will comply with
  - a. K.A.R. 91-40-17 by providing parents with prior written notice of every IEP Team meeting, and
  - b. 34 C.F.R.300.341 by implementing the IEP as written.

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, 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).

# 14FC05

## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

### REPORT OF COMPLAINT FILED AGAINST PUBLIC SCHOOLS # ON APRIL 28, 2014

DATE OF REPORT: MAY 13, 2014

This report is in response to a complaint filed with our office on behalf of \_\_\_\_\_ by his guardians, \_\_\_\_\_, and \_\_\_\_\_ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. \_\_\_\_\_ will be referred to as "the complainants."

#### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_, Director of Special Education for USD # \_\_\_\_\_, on April 29, 2014. On April 30, 2014 the investigator met with Mrs. \_\_\_\_\_ and the advocate for the family, Susan Johnson.

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

- IEP for this student dated November 14, 2012
- Report of Complaint dated March 24, 2014
- Corrective Actions related to the above complaint
- Email from the Director of Special Education : \_\_\_\_\_ to the complainant dated March 3, 2014
- Notice of Meeting dated March 3, 2014
- Email from the complainant to the Director dated March 3, 2014
- Emails between the complainants and the Director on March 6 and 7, 2014
- Emails between the complainant and the Director dated March 10 and 11, 2014
- Email from the Director to the office of Special Education Services dated March 11, 2014
- Notice of Meeting dated March 14, 2014
- Emails between the complainant and the Director dated March 18, 2013
- Report of comprehensive reading assessment completed on March 20, 2014
- Email containing draft IEP sent to the complainants by the Director on March 25, 2014
- Email containing draft IEP sent to the complainants by the Director on March 28, 2014
- Prior written notice of IEP Team meeting on April 3, 2014

- Email from the complainant to the Associate Principal dated April 4, 2014
- Email correspondence between the complainant and the Director between April 6 and 23, 2014 regarding the scheduling of an IEP Team meeting
- Email containing revised draft IEP and prior written notice of meeting sent to the complainants by the Director on April 25, 2014
- Notice of Meeting for April 29, 2014 IEP Team meeting
- Agenda for April 29, 2014 IEP Team meeting

### **Background Information**

This investigation involves a 17 year-old boy who is enrolled in the 11th grade. The complainants are the student's biological aunt and uncle who have had guardianship of the student since he was six years old.

The student received a long-term suspension from school due to a violation of the school's Code of Conduct. That suspension ended on April 7, 2014.

At the time of the filing of this complaint, the student was being provided with special education services under an IEP developed in November of 2012. Meetings to review and revise that IEP were held on April 3, and 7, 2014, but the revision was not completed until a third IEP Team meeting on April 29, 2014.

### **Issues**

Two issues are outlined in this complaint.

#### **Issue One: The district failed to revise the student's IEP at least annually.**

Kansas statutes at K.S.A. 72-987(f) state that a student's IEP must be reviewed "periodically, but not less than annually to determine whether the annual goals for the child are being met."

IEP Team meetings should – according to K.A.R. 91-40-17 – be scheduled at a mutually agreed upon time. The Office of Special Education Programs (OSEP) has said that this regulation does not preclude a district from considering its own scheduling needs and contract agreements. OSEP added that when there is no agreement regarding a meeting time, a district is not required to meet at the time specified by a parent or guardian, but the regulation does require some flexibility by the district (See, Letter to Anonymous, 18 IDELR 1303 (OSEP 1992)). In a case similar to this one, the United States Circuit Court of Appeals said the requirements of this regulation are not met by simply scheduling a meeting and offering participation in another manner such as by speakerphone. Drobnicki v. Poway Unified School District, 109 LRP 73255 (9<sup>th</sup> Cir. 2009).

In another case, the United States Circuit Court of Appeals found that if a district has demonstrated consistent willingness to develop an IEP for a student and the



parents have played a role in delaying that process, the district would not be held liable for associated procedural violations. C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212 (3rd Cir. 2010).

The IEP that was in place for this student at the time this complaint was filed was developed on November 14, 2012. The complainants contend that the district was ordered to complete a revision of the November 2012 IEP by no later than March 14, 2014 as directed by corrective actions in the February 12, 2014 report of the investigation of a previous formal complaint.

The complainants assert that an IEP Team meeting was held on April 3, 2014. They contend that draft goals presented by the district at the time of the meeting were to be revised. According to the complainant, those goals were not discussed by the team at a subsequent IEP Team meeting held on April 7, 2014.

The complainants sent an email to the Director on April 11, 2014 requesting that a third IEP Team meeting be convened on April 17, 2014 with the special education teacher and any one of the student's general education teachers present. The complainants requested the participation of the reading specialist who had been contracted by the district to conduct a comprehensive assessment of the student's reading skills. They also wanted to have present the individual who had been hired by the district to provide English instruction to the student while he was suspended from school. According to the complainants, the district declined to meet on April 17<sup>th</sup>.

The district contends that numerous attempts have been made to complete a review and revision of the student's IEP beginning in October 2013. Records indicate that the complainants on at least two occasions between October 28 and November 11, 2013 requested that IEP Team meetings be rescheduled. The district and the complainants were unable to agree on a time to meet during the months of November and December 2013.

At the time the student was suspended from school for a code of conduct violation on December 11, 2013, the complainants and the district had not arrived at a mutually agreed upon time for the annual IEP review. Further, a three-year reevaluation had yet to be finalized.

An IEP Team meeting was held on December 6, 2013 for the purpose of determining whether the student's actions were a manifestation of his disability. The IEP Team met during the months of January and February to discuss interim services to the student during the period of his suspension.

Upon receipt of the report of a complaint investigation dated February 12, 2014, the district attempted – as directed by the report – to schedule an IEP Team meeting to review and revise the IEP for the student and to complete the reevaluation process.

On March 3, 2014, the district sent an email to the complainants that included prior written notice of an IEP Team meeting to be held at 2:00 PM on March 13, 2014 for the purpose of completing an annual review of the student's IEP. The complainant notified the Director via email on March 3<sup>rd</sup> that the comprehensive assessment of the student's reading skills would need to be completed prior to holding an IEP Team meeting. The complainants also informed the district in that email that an advocate for the complainants would need to be present. Therefore, the complainant wrote, the meeting would need to be held

- at 3:00 PM (to allow the advocate for the complainants, who is also a district employee to use her flex time to participate),
- at 3:45 PM (after the contract day for that advocate), or
- at other times so long as the district paid staff and non-district employed staff serving as advocates for the complainants.

The complainants, in an email on March 6, 2013, asked the Director to reschedule the March 13<sup>th</sup> IEP Team meeting stating that a 3:15 PM or later time would work best and requesting that they be sent a copy of the report of the comprehensive reading assessment and a copy of a draft IEP before the meeting.

In an email dated March 7, 2014, the Director wrote the complainant, " I realize your request of the 3:15, or later start time, but I was wondering if we could meet in the middle on this one. (The advocate) stated in the meeting she would be willing to take 'personal time' if the IEP was during the contract day. I would like the IEP to begin at 2:00 but want to iron out the time with you prior to sending the Notice of Meeting. Please let me know if a start time can be any earlier than 3:15."

On March 10, 2014, the complainant wrote an email to the Director stating that no meeting time prior to 3:15 PM would be workable "unless I...find another advocate. Also, business with Spring is picking up and it is harder for me to leave work early. If this start time doesn't work, please confirm that you are willing to pay for (other advocates) so I can schedule someone to attend the meeting with me." The Director responded via email on March 11<sup>th</sup>, stating the starting time for the IEP meeting would be 3:15 PM and informing the complainant that the district would not be responsible for securing services for parental consultants.

On March 14, 2014, the district provided the complainants with prior written notice of an IEP Team meeting to be held on March 27, 2014 for the purpose of completing the annual review of the student's IEP.

The complainants provided their written consent for the comprehensive reading assessment on March 18, 2014. The assessment was completed on March 20, 2014.

Because the district and complainants were unable to mutually agree on a date for an IEP Team meeting prior to the March 21, 2014 deadline established in the Corrective Actions of the February 12<sup>th</sup> complaint report, the district contacted Special Education Services to ask for an extension of the timeline to March 31, 2014. That extension was granted.

The Director sent an email to the complainants on March 25, 2014 attaching a draft copy of the district's proposed IEP. The complainants sent a return email that same date indicating the attachments had not come through and stating, "Since we will not have time to adequately review the reading report and the resulting IEP prior to the meeting, the IEP meeting will need to be rescheduled for next week. We are available Wednesday or Thursday next week at 3:15." Per the complainants' request, the district rescheduled the meeting for April 3<sup>rd</sup> and provided the complainants with prior written notice of that meeting.

The district contacted Special Education Services to request an additional extension on the deadline for completing corrective actions until April 11<sup>th</sup>. That request was granted.

On April 3<sup>rd</sup>, the IEP Team met for more than 2 hours with the complainants present. The results of a comprehensive reading assessment were reviewed and the reevaluation process was completed. The team determined that a second meeting would be conducted on April 7<sup>th</sup> to continue work on the IEP.

In an email to the Associate Principal on April 4<sup>th</sup>, the complainant indicated that she planned to attend the meeting on the 7<sup>th</sup>, but on April 6<sup>th</sup>, the complainant emailed the Director to say that she would not be able to arrive at the meeting by 3:15 as planned. The complainant indicated the meeting could be held if the advocate for the family and other specified participants were in attendance. The complainant had not arrived by the time the meeting was adjourned at 5:30 PM. The district had delayed discussion of goals expecting the arrival of the complainant, and it was determined that yet another IEP Team meeting would be needed to complete the IEP review/revision.

On April 8<sup>th</sup>, the Director emailed the complainants to propose that the IEP Team meet from 3:15 – 5:00 on April 14, 2014. The complainant sent a return email on April 9<sup>th</sup> indicating that the proposed date would not work but stating that April 15<sup>th</sup> or 17<sup>th</sup> would be workable. The Director responded on April 10<sup>th</sup> saying that neither the 15<sup>th</sup> or 17<sup>th</sup> would work for district staff and suggesting April 16<sup>th</sup> as a possible meeting date.

On April 11<sup>th</sup>, the complainant emailed the Director to say that they would only be available on April 17<sup>th</sup> and that it would be "appropriate to have the meeting" if only one of the two special educators who had been working with the student was present along with any of the student's core teachers, the interim English teacher, and the reading specialist who had conducted the recent comprehensive

assessment for the district. The complainant stated that if the district was unable to meet on the 17<sup>th</sup>, then the meeting would have to be held the following week.

After checking with staff, the Director emailed the complainant on April 14<sup>th</sup> to say that the district would not be able to meet on the 17<sup>th</sup>. The Director proposed April 21<sup>st</sup> or 22<sup>nd</sup> at 3:15 as possible options. The complainant responded on the 14<sup>th</sup> to say that neither the 21<sup>st</sup> or 22<sup>nd</sup> was a workable option but that "Thursday" was still a good day for the complainants.

The Director responded on the 14<sup>th</sup> asking if the complainant would be "ok if the general ed teachers were not in attendance if we met **Thursday, April 24<sup>th</sup>**" (emphasis added).

On April 17<sup>th</sup>, the complainant emailed the director saying that since she had "not heard back about meeting **today** (emphasis added), I would like to get a time scheduled and set in the next two weeks." The Director responded referencing her April 14<sup>th</sup> email wherein she had indicated district staff could not meet on April 17<sup>th</sup>. The Director again asked the complainant if an April 24<sup>th</sup> date was workable.

The complainants assert that they wrote the Director stating that they "were prepared to meet last Thursday (April 17<sup>th</sup>) and (did) not understand why the school was unable to complete the process with the individuals we requested." The Director responded on April 22<sup>nd</sup> saying, "certain members of the IEP were not able to meet last Thursday which is why that particular date did not occur." The Director again asked the complainant if the April 24<sup>th</sup> date would be workable and stated that if the complainants were not available on the 24<sup>th</sup> then April 28<sup>th</sup> or 29<sup>th</sup> would work for the district.

On April 23<sup>rd</sup>, the Director contacted the complainant to see if she would be available for an IEP Team meeting on April 24<sup>th</sup>, 28<sup>th</sup>, or 29<sup>th</sup> or on May 1<sup>st</sup>. On April 25, 2014, the district provided the complainants with prior written notice of an IEP Team meeting to be held on April 29, 2014. The complainants waived their right to a 10-day prior notice on April 29<sup>th</sup>.

The IEP Team met on April 29, 2014 and completed the IEP.

There is sufficient evidence to indicate that the district has made repeated attempts to schedule team meetings for the purpose of reviewing and revising this student's IEP. The complainants have also proposed a number of meeting dates, but the parties were not able to arrive at mutually agreed-upon meeting times until April of 2014. Since the delays in setting IEP Team meetings were the result of the scheduling difficulties of **both** parties, the district cannot be held solely responsible for the delay in completing the review/revision of the student's IEP. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Two: The district did not provide Draft IEP goals to the complainants on the same schedule as those goals were provided to district staff thereby denying the complainants adequate time for preparation for the annual IEP review meeting.**

Comments regarding 34 C.F.R. Part 300 note on page 46678 of the Federal Register, August 14, 2006, that "public agency staff (should) come to an IEP Team meeting prepared to discuss...preliminary recommendations." Districts are not encouraged to "prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs." However, if the district develops a draft IEP prior to the meeting, the district should make it clear to the parents that the services proposed by the district are preliminary recommendations for review and discussion with the parents. "The public agency should provide the parents with a copy of the draft proposals...**prior to the IEP Team meeting** (emphasis added) so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP." The comments do not specify any timeline for the provision of a copy of a draft document. It is also important to note that these comments were provided by the Office of Special Education Programs (OSEP) as guidance and are not requirements of law or regulation.

The complainants contend that emails from the Director on April 8 and 10, 2014 indicated that the district had developed proposed goals with input from the Reading Specialist hired by the district to conduct a comprehensive assessment of the student's reading skills. According to the complainants, they sent an email to the Director on April 21, 2014 asking that draft goals be provided to them once those proposed goals had been reviewed by district staff with the individual who had instructed the student in English while he was suspended from school. The complainants state that the Director responded via email on April 22, 2014 saying, "Once a meeting date is arranged I will send the draft IEP to you for review." On April 23<sup>rd</sup>, the complainants sent an email to the Director requesting that the draft IEP be sent immediately, but by the time of the filing of this complaint on April 25<sup>th</sup>, a draft document had not yet been provided to the complainants.

The district did opt to develop a draft IEP and asserts that the complainants were sent draft copies of the revised IEP on March 25, 2014 in preparation for the IEP Team meeting on April 3, 2014. An email from the complainant to the Director dated March 26, 2014 indicated that the complainants did not receive the attached draft which was subsequently re-sent by the Director on March 28<sup>th</sup>. Following IEP Team meetings on April 3 and 7, 2014, the district made revisions to that draft and sent the complainants an updated document on April 25, 2014 in preparation for the IEP Team meeting on April 29<sup>th</sup>.

The complainants were provided with a draft of the district's proposed IEP 6 days prior to the IEP Team meeting on April 3, 2014. They were given a revised draft

five days prior to the IEP Team meeting of April 29, 2014. 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 failed to substantiate noncompliance with special education laws and regulations on issues presented in this complaint. Therefore, no 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).

JUN 04 2014

**Kansas State Department  
of Education**

**KSDE**

**Special Education Services**

**Complaint Investigation Report**

<b>Complaint Investigator (CI):</b>	<b>Richard J. Whelan</b>
<b>Complaint Filed:</b>	<b>May 6, 2014</b>
<b>Report Completed:</b>	<b>June 3, 2014</b>
<b>Complaint Number:</b>	<b>14 FC</b>

This report is in response to a complaint of noncompliance filled under K.A.R. 91-40-51. \_\_\_\_\_ a resident of \_\_\_\_\_, Kansas USD \_\_\_\_\_, filed the complaint on behalf of her son, \_\_\_\_\_ [DOB: \_\_\_\_\_].

During the 2013-2014 school year, the student was in the 1st grade at the USD \_\_\_\_\_ Elementary School. His primary special education classification is "Specific learning disability" [K.A.R. 91-40-1 (mmm)].

**Background**

The parent’s written formal complaint alleged racial discrimination by the district. Because the Kansas State Department of Education is not authorized by law or regulation to investigate this allegation, this report will focus only upon allegations of district noncompliance with special education laws and regulations. Additionally, the parent’s complaint alleged that the district’s noncompliance started in August 2011 and continued through the date the complaint was filed. However, K.A.R. 91-40-51 (b) (1) states that the complaint “shall allege a violation that occurred not more than one year before the date the complaint is received” at the Department, which in this case was May 6, 2014. Federal special education regulations at 34 CFR 300.153 (c) set the same time limit of a calendar year.

Since November 28, 2012, when the parent withdrew the student from the district, the student was in a home school setting through May 2013. On August 14, 2013 the student was enrolled in the first grade at a USD \_\_\_\_\_ school, and has continued in that capacity for the remainder of the 2013-2014 school year. Based upon these facts, the CI limited the investigation to alleged district noncompliance for the period of August 1, 2013 through May 6, 2014.

The parent’s written formal complaint contained statements pertaining to dissatisfaction with the district’s processes for (a) the Multi-Tier System of Supports (MTSS), [i.e., general education interventions implemented prior to an initial special education evaluation] for the student; (b) areas to be assessed during an initial special education evaluation of the student; (c) determining the student’s eligibility, first as a student with a disability, and second, his needs for special education services; (d) the specific identification of the student’s IEP special education services and (e) his proposed special



education placement. These processes are the parent's concerns, and the relevant statements related to each concern are addressed in this report.

### **Complaint Concerns, Facts, and Conclusions**

When "parent" is used in this report it refers to the student's mother. "Parents" refer to the student's mother and father.

The **first concern** is related to the district's use of MTSS procedures for the student.

Under this concern, the parent alleged that the district did not have supports in place so the student could stay in school and learn.

From August 16, 2012 through November 27, 2012, the student attended kindergarten in a district school. During this time period the student exhibited numerous misconduct incidents so the district started MTSS procedures on August 28, 2012, and continued the general education interventions to November 28, 2012. On this date, the parent withdrew the student from the district and provided home school for him.

The parent decided to enroll the student in the district as a first grade student for school year 2013-2014. On August 9, 2013, the student's mother and father and several school staff members conducted a MTSS meeting to address supports to help the student be successful during the school year. Examples of supports were a quiet room to use if the student became upset, and a daily communication sheet. Subsequent MTSS meetings to address the student's academic and social behavior needs were held on October 8, November 4, 14, and 22, 2013. In addition to academic interventions such as single word matching, the supports included teaching prosocial replacement behaviors for asocial incidents, and reinforcing the occurrences of those prosocial behaviors.

Based upon these facts, the CI could not substantiate that the district did not comply with K.A.R. 91-40-7 (c) pertaining to General Education Interventions (GEI/MTSS), 34 CFR 300.226 related to early general education interventions, and Response to Interventions (RTI) as described in 34 CFR 300.307 (a) (2).

The **second concern** is related to the initial evaluation process used for the student.

Under this concern, the parent alleged that district personnel did not respond to her request for testing the student until a year passed.

During the October 8, 2013 MTSS meeting, the parents told the school staff members of their intention to schedule an evaluation the student at Children's Mercy Hospital in Kansas City Missouri, and that they would contact the school if the hospital staff needed information. A district psychologist, who was present during the meeting, informed the parents that the district would conduct an initial evaluation, but the parents declined because they wanted a third-party evaluation.

On October 29, 2013, the school counselor, via email to the parent, repeated the district's willingness to conduct an initial evaluation of the student. The parent's response on the same date stated that she would continue to rely upon the student's pediatrician for guidance which may, at a later date, include requesting the district to complete an evaluation.

At the MTSS meeting on November 4, 2013, the school staff told the parents that the district would pay for the student's evaluation at Kids TLC, a psychiatric treatment center in Olathe, Kansas. The district also suggested an initial evaluation process that would use an interim location in a district school with specialized knowledge to evaluate the student's academic, social and emotional needs. The parents declined both suggestions because they preferred to rely upon the student's physician for an evaluation, and later an evaluation at Children's Mercy Hospital.

At a November 22, 2013 MTSS meeting, the district gave the parent a prior written notice (PWN) for an initial evaluation of the student, and a request for her written consent to conduct it. This proposal included new and existing information relevant to the students suspected disability. It also included a plan to conduct the evaluation while the student was temporarily located in a center base classroom for students with learning and behavior problems at another district school. The parent refused to give consent for the proposal. The district then proposed to complete the initial evaluation at the student's home school. The parent stated that she would give written consent to the November 26, 2013 PWN if the evaluation was limited to occupational therapy, physical therapy, academic performance, and cognitive ability. That is, the parent would not consent to the district's PWN to conduct new evaluation of the student's social, emotional and behavioral status. The parents preferred to use private providers to obtain this information and also agreed to share it with the student's evaluation team.

On December 4, 2013, the parent sent a letter to the school principal in which she requested a "complete comprehensive educational evaluation" of the student. The principal sent an email to the parent to ask for clarification because the parent had previously given written consent for the student's initial evaluation on November 26, 2013. That is, did the parent now want to include the social, emotional, and behavioral new information in the process? The parent replied on December 6, 2013 that her letter did not alter the conditions for the previous consent.

In summary, the district offered an initial evaluation process on October 8, 2013, and repeated the offer several times until the parent gave written consent on November 26, 2013. There is no documentation that the parents requested an initial evaluation before December 4, 2013, and that request was made after the parent had previously given written consent for it.

Based upon these facts, the allegation is not substantiated.

The **third concern** is related to determining the student's eligibility for special education services.

Under this concern, the parent alleged that the district did not accept another agency's diagnosis of the student.

On January 2, 2014, a primary care physician in private practice diagnosed, without treatment recommendations, the student with Inattention and Oppositional Defiant Disorder. The parents gave this one-page document to the district.

On April 2, 2014, a Kansas University Medical Center clinic completed a one-page Visit Summary of an evaluation of the student, and the parents gave a copy to the district. The findings included (a) no autism spectrum disorder; (b) ADHD-combined type; (c) ODD by history; and (d) monitor for any emerging characteristics of a mood disorder. The report included a recommendation to "complete the IEP process, including behavior supports", and complete a "functional assessment of challenging behaviors at school to be clear about environmental triggers"

The district's March 27, 2014 evaluation report of the student included a full reference to the physician's one-page report. The student's April 10 IEP referenced both reports, plus a note that the student was seeing a psychologist for therapy. The third party reports were considered by the district in determining that the student has a disability and is eligible for special education services, and were also considered in developing interventions and supports included in the student's IEP.

Based upon these facts, the allegation is not substantiated.

The **fourth concern** is related to specific IEP services for the student.

Under this concern, the parent alleged that she has to provide transportation for the student. Also, the parent stated that the district changed staff members providing services to the student, thus renegeing on an agreement to maintain staff stability which the student needs to make progress in academic and behavioral areas.

In the April 10, 2014 IEP, under transportation, is the following statement: "The student is eligible for transportation, but the parent(s)/guardian chooses not to utilize district transportation." However, the district's draft IEP indicated that the student was eligible for transportation as a related service. Also, the April 10, 2014 PWN for initial special education services and educational placement indicated that the student was eligible for transportation services, but the parents decided to continue to transport him to and from school until they decided to contact the school to make other arrangements. The parent gave written consent to implement the initial IEP on April 15, 2014.

Given these facts, the allegation related to transportation is not substantiated.

With regard to the concern related to staff stability, the student's initial special education services started on April 15, 2014 and were scheduled to be reviewed on October 9, 2014. Until the end of the 2014 spring semester, the student was placed in a special education classroom with a special education teacher and a paraeducator because of aggressive behavior which was, at times, destructive and physical toward others. Initially, the special education services were provided by district staff members from another location until a permanent staff member was trained. However, the student directed aggressive comments and actions toward the new paraeducator although the data on misconduct incidents were variable before the new staff member started, and could have also been related to increased academic expectations. In any event, the special education teacher increased her direct instruction time in the class room, and reduced the paraeducator's contact with the student. Thus, the district responded to the parent's concern about the impact of a new paraeducator upon the student's classroom. Further, there was no documentation in the IEP or other sources about staff stability as it is the district's responsibility to provide personnel to implement special education services. Nevertheless, the parent's concern about the new paraeducator was addressed in a timely manner to prevent any disruption in the student's program.

Based upon these facts, the allegation related classroom staffing is not substantiated.

The **fifth concern** is related to the student's proposed special education placement.

Under this concern, the parent alleged that the district proposal for the student's placement was too restrictive.

This allegation is associated with the MTSS processes before the student's IEP was implemented, after the IEP was in effect. On November 13, 2013 the student's inappropriate behaviors escalated to the point that other students were removed from the room. The student scattered materials, broke a TV with a stapler, and threw a stapler at a district administrator who intervened to calm the student.

The parents and school staff met several times to develop Tier 3, MTSS interventions which involve intensive interventions in small group or one-to-one settings. On November 22, 2013, the MTSS members planned for a one-to-one instructional setting with the intent to return the student to the classroom based upon his progress. At a February 12, 2014 MTSS meeting, the participants discussed the restrictive nature of the setting, and also noted that the student interacted with peers during a daily break. While this was a difficult time period for the student, his parents and school staff, it is clear from the documentation that all parties were focused upon assisting the student make a positive adjustment to the school settings. However, as noted above, the parent did not give even limited written consent to the student's initial evaluation until November 26, 2013 even though the district had offered to conduct one as early in the fall semester as October 8, 2013, and subsequently repeated the offer several times before the parent gave written consent to proceed with the initial evaluation.

The student's April 10, 2014 IEP addressed the nature of his placement in a setting where he received individualized instruction in academic content and acquisition of self-control skills, and time with selected general education peers. The team discussed options to the placement. One option was placement in one of the district's programs that provided services to meet the student's needs and was less restrictive in that the setting had several students and provided more opportunities for interaction with general education peers. However, the parents wanted the student to remain in the current setting while external evaluations were being completed and while medication options were being considered.

On May 14, 2014, the student's IEP team changed the student's placement from his current school to another location at the parents' request. The new setting will provide staff with specialized expertise to assist the student cope with school expectations, and will provide him, as he progresses, with additional opportunities to interact with general education peers. Also, the student will receive transportation as a related service. The parent gave written consent to this change of placement on May 14, 2014.

There is consensus among the parents, MTSS school staff members, and special education personnel that the student's MTSS settings and the setting for his special education services during this school year had limited his participation with general education peers. However, it is also clear to the CI that the parties exhausted MTSS initiatives before deciding upon a special education services and placement for the student during the current school year. In this instance, that placement was the least restrictive for the student because it and the special education services planned for him were reasonably designed to provide him with an educational benefit.

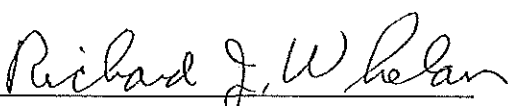
Based upon these facts and the documentation that the parents fully participated in decisions, including the nature of services and placements, regarding their child's education, the allegation is not substantiated.

### **Corrective Actions**

Based upon the Facts and Conclusions related to the formal complaint allegations, corrective actions are not required.

### **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  
SPECIAL EDUCATION SERVICES**

KSDE

**REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
ON NOVEMBER 6, 2013**

DATE OF REPORT: DECEMBER 5, 2013

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

### **Investigation of Complaint**

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_, Due Process Supervisor for \_\_\_\_\_ Public Schools on November 20, 25, and 26, 2013. The investigator spoke by telephone with the student's mother on November 19, 2013.

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

- IEP for this student dated November 9, 2012
- Notice and Consent for Special Education Action – Evaluation, Identification or Placement dated November 9, 2012
- IEP Progress Report dated October 10, 2013
- Proposed IEP for this student dated October 30, 2013
- Response to this complaint developed by the district entitled "(The student's) 2112-13 IEP Goals"
- Written response to this complaint provided by the district regarding a description of services to the student during the 2012-13 school year
- Written response to this complaint provided by the district regarding a description of services to the student during the 2013-14 school year and the use of prompting and cuing
- Child Study Team Agenda 2013-14

### **Background Information**

This investigation involves an 11 year-old girl who is enrolled in the sixth grade in her neighborhood school. She has been diagnosed with vision impairment (Extropia, Optic Nerve Hypoplasia, Nystagmus, and Amblyopia). She has no light perception in her right eye. She wears glasses to correct near and distance vision in her left eye.

An IEP was developed for this student on November 9, 2012 while she was enrolled in her neighborhood elementary school. An Annual IEP Team Meeting was held at the student's middle school on October 30, 2013 for the purpose of reviewing and revising the student's IEP. The district proposed a new IEP at that time, but consensus was not reached, and to date a new plan has not been implemented.

### **Issues**

Federal regulation, at 34 C.F.R.300.341, state that a student's IEP must be implemented as written.

The parent contends that the district failed to implement the student's November 2012 IEP in two areas:

**One: The district is not providing the interrelated special education services called for in the student's IEP.**

Kansas statute, K.S.A. 72-988(b)(6), provides that parents have the right to consent, or refuse to consent, to any substantial change in placement of their child or to any material change in services as outlined in the student's IEP. Also, K.A.R. 91-40-27 (a)(3) states that "...an agency shall obtain written parental consent before making a...substantial change in the placement of...an exceptional child..." As defined by K.A.R. 91-40-1(sss) "'(s)ubstantial change in placement' means the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment." K.A.R. 91-40-27(mm) defines a "material change in services" as an "increase or decrease of 25% or more of the duration or frequency of a special education service, related service, or supplementary aid or service specified on the IEP of an exceptional child."

The "Assignment, Dates and Services" section of the student's November 2012 IEP indicates that beginning November 9, 2012 and ending November 9, 2013, the student was to receive 180 minutes per day of special education service 5 days per week. According to the IEP those services were to be provided in an "Interrelated" Special Education classroom in a regular education building.

The following statement is also included in the "Assignment, Dates and Services" section in response to the question, "When will the student NOT participate with non exceptional (sic) peers in the regular education classroom and in extracurricular and other nonacademic activities."

"(The student) will not participate with her non-exceptional peers during Reading, Writing, and Math. She may be pulled out of the regular classroom for the building's Math and Reading Intervention programs,



along with her non-exceptional peers. Potential harmful effects may include (the student) feeling somewhat isolated from her nonexceptional (sic) peers and she may miss some activities in the general education setting.”

A form signed by the parent on November 9, 2013 and entitled “Notice and Consent for Special Education – Evaluation, Identification, or Placement” reflects that the district recommended continued “Visual Impairment” services “by/in Inter-related” for 180 minutes 5 days per week for 36 weeks. The form also states that the student would be spending from “61-100%” of her school day in special education. As stated on the form, the district considered “decreasing the amount of time in the special education classroom...(and) rejected (that option) in order to best meet (the student’s) educational and social needs...”

During the first quarter of the 2012-13 school year, the student’s reading needs had been addressed for 45 minutes a day through what the district calls a “Class Within a Class” (CWC) model. Under that model, a special education teacher – working with a general education teacher – supported this student and 6-7 other identified special education students in a classroom of 22 students. At the end of the first 9 weeks, it was determined that the student’s reading-related needs would be better met through 90 minutes of pullout services in an “interrelated” classroom with 3 other special education students, and the student’s IEP was revised on November 9, 2012 to reflect that change. No one from the student’s current middle school attended that meeting because at that time no final decision had been made as to which middle school the student would attend.

The student’s math needs were addressed throughout the 2012-13 school year with 60 minutes of interrelated pullout services in a special education setting with 4 other students. For writing, the student spent 30 minutes a day in the interrelated special education classroom working with 2 other students, or she and her special education teacher joined those 2 students in the regular education setting if it was determined that the lesson was appropriate for them. In total, then, the student received 180 minutes of direct special education services in an interrelated special education classroom from November 2012 through May 2013.

In addition to these services, the student received “Tier 3” support (not considered special education) for reading and math, working in small groups of 5-8 general and special education students.

According to the parent, the district has since the start of the 2013-14 school year provided all services to the student through a “Class Within a Class” (CWC) model rather than serving the student through an “interrelated” special education classroom as specified by her November IEP.

The district stipulates that it has exclusively used the "CWC" model to provide services to the student during this school year. According to the district, the student's IEP manager and the Assistant Principal explained this service model to the parent in a meeting in September 2013. The parent was not provided with prior written notice of any change the student's program.

The district reports that the "CWC" model at the student's current school is structured differently than was the model used at her elementary school. At this middle school, CWC classes are taught by either a general education teacher and a Paraeducator or other support staff or (as in the case of classes attended by this student) by a special education teacher with Paraeducator support. Since advancing to the Middle School setting, the student has, according to the district, been receiving 270 minutes of special education services through CWC courses taught by a special educator. The schedule is divided as follows:

Language Arts: Ninety (90) minutes.

There are 13 students in the class (including the student). Ten of these students (77%) are identified special education students. A special education teacher instructs the class with assistance from a Paraeducator. The period is split into two 45-minute sections, one to focus on core instruction, the other on Tier 3 interventions.

Social Studies: Forty-five (45) minutes.

There are 15 students in this class; 13 (or 87%) are identified special education students. The class is taught by a special education teacher who is assisted by a Paraeducator.

Science: Forty-five (45) minutes.

There are also 15 students in this class, and 13 (87%) are identified as exceptional. Again, the class is staffed by a special education teacher and a Paraeducator.

Math: Ninety (90) minutes.

Fourteen students (including 12 – or 86 percent – identified special education students) are taught by a special education teacher with help from a Paraeducator. The period is split between core (45 minutes) and Tier 3 (45 minutes) instruction.

While labeled as "CWC," this student is currently placed in an interrelated special education classroom setting for 270 minutes a day – 90 minutes per day more than is stated in her November 2012 IEP. Those 90 minutes represent an increase of 50% over the level of services consented to by the parent on November 9, 2012. The district did not conduct an IEP Team meeting to discuss a change in services or placement, did not provide the parent with written notice of this proposed change in the student's placement, and did not obtain the parent's written permission for that change.

A violation of special education laws and regulations is substantiated.

### **Additional Comments**

In the course of this investigation, the investigator determined that the district does not apply a common lexicon when defining the "Class Within a Class" model. The student's elementary school appears to follow the common conception of the CWC model (Hudson, 1989) for serving students who are categorized as having mild and moderate handicaps. For these students, the special education teacher works with the general education teacher in a collaborative setting to co-teach. The general education teacher provides grade level curriculum knowledge while the special education teacher provides strategic modifications and presentation techniques to mediate the content of academic subjects. Together these two professionals design lessons and activities to accommodate students with mild and moderate handicaps to afford these students access to understanding the curriculum. Emphasis is on equalizing learning opportunities through effective teaching strategies and not curriculum adaptations (Hudson, 1989). As a result, the curriculum is presented so all students can understand and use the concepts presented.

The student's Middle School is not implementing this model of CWC. Instead, the term "CWC" has been applied to classrooms taught by a single special educator with Paraeducator support. Each of the student's core content classes has an identified population of special education students of at least 75%, not the 33% typically associated with the traditional CWC model.

Because the student's IEP team had in November of 2012 determined that her needs could not be adequately met under the CWC model used by her elementary school, the parent had reason to expect that her daughter could not be successful under that model at the Middle School. The use of the term "CWC" when applied to two very different models of instruction no doubt contributed to the parent's belief that her daughter has been placed full time in a general education setting.

Also in the course of this investigation the investigator discovered that this Middle School relies ***solely*** on the CWC model to address the concept of a "continuum of services." Kansas regulations, at K.A.R. 91-40-1(II), define "least restrictive environment (LRE)" as the educational placement in which, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Children with disabilities are to be removed from the general education environment only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services or modifications cannot be achieved satisfactorily (K.S.A. 72-976(a)).

In determining the location for special education and related services the IEP team must consider the ***continuum of educational placements necessary to***

**implement the IEP.** The educational placement is to be determined at least annually and should be based upon the child's educational needs (K.A.R. 91-40-21).

In the case of this Middle School, the only placement option available to students with mild to moderate disabilities is – according to the district – a greater or lesser enrollment in a twelve to fifteen-student CWC class taught by a special education teacher.

The Progress Report for this student dated October 10, 2013 indicates that for 3 of the student's 5 Annual Goals (those related to reading and math), her "Mastery Level" (progress) was "not sufficient to meet (the goal) by the next progress report period." Though she has made some progress toward attainment of her writing goal, "the goal may not be met (and) instructional strategies may need to be changed." It appears that the student's "performance is at or above what is required" only with regard to her orientation and mobility goal – a skill not addressed during CWC class time.

In the opinion of the investigator, the IEP Team should, when convening its next IEP Team meeting for this and any other student, ensure that a **continuum** of placement options is considered. As stated in the Child Study Team Agenda for 2013-14 presented by the district, "A comprehensive school does offer a Continuum of Services for all students with disabilities. When considering CWC for a student...make sure that it is a team decision and that it is IEP/data driven."

**Two: The district is not providing the student with an accommodation that is specified in her November IEP.**

According to the parent, the district has not – during the 2013-14 school year – accommodated the student by "prompting and cuing" her for assignments and assessments. The parent states that her daughter often reports that she did not understand an assignment but received no assistance from classroom staff. The parent contends that because the student is placed full time in a regular education setting, she is being lost in the crowd and is not getting the help promised by her IEP.

The "Assessment/Accommodations" page of the student's November 2012 IEP contains two references to the use of prompting and cuing. The following statement is included under both "State Assessment" and "District Assessment:"

"Prompting and cuing should occur for the duration of all assignments/assessments in all settings."

According to the district, the student is being prompted and cued in all instructional settings. In her Language Arts class, she has been given preferential seating at the front of the classroom near the teacher to facilitate

teacher support during group instruction. The teacher and Paraeducator frequently check on the student, walking by to see if she is "where she needs to be while the class is occurring." The student is paired with other students who assist with prompting and cuing "while they are working an assignment or task." The teacher and Paraeducator provide prompts and cues before the student begins working on an assignment and while the student is working on the assignment as well as during assessments.

In her Math class, the student can see a visual aid on the SmartBoard while taking notes and can copy those notes for herself. Some notes are presented in a cloze format wherein students fill in blank portions of notes they have been given. A Paraeducator assists to ensure that the student is keeping up. Once assignments are given, the student is prompted to begin working if she does not do so on her own. Any time the student appears to be off-task, staff is available to refocus her. In this class as well, the student receives preferential seating at the front of the classroom.

In Social Studies and Science, either the teacher or Paraeducator check to see if the student is on task, offer assistance if needed, and prompt the student to complete assessments or to begin working on assignments.

While the investigator has not been present in all of the student's classes throughout the 2013-14 school year in order to guarantee that the student has been prompted and cued at every opportunity, it does appear that the necessary supports are in place in order for the student to have been provided with this accommodation. 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. Violations have occurred in two areas:

- 34 C.F.R.300.341 state that a student's IEP must be implemented as written, and
- K.A.R. 91-40-27 (a)(3), which requires an agency to obtain written parental consent before making a material change in the services to or a substantial change in the placement of an exceptional child. Specifically, the district failed to obtain the written consent of the parent before increasing by more than 50% the time the student spends in a special education setting.

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

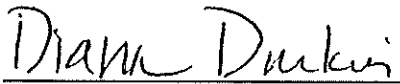
- 1) Submit, within 20 days of the receipt of this report, a written statement of assurance to Special Education Services stating that it will comply with
  - a. 34 C.F.R.300.341, by implementing this student's IEP as written,
  - b. K.S.A. 72-988(b)(2), by providing prior written notice before making a change to services or placement specified in a student's IEP; and
  - c. (c) K.A.R. 91-40-27 (a)(3), by obtaining parental consent before making a material change in the services to or a substantial change in the placement of an exceptional child.
- 2) Upon receipt of this report, immediately schedule an IEP Team meeting to be held prior to the end of the semester on December 20, 2013 to discuss the delivery of services and the educational placement needed to address the unique needs of this student.
- 3) Provide Special Education Services with a copy of the notice of the meeting referenced above in Item 2 and with a copy of the IEP developed at that meeting.
- 4) If the IEP Team referenced in Item 2 determines that a material change in services or a substantial change in placement for this student is to be made, provide Special Education Services with a copy of the written notice of any proposed change, and the written consent for that change, that has been signed by this parent.
- 5) Within 20 school days of the date of this report: (a) conduct a review of all files of exceptional students who attend this middle school and receive services under the CWC model to determine whether or not parents were given prior written notice if service under that model constituted a change in placement or a change in services described in the IEP and whether written parental consent was obtained if service under that model represented a substantial change in placement or a material change in services for the student; (b) prepare and submit to Special Education Services a written report of the results of the review referred to above; (c) prepare and submit to Special Education Services a written plan specifying the actions the district will take to address any instance in which a change of placement or services was found in the review to have occurred without prior written notice and, if needed, written consent; and (d) prepare and submit to Special Education Services a written plan specifying the actions the district will take to insure that IEPs of exceptional students entering this middle school in the future are implemented as written and changes in services or placements are made only with parent participation and with required written notices and consents.

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).



MAY 28 2014

Kansas State Department  
of Education

KSDE

Special Education Services

**Complaint Investigation Report**

<b>Complaint Investigator (CI):</b>	<b>Richard J. Whelan</b>
<b>Complaint Filed:</b>	<b>April 28, 2014</b>
<b>Report Completed:</b>	<b>May 22, 2014</b>
<b>Complaint Number:</b>	<b>14 FC</b>

This report is in response to a complaint of noncompliance filed under K.A.R. 91-40-51. \_\_\_\_\_ (hereinafter parent), a resident of \_\_\_\_\_, Kansas USD \_\_\_\_\_ filed the complaint on behalf of her grandson, \_\_\_\_\_; [DOB: \_\_\_\_\_].

Currently, the student is in the 7<sup>th</sup> grade at the USD \_\_\_\_\_ Middle School. His special education primary classification is "Specific learning disability" [K.A.R. 91-40-1 (mmm)] and his secondary classification is "Traumatic brain injury" [K.A.R. 91-40-1 (www)].

**Complaint Concerns**

The **first concern** is that the student's in-school-suspension (ISS) from February 2014 to the present time should constitute out-of-school suspensions (OSS).

The **second concern** is that the student, while in his language arts class, has been forced to sit with his desk toward the wall since February 2014 to the present.

**Documents and Interviews**

The CI reviewed the following documents (referred to as D in this report) related to the concerns:

1. The parent's formal written complaint, including (a) a physician's determination, dated November 2, 2012, that the student has an acquired brain injury; (b) a written statement of "parental input" for the student's IEP meeting; and (c) an e-mail from the parent to the student's IEP manager regarding ISS, and support for the student.
2. The student's current IEP (February 6, 2014), and Behavior Intervention Plan (BIP), February 14, 2014.
3. The student's reevaluation report, February 11, 2014.
4. The student's mental health evaluation report, January 27, 2014.
5. The student's ISS dates and services provided on those dates.
6. District documents regarding an April 2, 2014 meeting of the student's IEP team, and other responses to the parent's concerns.

The CI and a District Special Education Supervisor exchanged several e-mail letters about the parent's concern. On May 12 and 13, 2014, the CI and the student's parent had a telephone discussion about the concerns.

### **Facts and Conclusion**

The **first concern** is that the student's in-school-suspension (ISS) from February 2014 to the present time should constitute out-of-school suspensions (OSS).

The parent alleged that, because of numerous ISS days, the student has not received services as required for special education students in ISS. Further, the student has been denied the opportunity to participate with students without disabilities while in ISS.

The student is currently enrolled in all general education classes where he receives supplementary aids and services from a paraeducator who is supervised by a special education teacher. His IEP includes three academic annual goals, and one behavioral [learning how to verbalize feelings and express them appropriately] annual goal that is addressed by a school counselor. His IEP includes numerous accommodations inclusive of preferential classroom seating, shortened assignments, visual organizers, note copies, and a study-hall. His BIP is focused on teaching and reinforcing socially acceptable behaviors to increase compliance with the school's conduct code, and to replace noncompliant behaviors such as "blurting out" in class, swearing, verbal aggression, and physical aggression. The BIP does not contain any consequences for engaging in noncompliant behaviors listed [D 2].

The Office of Special Education Programs' (OSEP), U.S. Department of Education, published policy is that an ISS school day would not be considered an OSS school day if the student (a) is afforded the opportunity to continue to appropriately participate in the general curriculum, (b) continues to receive the services specified on the IEP, and (c) continues to participate with nondisabled children to the extent they would have in their current placement [71 Fed. Reg. 46715 (2006)].

Since February 1, 2014, through May 6, 2014, the student has been in ISS for 19 partial or total school days [D 5]. That is, on some school days the student was in ISS for two, four or all class periods. Examples of the student's behaviors that resulted in the imposition of an ISS include (a) loud refusal to comply with staff instructions, (b) obscene gestures, (c) verbal threats to fight another student, (d) making marks on a desk, and (e) theft from a teacher. These types of misconduct were identified in the student's IEP and the BIP as the focus of interventions to be provided by the school counselor and throughout the school day by general and special education instructional staff members.

At the student's middle school, an administrator may assign students, general and special education, to the school's Positive Alternative to School Suspension (PASS), an ISS room, as discipline for violating the school's code of conduct. A staff member supervises the PASS classroom during the school day.

When general and special education students are assigned to ISS, their teachers are required to bring their classroom work to them for the day. When a special education student is placed in ISS, a special education teacher from a "class within a class" classroom and/or paraeducators go to the ISS classroom to assist students. Also, when special education students are placed in ISS, their IEP manager spends time in the ISS classroom to assist them with general education and other IEP related assignments.

During the time the student has been in ISS, both general and special educations have been in the classroom. The ratio of special education to general education students in ISS has ranged from 1:6 to 3:3.

The district's documentation shows that the student, during typical ISS days, received services related to his general education classes, the services in his IEP, and the opportunity to participate in activities with general education students [D 5]. Therefore, even though the student's number of ISS days since February 2014 is a concern for the parent and school staff members, they are not OSS days.

Based upon these facts, the CI could not substantiate that the district's placement of the student in ISS had not complied with the services criteria explicated in the OSEP policy stated above.

### **Related Concerns**

During the investigation, the CI noted that the numerical count of ISS days varies by month. February had 4 ISS days; March had 8; April had 4; and May, as of May 6, had 3 ISS days. Because of spring break, March had a total of 15 school days; in contrast, April had 21 school days. However, three ISS days were imposed within the first four school days in May. Therefore, the ISS pattern of days per month appears to be random instead of the anticipated monthly decreases in incidents resulting in ISS because the BIP and counseling sessions were prospectively proposed to help the student learn appropriate responses to school expectations for appropriate behavior. In response to this ISS pattern, on April 2, 2014, during an IEP meeting, the parent requested, and other members of the student's IEP team agreed to start, a Functional Behavioral Assessment (FBA) of the student which may provide new or revised interventions to reduce the numbers of ISS days during the next school year. Also, because the parent is concerned about the student's academic performance, the IEP team may also use FBA to address academic as well as misconduct issues. The student's BIP was also revised after the April 2, 2014 meeting.

Part of the parent's concern was that the district, other than staff comments at the IEP meeting on April 2, 2014, did not respond in writing to several of her written requests, e.g., an FBA; amend BIP; student should not be punished for behaviors related to his disability; conduct an assistive technology evaluation; add a visual schedule to the IEP; all staff receive TBI training; receive ESY [D 1]. The district addressed many of the parents previous requests, except her request that the student be removed from his language arts class, when it revised the student's IEP, completed a multidisciplinary

evaluation, and a comprehensive mental health evaluation in January and February 2014. For example, the evaluation report indicated that the student did not need assistive technology service [D 2, 3, 4]. As of the date of this report, the FBA is in progress and the BIP has been revised, and the student's IEP contains visual aids and graphic organizers.

While the student's IEP team has responded to several parental concerns, past and present, there is no documentation that its actions to revise the BIP and initiate an FBA as well as its responses to the parent's other requests during the April 2, 2014 meeting such as ESY, assistive technology evaluation and TBI training was in accord with the requirements of 34 CFR 300.503 Prior notice by the public agency:

(a) *Notice.* Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time (15 school days in KS) 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.

Also, there is no documentation that the district gave the parent prior written notice of its intent to conduct an FBA (reevaluation) along with a request for written consent. The following paragraph addresses this requirement:

*Letter to Christiansen, Office of Special Education Programs, February 9, 2007*

If an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised, we believe that the FBA would be considered a reevaluation under Part B for which parental consent would be required under 34 CFR 300.300(c).

The absence of responses to parental requests, and the initiation a special education action which requires written parental notice and consent prior to taking such action, are serious procedural errors, they did not, in this case, function to deny the student a free appropriate public education (FAPE). Nevertheless, the district has not complied with Kansas and Federal special education regulations related to the matters of providing prior written notices of acceptance or rejection of parental requests for changes or additions to the student's special education services, and providing prior written notices and requests for parental written consent when the district proposes to conduct a reevaluation.

The **second concern** is that the student, while in his language arts class, has been forced to sit with his desk toward the wall since February 2014 to the present.

The student's current IEP, under the preferential seating classroom accommodation, has the following statement:

[Student] will be more successful if he is seated near the teacher and close to visual instructions. [D 2]

The student's IEP case manager made the following comment about this concern:

It is "preferential" seating in that it is where [student] has few distractions and can see things easily. He is free to move his seat to face instruction and participate in class discussions, etc., but completes his independent work facing the wall to eliminate distractions. [D 6]

The case manager also stated that the student moves his chair to face the front of the room for classroom instruction and discussion, turns to face the wall when working to complete independent work, and does so without objection.

In general, the current IEP statement about preferential seating and the case manager's description of how it is implemented are in agreement. That is, the student has the opportunity to access instruction and participate in class activities. And, when independent work is required, he turns his desk to the wall as a means to reduce distractions which interfere with task completion.

Some classrooms provide a three-sided learning carrel for students; others set up a space enclosed by book shelves. The options to devise "preferential seating" are many and teachers may change them from time to time depending upon student reactions to them, but as long as each option is compliant with an IEP, in this case "near the teacher and close to visual instructions," it may be implemented.

The parent's concern about this preferential seating option should be addressed at the student's next IEP meeting, because, based upon the facts related to this concern, the CI could not substantiate district noncompliance with special education laws and regulations.

### **Corrective Actions**

Based upon the Facts and Conclusions related to the parent's first concern, a corrective action is required.

1. The district's director of special education, within 15 school days from the date of this report, shall correct the procedural errors cited above by scheduling an IEP meeting to address any outstanding or new parental requests regarding the student's program. The district shall develop written notices to accept or reject the parent's requests.

2. The director, by or before August 15, 2014, will send a written policy to the special education staff members at the school the student attends regarding (a) the use of a Prior Written Notice form for responding to parental requests about special education services, and (b) the conditions when prior written notices and requests for parental written consent are required for special education actions.

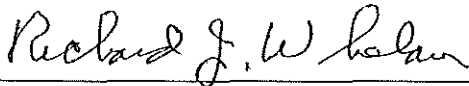
The director shall send a copy of the required documents noted above to Mr. Mark Ward, KSDE/SES; 900 SW Jackson Street, Suite 620; Topeka, Kansas 66612-1212 on the same date the documents are given to the parent and on the same date the policy is sent to special education staff members at the school.

Finally, the cooperative director, within 10 calendar days from the date of this report, shall submit to Mr. Ward 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, 120 SE 10<sup>th</sup> Avenue, Topeka, Kansas 66612-1182 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).

# 14FC08A

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 April 28, 2014, by \_\_\_\_\_, on behalf of her grandson, \_\_\_\_\_, against Unified School District No. \_\_\_\_, \_\_\_\_\_ Public Schools. \_\_\_\_\_ is a person acting as a parent under Kansas law and has a right to access and review information in the education records of this student. She will be referred to as the “parent” in the remainder of this decision. The complaint (14FC\_\_\_\_-002) alleged that: (a) the student’s in-school suspensions (ISS) from February 2014 to the filing of the complaint should constitute out-of-school suspensions (OSS); (b) the school district failed to properly address her concerns and requests; and (c) the district improperly implemented an accommodation specified in the IEP as “preferential seating” by having the student turn his desk toward an adjacent wall when working independently.

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 all of the allegations, was issued on May 22, 2014. That report concluded that there were violations of special education laws and regulations relating to the requirements for responding to parent requests through the use of an IEP meeting and a prior written notice.

Thereafter, on June 4, 2014, the parent filed an appeal regarding the issues addressed in the Initial Report, which the investigator concluded were not a violation of special education laws and regulations. Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the original complaint, the report, information contained in the KSDE file regarding this matter, the parent’s notice of appeal, and the district’s written response to the appeal. The Appeal Committee now issues this final report.

## DISCUSSION OF ISSUES ON APPEAL

### ISSUE 1

In the first issue on appeal the parent contends that, although the investigator used the correct standard to determine that the days of in-school suspension should not be considered as days of out-of school (OSS), the decision is in error because of other factors, including that some of the ISS days were full school days, some of the days of ISS were followed with after school detentions on the same day, at least some of the student’s behaviors were a manifestation of his



disability, and that the student did not progress academically during days in which he was placed in ISS.

The appeal committee agrees that the complaint investigator applied the correct standard. In the commentary portion of the federal regulations issued by the United States Department of Education, the Office of Special Education Programs (OSEP) said:

It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in § 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy.

71 Federal Register, Aug. 14, 2006, p. 46715

This policy statement by the United States Department of Education contains its own contingencies. It is not contingent upon whether the ISS removals were for full days or partial days, or whether the ISS days were on the same days the student was subject to after school detention, or even whether the student made academic progress in the ISS or whether the behaviors leading to ISS are manifestations of the child's disability. The policy is contingent upon three criteria: (1) the child must have at least the opportunity to continue to participate in the general curriculum; (2) the child must continue to receive services specified on the IEP; and (3) the child must continue to participate in educational activities with nondisabled children to the extent specified in the child's IEP.

The investigator determined that these criteria were met. Teachers brought classroom work to the ISS room so the student could continue to participate in the general curriculum, special education staff members came to the ISS room to deliver instruction specified in the IEP; and the ISS room serves as an ISS room for both children with disabilities and for nondisabled students.

The committee sustains the conclusion of the complaint investigator that a violation of special education laws and regulations is not substantiated on this issue.

NOTE: The committee sustained the conclusion of the complaint investigator on this issue because it agreed with the investigator's interpretation of law. However, the committee also cautions the school district that overuse of in-school suspensions, even when those suspensions meet the criteria set by OSEP, as referred to above, is not a good practice. In some instances, the Committee believes overuse of in-school suspensions could result in a failure to make a free appropriate public education available to the child who is subjected to those in-school suspensions. As for this particular case, the committee believes the 19 instances of in-school suspensions of this student in a four month period is problematic. However, it is the Committee's understanding, from information in the complaint report, that the student's behavior intervention plan was recently revised. If the revised behavior intervention plan does not reduce the use of in-school suspensions for this student in the future, the Committee strongly encourages

the student's IEP team to continue to work toward developing an effective behavior intervention plan that is effective in keeping this student in his regular classrooms.

## ISSUE 2

In the second issue on appeal, the parent challenges the investigator's decision that having the student move his chair away from a position facing the front of the classroom to a position where the student is facing an adjacent wall is consistent with a provision in the student's IEP regarding preferential seating. On this issue, the Committee agrees with the parent.

The IEP states that the student will receive preferential seating. The rationale provided for preferential seating in the IEP explains that the student "will be more successful if he is seated near the teacher and close to visual instructions." The Committee believes that the ordinary meaning of the term "preferential seating," along with the plain language used in the IEP to explain the rationale for the preferential seating, does not support the interpretation that this IEP provision was intended to be used to require the student to turn his desk away from the front of the classroom to an adjacent wall, where the student is no nearer to the teacher and where no visual instruction is provided.

In coming to this conclusion, the Committee is not indicating that requiring the student to turn his desk away from the front of the classroom to help reduce distractions while doing independent work is inappropriate. The Committee has only concluded that how this intervention is being implemented not consistent with statements in the student's IEP. If the IEP team wishes to address this particular intervention in the future, it may do so at a properly constituted IEP meeting.

The decision regarding this issue in the complaint report is overruled.

## OTHER MATTERS

The Committee also wishes to address two other matters raised by the parent in her appeal.

First, in her letter of appeal, the parent said: "District refused to amend his IEP to add my requests in the parental input." The parent had submitted to the district a document titled "\_\_\_\_\_ Parental Input," which included a list of 17 numbered requests. The investigator addressed this issue in the report under the title "Related Concerns." There, the investigator found that most of the parent's requests were addressed by the IEP team, but the district had failed to provide the parent with a Prior Written Notice of the team's decision. For this, the investigator determined there had been a violation of law, and corrective action was included in the report to address this issue. The corrective action requires the district to conduct another meeting to address all outstanding or new parent requests and to issue a Prior Written Notice regarding the decisions of the team. The Committee agrees with the investigator that the IEP team does need to respond to parent requests and to provide prior written notice of the team's decisions. The Committee also agrees that the corrective actions in the report adequately address this violation. However, the Committee also wants to clarify for the parent that although an IEP team must consider all requests of a parent, the team is not required to adopt those

requests. Thus, the fact that the team did not adopt the parent's requests is not, by itself, a violation of law.

Second, in her letter of appeal, the parent states: "Also the causes of many of the ISS were as a result of harassment and Bullying – an issue that was not addressed in the investigator's findings." The parent did not present this allegation in her complaint. In the department's letter to the parent and district regarding receipt of this appeal, dated June 4, 2014, both parties were notified that the appeal committee would limit its inquiry to the issues in the report and that no new issues would be addressed by the committee. The Committee would add that issues regarding bullying or harassment are not addressed by special education laws and regulations. Kansas statute, K.S.A. 72-8256, requires all local boards of education to adopt policies prohibiting bullying by any staff member, student or parent and to adopt and implement a plan to address bullying on school property, in a school vehicle or at a school-sponsored activity or event. Therefore, if parents believe they, or their child, are being subjected to bullying at school, in a school vehicle, or at a school-sponsored activity, they may properly present their concerns to the local school board of education.

### CONCLUSION

The Initial Report issued in this matter is sustained with regard to issue 1 and overturned with regard to issue 2.

With regard to issue 2, the Committee directs the district to inform all staff members who will be in this student's classrooms in the 2014-15 school year that this student may not be required to move his desk away from facing the front of the room. In addition, the district is directed to send Early Childhood, Special Education and Title Services a written statement of assurance that it will inform all staff members who will be in this student's classrooms during the 2014-2015 school year of this requirement. This written statement of assurance shall be delivered to Early Childhood, Special Education and Title Services no later than July 7, 2014.

If, during the 2014-15 school year, this student's IEP is changed to permit requiring the student to move his desk away from facing the front of the room, within 10 school days of such change, the district shall notify this agency of that change and provide a copy of the prior written notice specifying the change.

Kansas Special Education Regulations provide no further appeal. This Final Report is issued this 19th day of June, 2014.

APPEAL COMMITTEE:

\_\_\_\_\_  
Colleen Riley

\_\_\_\_\_  
Jana Rosborough

\_\_\_\_\_  
Laura Jurgensen



# 14FC09

## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #  
PUBLIC SCHOOLS  
ON NOVEMBER 27, 2013

DATE OF REPORT: DECEMBER 23, 2013

This report is in response to a complaint filed with our office by \_\_\_\_\_, the parents 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: (1) the decision of the IEP team that the student's behavior on September 24, 2013 was not a manifestation of the student's disability is incorrect because that decision is inconsistent with information included in the student's initial special education evaluation; and (2) the district has failed to provide a free appropriate public education (FAPE) because the services offered to the student in the alternative educational setting are insufficient to provide adequate growth toward the behavioral component of the student's IEP.

### Investigation of Complaint

The investigator conducted an on-site review on December 11, 2013, consisting of a discussion with the Director of Special Education and a review of all of the student's education records. In addition, the investigator spoke by telephone with the student's father on December 17, 2013.

### Jurisdiction

The student was expelled from school on September 30, 2013, for behavior which occurred on September 24, 2013. At the time of the behavior, the student had not yet been identified as a student with a disability. However, the student's parents had requested an evaluation of the

student on September 19, 2013. Under this circumstance, one in which a parent requests a special education evaluation prior to behavior which results in a long-term suspension, federal regulations state that the parents may assert all of the rights of the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. 300.534. That includes rights relating to the manifestation determination review and educational services during the period of a long-term suspension. Therefore, the Kansas State Department of Education has authority to conduct an investigation of the allegations made by the parents in this complaint.

There are two inherent difficulties for school districts attempting to comply with this regulation. The first is conducting a manifestation determination review to determine whether the student's behavior is a manifestation of the student's disability, at a time when the student has not yet been identified as having a disability. The second difficulty is determining what services a student will need during expulsion to continue to make progress on IEP goals when no IEP has been developed.

Although these are difficult tasks, this regulation requires IEP teams to address these two issues. In doing so, the IEP team must exercise a significant amount of judgment as to what disability the student is suspected to have, how that disability is likely to manifest itself through student behavior, and what goals might be likely set for the student if it is determined that the student is eligible for special education services.

It is important to note at the outset of this report that the law empowers IEP teams to make these kinds of decisions, not federal agencies or State Departments of Education. Accordingly, the Office for Civil Rights, which is the office within the United States Department of Education with authority to investigate complaints regarding children with disabilities in school, has developed a policy in which it refrains from assessing the appropriateness of decisions made by an IEP team, except under extraordinary circumstances [See, Corning-Painted Post (NY) School District., 46 IDELR 199 (OCR 2006)]. Likewise, although the Kansas State Department of Education has investigative authority to assess the appropriateness of decisions made by an IEP team, and to overturn IEP team decisions if necessary, it will not do so lightly.

### Background Information

The student is an 8 year-old boy who, before the incident which resulted in expulsion, was a general education student attending 2<sup>nd</sup> grade at a district Elementary School.

The sequence of relevant events is as follows:

- 9/19/13 The student's parents request an initial special education evaluation; a Prior Written Notice and Request for Consent form is completed and delivered to the parents; and the parents signed the form granting consent for the evaluation.
- 9/24/13 The student was involved in an extensive series of incidents and received a short-term suspension.
- 9/26/13 An IEP team was formed and conducted a Manifestation Determination Review (MDR). The team determined the student's behavior on 9/24/13 was not a manifestation of the student's suspected disability.
- 9/30/13 A disciplinary hearing was conducted. The hearing committee determined that the student would be expelled for the remainder of the 2013-2014 school year.
- 10/8/13 The director of special education sent an e-mail to the parents offering specified services to be provided during the period in which the evaluation team proceeded with the initial evaluation, and before an IEP was developed. This date was the 11<sup>th</sup> consecutive school day of suspension.
- 10/21/13 An eligibility meeting was conducted. The student was determined to be eligible for special education under the category of "Emotional Disturbance."

- 10/28/13 An IEP meeting was conducted and an IEP developed.
- 11/1/13 Parents were given a Prior Written Notice specifying the services the IEP team was offering during the student's expulsion.
- 11/27/13 The student's parents filed this complaint.

### **Behavior Subject to Discipline**

On Tuesday, September 24, 2013, the student left the music room without permission to get some cards from his classroom. When he returned to the music room, he started walking around the room and peeling notes off the wall. The teacher reminded him that he needed to be in his designated area. The teacher took the student's arm to lead him back over to his area and he started punching her in the stomach. The teacher then took hold of his arms so that he would stop punching. The student grabbed her arms. She was able to get out of his grasp and at that point buzzed the office calling for help. She told the student that he needed to leave the music room and have a seat in the hallway.

The student left the room and the teacher closed the door. Approximately one minute later, the student came back into the room and approached the teacher like he was going to attack her. The teacher sidestepped and then the student jumped onto her back. He got off the teacher's back and proceeded to roundhouse kick her backside. The student then grabbed a bag of manipulatives and started throwing the bag at her face. Each time it dropped, the student picked it back up and threw it again. The office was called. A school psychologist came into the music room and the student left with her. When they were walking down the hallway and got near the school entrance doors, the student ran East down the kindergarten hallway. He entered the music room and calmly sat in his seat. The teacher asked him if he was going to do the activity with the class. The student said "yes" and started the activity without incident.

The school psychologist had been looking for him and found him back in the music room. When she arrived in the music room, the student got up from where he was sitting, tore up something and went toward the teacher and threw the torn



material in her face. He went to the door and started to run. The school psychologist put one hand under his arm and another by his hand to guide him to the office. The student walked down the cafeteria hallway with the school psychologist. At the end of the hallway, the student turned around and started hitting the school psychologist in the chest and kicking her in the legs. The Physical Education (PE) teacher came up to help with the situation. Initially, the student stopped swinging and kicking when he saw the PE teacher. The PE teacher and school psychologist escorted the student toward the office. Approximately half way down the hall, the student sat down and started kicking, swinging and struggling to get away. The PE teacher spoke with the student and the student seemed to be listening. The student stood up and appeared as if he was going to walk with them. They walked approximately ten feet, and then the student turned around and kicked the PE teacher in the knee. The PE teacher reported

"He appeared to kick with all his strength and at the same time was smirking. At this point, I was slightly injured and feared being kicked again. I picked him up and cradled him as though I would cradle my two year old son. He immediately calmed down and seemed to rest in my arms. I placed him on his feet when we entered the office, and we asked him to sit down. He refused to sit down. [The school psychologist] and I stood near him and would grab his hands when he repeatedly tried to run out the door. Several staff were present in the office at the time and after asking him several more times to be seated he finally sat down and appeared to regain composure. As he was sitting in the office by the wall behind the secretary's desk, I was calmly trying to reason with him, and he was calmly speaking to me. Then his face contorted and he grinned at me. He quickly stood up, lunged forward and kicked me in my upper thigh. He appeared intent on seriously harming me and seemed to be aiming for my groin."

At that point the police were called. The student listened to the call calmly. He did not attempt to run or harm anyone after that.

## Allegations

### I

The first allegation is that the decision of the IEP team that the student's behavior on September 24 was not a manifestation of the student's disability is incorrect because that decision is inconsistent with information included in the student's initial special education evaluation.

Specifically, the parents' complaint emphasizes that prior to acting out, the student was touched by a staff member and that "In each instance the student's behavior escalated and in all of these instances he responded negatively in a physical manner by striking the staff members with both his hands and his feet."

The testimony of staff members at the disciplinary hearing, however, does not support the parent's description. Certainly, some of the behaviors of the student occurred just after being touched by staff members. Other behaviors did not. The incident began when the student left the music room without permission, and then returned and began peeling notes off the wall. There is no indication this behavior resulted from touching. When the student returned to the music room, he was touched by the teacher and he reacted violently. However, he then left the room and the teacher closed the door. A minute or so later, the student returned to the room and attacked the teacher. There is no indication that touching provoked this attack. When the school psychologist found the student back in the music room sitting quietly, the student tore up some material, threw the material at the teacher and started to run. There is no evidence of touching just prior to this behavior. While the PE teacher and the student walked down the hall, the student alternated between calm and suddenly attacking without warning and apparently without being touched. Moreover, the student did not react adversely to each touch. At one point, the PE teacher said "I picked him up and cradled him as though I would cradle my two year old son. He immediately calmed down and seemed to rest in my arms." Once in the office, the student refused to sit. The school psychologist and PE teacher said they stood near the student and grabbed his hands when he repeatedly tried to run out the door. He did not react violently to these

touches. After asking him several more times to be seated, he finally sat down and appeared to regain composure.

The parents also indicated in their complaint that the Evaluation and Eligibility Report included the following statement:

"Tactile Sensitivity: [The student] may be defensive and uncomfortable with touch. Often, children with tactile sensitivity are most likely to react to light touch as touching is a primary sensory system. Responses such as screaming, crying, hitting back seem very primal as the nervous system is interpreting that it is being threatened and reacts with 'fight or flight' responses."

This statement, and a note in the Functional Behavioral Assessment indicating the student scowled and pulled away from a staff member who reached out to pat the student on the shoulder, were cited by the parents as further evidence that the student's disability manifests itself in violence when the student experiences even positive touching.

The problem with this analysis is two-fold. First, neither of these statements were cited as conclusions in the respective documents. Second, neither of these documents were available to the IEP team at the time of the Manifestation Determination Review. Accordingly, the team could not have considered this information at the Manifestation Review. As indicated earlier, this is one of the inherent difficulties with this process.

The team could meet again and look at data generated by the initial evaluation and the functional behavioral assessment, but the Office of Special Education Programs (OSEP), which is the office within the United States Department of Education that writes the federal special education regulations, has issued multiple guidance letters indicating IEP teams should not reopen a manifestation determination to review new information. OSEP has said the law requires teams to conduct the manifestation review within 10 school days of the date the school decides to take disciplinary action [See, 34 C.F.R. 300.530(e)]. In situations such as this one, that means teams will not have time to consider evaluation data and functional behavioral assessments which have not been completed. Nevertheless, OSEP has said teams should follow the law and make their decisions in the time frame provided by law, and not reopen

the review at a later time after the legal timeline for conducting the review has expired. OSEP has stated that teams should, of course, use the new information when examining or reexamining a student's educational program [See, Letter to Yudien, 39 IDELR 242 (OSEP 2003)].

The most recent evaluation of the student prior to the behavior which resulted in suspension is a psycho-educational evaluation which was conducted at the request of Dr. \_\_\_\_\_, who is the family doctor for the student's family. The psycho-educational evaluation was conducted by Dr. Paul White, a Licensed Psychologist. His report is dated November 19, 2012. In the summary portion of the report, Dr. White states:

First, [the student] is not academically interested. He does schoolwork because he has to. Therefore, he will put forth a minimal amount of effort.

Secondly, [the student] does have a somewhat short attention span, but this is largely due to his lack of interest in academic tasks. He has the cognitive ability to concentrate and stay focused. It is this examiner's belief that he does not have an Attention deficit Hyperactive Disorder.

Third, [the student] is impulsive. He tends to do and say things "on impulse." He tends to react quickly and intensely to feeling situations and, as a result, he is easily frustrated and expresses his anger quickly and intensely.

Additionally, [the student] has personality characteristics that are contributing to his struggles. He is strong-willed and, at times, oppositional and defiant. He resents having to do tasks or work that he doesn't want to. He is primarily self-focused. He can be disrespectful to adults and aggressive towards peers when they don't do what he wants them to.

This report does not indicate the student's disability would likely manifest itself in the violent kinds of

behavior which occurred on September 24, particularly with regard to the student's relationships with adults.

In addition, over the summer of 2013, several standardized behavioral questionnaires regarding the student were completed. In a letter from Dr. Columbus Bryant, Licensed Psychologist, dated September 18, 2013, Dr. Bryant explains the outcomes of the behavioral questionnaires.

Dr. Bryant concluded that the results were significant for generalized anxiety with the potential of accompanying obsessive thought processes. The findings were also significant for oppositional tendencies, which were complicated by rigidity in thinking and his oppositional tendencies. The findings also indicated some suggestion of hyperactivity/impulsivity. There is nothing in this letter which predicts the kinds of violent behavior toward adults that occurred on September 24.

In short, these Psycho-educational Evaluations indicate that the student is easily frustrated, becomes oppositional, gets upset quickly, acts on impulse, expresses his anger quickly and intensely, and can become aggressive, particularly with peers. It is likely that some of the behaviors the student exhibited on September 24 fit into this description of the student. However, it does not appear that these descriptions of the student's disability accounts for the multiple instances on September 24 in which the student calmed down and appeared to be under control, and then, without any apparent provocation, began to again hit and kick school personnel. Although the student is quick to anger, the evaluation by Dr. White states that the student "has the cognitive ability to concentrate and stay focused." Looking at these evaluation results as a whole, this investigator finds that there is some likelihood that the initial outburst of the student, when the music teacher took his arm to lead him to his seat, may have been a manifestation of his disability. However, the on-going series of physically aggressive acts between periods of calm appear to be more deliberate and calculated acts rather than impulsive reactions due to the student's disability. These more deliberate acts would include at least: (a) the attack on the music teacher after coming back into the music room; (b) throwing material into the face of the music teacher and running out of the music room; (c) attacking the PE teacher while walking down the

hallway; and (d) the unprovoked attack on the PE teacher in the office.

It is, therefore, concluded that the four actions specified above, (a) through (d), were not caused by and did not have a direct and substantial relationship to the child's disability. Pursuant to Kansas statute, K.S.A. 72-8901, a district may expel a student for any willful violation of school rules. Thus, the student could have been expelled for any of the actions specified above (a) through (d). The parents' allegation of a violation of special education laws and regulations is not substantiated on this issue.

## II

The second allegation is that the district has failed to provide a free appropriate public education (FAPE) because the services offered to the student in the alternative educational setting are insufficient to provide adequate growth toward the behavioral component of the student's IEP.

Because this investigator has determined that at least some of the behaviors of the student on September 24 were not a manifestation of the student's disability, the district is authorized by law to implement the expulsion ordered on September 30, 2013. However, during the expulsion, the district is required to provide the student with educational services which will enable the student to continue to participate in the general curriculum, although in another setting, and to make progress toward meeting the goals set out in the student's IEP [See 34 C.F.R. 300.530(d)]. In the telephone conversation between the student's father and the investigator, the student's father said his concerns regarding this issue were not the academic services offered during the term of the expulsion, but rather that: (a) the services offered during the term of the expulsion to help the student achieve his behavioral goals were inadequate; and (b) the location of the services offered during expulsion constituted a violation of the student's right to be educated in the least restrictive environment (LRE).

With regard to the parent's least restrictive environment argument, special education regulations, at 34 C.F.R. 300.530(d), specify that educational services provided to a

child with a disability during a long-term suspension may be provided in an alternative educational setting determined by the child's IEP team. There is no requirement that these children be educated in the least restrictive environment, or that they even be educated with other children, during expulsion. Therefore, with regard to the LRE portion of the allegation, the investigator concludes there is no violation of law.

With regard to the services to be provided during the expulsion, the parties got off to a rocky start at the beginning. On the 11<sup>th</sup> consecutive day of this student's suspension, October 8, the special education director sent an e-mail to the parents offering specified services to be provided during the expulsion until such time as the eligibility decision was made, and if the student was found to be eligible, until an IEP was developed. The offer included K12, an on-line school, with teacher support. In the same e-mail, the director also offered an alternative curricula in Lexia Reading and IXL Math, and indicated that the offered curricula could be assigned in an individualized manner. The director added that either of these options would be organized and monitored by teachers at a district Elementary School. The parents did not immediately accept this offer, and there is no evidence of any written parent response. Accordingly, there was a period in which the student was not being served. However, an offer was made and the investigator finds the offer was reasonable in light of the fact that the initial evaluation had not been completed, nor eligibility determined. At this time, the student is receiving the services offered on a subsequent Prior Written Notice, dated November 1, 2013.

The parents requested the initial evaluation on September 19 and the district completed it in an expedited manner, approximately 22 school days later on October 21. On October 28 an IEP meeting was conducted and an IEP was developed. The IEP contains three goals. Two of the goals are related to behavior. They are:

1. "By 10/27/2014, in a one-on-one or small group setting, [the student] will demonstrate social skills such as 'accepting no,' and 'disagreeing appropriately,' 75% of the interactions observed."
2. By 10/27/2014, [the student] will have 0 incidences of physically (sic) aggression towards others."

On November 1, 2013, the parents were given a Prior Written Notice specifying the services to be provided in the interim alternative educational setting (IAES) during the period of expulsion. The bulk of the offered services address the academic needs of the student to continue to progress in the general curriculum.

The only service related to the two behavioral goals is two, twenty minute, sessions of social work services per week. These two sessions will be provided in an individual setting, as opposed to a group setting.

The parents contend this is an insufficient amount of time for this service. In addition, the parents contend the student should also receive some of the group services specified in his IEP.

With regard to the two, twenty-minute, social work sessions per week in an individual setting, the investigator was presented with no evidence that this would be an insufficient amount of time for this service. While forty minutes per week does appear to be somewhat minimal considering the extensive needs of this student, it would be only speculation to conclude, without sufficient evidence to the contrary, that it is inadequate. Thus, the parents' allegation on this part of their complaint, is not substantiated.

With regard to the allegation that some behavioral services need to be provided in a group setting, this investigator notes that all of the group services specified in the student's IEP were excluded from the services to be provided in the IAES. The Prior Written Notice, dated 11/1/2013, notified the parents of this exclusion. Under the heading "Options considered and why the options were rejected," the notice informs the parents that the two behavior related services in the student's IEP to be provided in a setting with other children, will not be provided in the IAES. These statements in the notice are as follows:

Social work services 1 time per week for 20 minutes per session in a group setting. These services are provided to help [the student] communicate with peers and navigate the social



aspect of the school environment and will not be required in the IAES.

120 minutes of behavioral support in the general education classroom and 90 minutes of behavioral support in the special education classroom. These services are intended to help the student navigate the school day and are not required in the IAES.

Thus, the team determined that all social work services in a group setting were only needed by the student to communicate with peers and to navigate the social aspect of the school environment. The team also determined that behavioral support in general and special education classrooms was only needed to navigate the school day.

It makes sense that the group social work services and the behavioral support services are needed in order for this student to communicate with peers and to navigate the school environment. It does not, however, necessarily follow that the student would not need at least some of these services to make progress on his IEP goals.

How, for example, is this eight year-old, second grade, student expected to make meaningful progress on the first IEP goal to demonstrate appropriate social skills 75% of the time with no group services? How is the student expected to make meaningful progress on the second goal to have zero instances of physical aggression toward others with no contact with peers?

Certainly, a significant portion of these two goals pertain to how the student relates to adults in the school setting. But these goals also address the student's needs in his relationships with peers. These IEP goals and the services offered to the student in the above referenced Prior Written Notice were determined after the completion of the student's initial evaluation. The student's initial evaluation recounted numerous disruptive behaviors in the school setting involving peer relationships, including interrupting students, speaking rudely to students, shoving students, and cutting in line. Moreover, as already indicated on page 8 of this report, the Summary and Recommendations portion of the Psycho-Educational Evaluation report issued by Dr. White, states that the

student can be aggressive toward peers when they do not do what he wants them to do.

As indicated in the "Jurisdiction" section of this report, the state department of education will not lightly overturn decisions made by an IEP team. In this case, however, it is the finding of this investigator that if this student is to have a reasonable opportunity to make meaningful progress toward attaining the two behavior goals in his IEP, there must be at least some peer interaction over the next five months.

Accordingly, the parents' allegation that the district is failing to provide the services necessary to enable the student to make progress toward his IEP goals during the term of his expulsion, is substantiated.

#### **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 offer services this student needs to progress toward meeting goals set out in his IEP, as required by 34 C.F.R. 300.530(d). Therefore, corrective action is required.

Required corrective action includes all of the following:

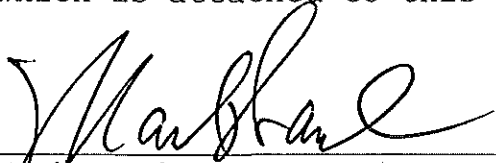
1. Within 15 days of the date of this report, the district shall provide Special Education Services with a written statement of assurance that it will provide the services needed for this student to continue to progress toward meeting IEP goals during his expulsion and for students in the future who are subjected to a long-term suspension.
2. Within 10 days of the date of this decision, the district shall schedule an IEP meeting to consider what social work and behavioral support services will be needed in a group setting during the term of the student's expulsion. The meeting should be held as soon as possible, but no later than January 15, 2014. At this meeting, the team shall offer, at minimum, at least two thirty minute or one sixty minute session(s) of Social Work service per week in a setting that includes other students. School administration may determine the specific location where these services will be provided.

3. The district shall send to Special Education Services a copy of the Notice of IEP meeting sent to the parents at the same time it sends this notice to the parents.

4. The district shall provide the parents with a Prior Written Notice of the team's decision regarding the services referenced in paragraph 2 of these Corrective Actions, and send Special Education services a copy of this notice on the same day it provides the notice to the parents.

#### 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 10<sup>th</sup> 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 Special Education Services of Education

## Complaint Investigation Report

Complaint Investigator (CD): Richard J. Whelan  
Complaint Filed: July 22, 2013  
Report Completed: August 7, 2013  
Complaint Number: 14 FC

This report is in response to a complaint of noncompliance filed under K.A.R. 91-40-51. , residents of Kansas USD .1 filed the complaint on behalf of their , [DOB: . USD is a member district of the Interlocal Cooperative # I, which is located in , Kansas.

During the 2012-2013 school year, the student was a 5<sup>th</sup> grade student at the Intermediate Center. His special education primary classification is "Mental retardation" [K.A.R. 91-40-1 (oo)]—now Intellectual disability; and his secondary classification is "Other health impairment" [K.A.R. 91-40-1 (uu)].

### Complaint Concerns

First concern: The parents alleged that the cooperative's decision to move the student's location for IEP services from his neighborhood school in to a school in USD , also a cooperative member district, was a substantial change in placement for which parental written consent is required.

Second concern: The parents alleged that the cooperative did not include them in the decision to move the student to for school year 2013-2014.

### Documents and Interviews

The CI reviewed the following documents (referred to as D in this report) related to the concerns :

1. The parent's formal written complaint which included the student's 2012-2013 IBP and the student's 2013-2014 IBP.
2. Teacher Information Pages for the EPs noted in 1 above.
3. March 27, 2013 IBP meeting notes.
4. March 27, 2013 Prior Written Notice.
5. May 16, 2013 School Assignment Notice from the cooperative to the parents.
6. Letters between the parents and cooperative staff regarding the student's school assignment during school year 2013-2014.

7. Written notes from cooperative staff attending the student's March 27, 2013 IBP meeting about a post-meeting discussion with the student's mother regarding the location of the school the student would attend during the 2013-2014 academic year.
8. The cooperative's written response to the parents' concerns.

On July 29, 2013, the CI and cooperative administrators had a telephone discussion about the parents' concerns. On August 1, 2013, the CI and the student's mother had a telephone discussion about the concerns.

## Facts and Conclusion

First concern: The parents alleged that the cooperative's decision to move the student's location for IBP services from his neighborhood school in to a school in \_USD , also a cooperative member district, was a substantial change in placement for which parental written consent is required.

The parents contend that the cooperative's decision to locate the student's IEP services at was a significant change of placement. Further, the parents assert that they did not give written consent to move the student from a school to a school [D 1]. Their written consent was for deleting occupational therapy (OT) from the student's IBP for school year 2013-2014 [D 4].

After the student's IEP meeting on March 27, 2013, the cooperative gave a prior written notice (PWN) [D 4] to the student's mother, a member of the IEP team. She gave written consent for deleting OT from the student's IBP services. There were no changes in the student placement on the PWN.

The student's 2012-2013 IEP and his 2013-2014 IBP show the same ratio of special education service time in general education settings and special education settings [D 1 and 2]. Therefore, as explained below, the student's special education placement was not changed by his IBP team.

According to the Office of Special Education Programs (OSEP) in the U.S. Department of Education, special education placement refers to points along a continuum of options (e.g., resource room, regular classroom) [46588 Federal Register/Vol. 71, No. 156/Monday, August 14, 2006/Rules and Regulations]. OSEP describes location as the "physical surrounding, such as the classroom," in which the IBP services are provided.

Finally, OSEP stated that "while public agencies (school districts/cooperatives) have an obligation under the Act (Federal special education statute) to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IBP and the decision of the group determining placement." That is, the location must be appropriate to provide the IEP services and the placement determined by the student's IEP team, but the selection of the location is determined by district/cooperative administrators. In this case, the

cooperative exercised its right to select a location in which the students IEP would be implemented.

OSEP's rulings on the definitions of "placement" and "location" have been affirmed by the U.S. Court of Appeals, 10<sup>th</sup> Circuit, which sets precedent for Kansas, in a location case related to placement in a neighborhood school by finding in part that "the statute (IDEA) says nothing about where inclusion (LRE/placement) shall take place (location)." [51 F.3d 921 April 20, 1995] Other circuit courts have also affirmed OSEP's definition: Fifth Circuit--The court held the "IDEA did not prohibit the district from making the administrative decision about where to provide services. While the Act requires parental participation in "educational placement" decisions, such "placement" refers to educational programming, not physical location." Second Circuit--The court concluded "there is no requirement in the IDEA that an IEP name a specific school."

In addition, OSEP has determined that "the Act does not require that each school building (location) in a district/cooperative be able to provide all the special education services (placement) for all types and severities of disabilities." Or stated differently program duplication in each district location is not required [Federal Register, Ibid]

In summary, the IEP team had a duty to specify in the IBP the educational environment in which services are to be provided (often referred to as the student's placement) and did so at the March 27, 2013 meeting. However, as explained above, the IBP team is not required to select the specific classrooms or school buildings where services must be provided and did not do so. Given these facts, the CI concluded that the cooperative was not required to allow the parents to participate in the cooperative's decision to designate a location for the student's IEP service, nor was parental written consent required prior to the cooperative's decision to designate a location. On May 16, 2013, the cooperative sent the parents notification of the student's school assignment [D 5].

Based upon the facts noted above, the CI cannot substantiate that the district has not complied with Federal Kansas special education laws and regulations related to this concern.

Second concern: The parents alleged that the cooperative did not include them in the decision to move the student to \_\_\_\_\_ for school year 2013-2014.

This concern is moot because, as noted in the CI's conclusion regarding the first concern, the cooperative had the authority to solely determine the location at which the student's IBP (services and placement) would be implemented.

As a part of this concern, the parents alleged that "in no part of the IEP meeting did the District discuss moving (student) to the Middle School for the 2013-2014 school year." [D 1] However, the March 27, 2013 IEP meeting notes include the following comments: "Mom asked about staff for next year. "; "Cooperative assistant director: no staff assignments or classroom type locations have been determined." [D 3]

While the parents were correct that a school location was not identified at the IEP meeting, after the meeting the student's mother and other IEP team members informally talked about cooperative interrelated classroom, e.g., functional applied academics,

examples. The parent knew that the example she preferred was located in , but cooperative staff members reiterated that a location decision would be made at a later date by cooperative administrators. Finally, the parent stated she would not approve a location other than at [D 7]. So, the parents were aware on March 27, 2013 that the cooperative administrators could assign the student to a location other than a school. Indeed, the parents exchanged several letters with cooperative staff members about the location decision after the IEP meeting [D 6]. Ultimately, the decision to move the student to a School was only a decision regarding the physical location where the student would receive educational services. That decision did not change the educational environments (placements) in which the student would be educated that were specified in the students' IBP. Accordingly, because the decision to educate the student in a school rather than a neighborhood school was not a placement decision, the parents did not have a right to participate in that decision.

Based upon the facts noted above, the CI cannot substantiate that the district has not complied with Federal Kansas special education laws and regulations related to this concern.

### Comments

The parents' formal complaint document included an allegation that the cooperative's location decision was not supported by information or data related to the student. The CI's examination of the student two EPs and meeting notes indicated that the cooperative complied with required special education federal and state procedures, applied required standards, and reached a determination that is reasonably supported by the student's available information. Therefore, the cooperative's decision regarding the location of the student's IEP service and placement is affirmed.

Another parental concern about the location change was the student's transportation time between and . Kansas State Department of Education guidance for a district transportation supervisor is that, if feasible, students should not be on a bus for more than one hour. However, a student with an IBP may need longer travel time to a special education placement. [K.S.A. 72-8302 (c) (d)] Federal special education laws and regulations do not address the amount of time for bus rides. The superintendent of USD \_\_\_ estimated that the one-way transportation time from home to school and return will be 50 minutes or fewer [D 8]. Therefore, the student's anticipated bus travel time is within the state guidelines for students,

### Corrective Actions

Based upon the Facts and Conclusions stated above, corrective actions are not required.

### Right to Appeal

Either party may appeal the findings of this report by filing a written appeal with the State Commissioner of Education, 120 SE 10<sup>th</sup> Avenue, Topeka, Kansas 66612-1182 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. 91-40-510. A copy of this regulation is attached to this report.



Richard J. Whelan

Richard J. Whelan  
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).

# 14FC10A

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 July 22, 2013, by \_\_\_\_\_ and \_\_\_\_\_ on behalf of their son, \_\_\_\_\_, against Unified School District No. \_\_\_\_, \_\_\_\_\_ Public Schools. The complaint (14FC\_\_-001) alleged that the cooperative's decision to move the location in which services would be provided from the student's neighborhood school in \_\_\_\_\_ to a school in \_\_\_\_\_, Kansas was a substantial change in placement, and was made without parent consent or parent participation in an IEP team meeting.

An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education Services Section of the Kansas State Department of Education. Following the investigation, an Initial Report, addressing both allegations, was issued on August 7, 2013. That report concluded that there were no violations of special education laws and regulations.

Thereafter, on August 16, 2013, the parents filed an appeal regarding the issues addressed in the Initial Report. Upon receipt of the appeal, an Appeal Committee was appointed. The Appeal Committee reviewed the report, information contained in the KSDE file regarding this matter, and the parents notice of appeal. The Appeal Committee now issues this final report.

### DISCUSSION OF ISSUE ON APPEAL

The parents do not appeal any factual findings of the investigator. Rather, the appeal challenges certain legal conclusions of the investigator in the report.

The complaint alleged that the Cooperative changed the location where special education and related services would be provided to the student from a school in \_\_\_\_\_ to a school in \_\_\_\_\_, without any opportunity for the parents to participate in the decision, without parent consent, and in violation of the Least Restrictive Environment (LRE) requirements of the Individuals with Disabilities Education Act (IDEA) and the Kansas Exceptional Children Act.

In his report, the investigator emphasized that the term "placement" refers to points along a continuum of environmental options, and not to the physical location where services are

provided. In doing so, the investigator cited the case of Murray v. Montrose, 51 F.3d 921 (10<sup>th</sup> Cir. 1995). In that case, the Circuit Court held that the IDEA did not include a presumption that a child should be educated in his or her neighborhood school.

In the parent's appeal, they state: "We object to the investigator's findings and conclusions connected to the analysis of "neighborhood school." The parents state they did not claim in their complaint that the student had a right to attend the neighborhood school. The parents clarify in their appeal that the specific issue in their complaint is:

"The \_\_\_\_\_ School District and the \_\_\_\_\_ County Cooperative assigned [the student] to the \_\_\_\_\_ Middle School District without regard to whether he could be genuinely included in a regular class in the \_\_\_\_\_ Middle School with the use of supplementary aids and services. As we allege in our complaint the \_\_\_\_\_ School District and the \_\_\_\_\_ County Cooperative violated the Kansas and the IDEA's least restrictive environment requirement."

For additional clarity, the parents indicate they are alleging the movement of the student from a school building in \_\_\_\_\_ to a building in \_\_\_\_\_ is in violation of the Least Restrictive Environment (LRE) requirement of the IDEA. The parent's appeal contends the Cooperative cannot make such a move unless it first concludes the student would not be successful at the \_\_\_\_\_ building with the use of supplementary aids and services. Further, the parents contend the Cooperative could not legally make such a move without: (a) affording the parents an opportunity to participate in that decision at an IEP meeting; and (b) obtaining consent for the move.

The committee believes the parent's distinction between the "neighborhood school" issue and the LRE issue is exceedingly narrow. However, the Committee finds it does not need to determine whether the facts of this case require a distinction between these two issues because the Committee agrees with the investigator that the term "placement" refers to the educational environment in which a student is educated (a general education classroom, a resource room, a self-contained room, a special school, an institution, etc.). The term "placement" does not refer to the physical location or specific building in which a student is assigned to receive special education services.

Although, in Murray v. Montrose, the Circuit Court referred to the term "neighborhood school," it too emphasized that the reason students do not have a right to attend a neighborhood school is because the choice of selecting a school building is not a "placement" decision. In that case, the Murrays made the exact argument that the parents make in their appeal of this complaint report. In response, the court said:

"Thus, they argue that 'supplementary aids and services' must be fully explored before a child is removed from both the neighborhood school and the regular classroom with nondisabled children. This interpretation strains the plain meaning of the statute. The statute clearly addresses the removal of disabled children from classes or schools with nondisabled children. It simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools. In other words, while it clearly

commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place.”

The court added:

“We have held, as a matter of law, that the obligation to explore supplementary aids and services prior to removing a child from a regular classroom does not apply independently to decisions to place children in non-neighborhood schools (Emphasis added).”

A careful reading of this case is required. The court is saying the LRE issue, which involves the child’s educational placement, relates to the removal of disabled children from classes or schools with non-disabled students. Neither LRE or placement are involved, however, when a school assigns a child to a particular school building, as long as that building has the services and environments (regular education classroom, resource room, self-contained room, special school, etc.) required by the student’s IEP.

The Office of Special Education Programs (OSEP) has summarized it this way:

“Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, 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.” Letter to Trigg, 50 IDELR 48 (OSEP 2007)

The committee notes that this OSEP guidance letter emphasizes that it is “school administrators” who should have the flexibility to assign a child to a particular school building or classroom, not IEP teams. This OSEP guidance and the 10<sup>th</sup> United States Circuit Court of Appeals agree on this point because both agree that the assignment of a student to a particular physical location is not a placement decision. Moreover, no Kansas statute or regulation can reasonably be interpreted to reach any other result.

The committee notes that the complaint report includes this statement:

“The student’s 2012-2013 IEP and his 2013-2014 IEP show the same ratio of special education service time in general education settings and special education settings [D 1 and 2]. Therefore, as explained below, the student’s special education placement was not changed by his IEP team (Emphasis added).” The parents did not dispute this finding in their appeal.

For the reasons stated above, the Committee finds that the decision of the Cooperative to move the student from a school located in \_\_\_\_\_ to a school in \_\_\_\_\_ was not a change

in placement. Accordingly, the decision by Cooperative administrators to move the student had no impact on the IDEA, or Kansas, least restrictive environment requirements, or on the educational placement of the student, and the parents did not, therefore, have a right to participate in making that decision, or the right to grant or withhold consent.

CONCLUSION

The Initial Report issued in this matter is sustained. This Final Report is issued this \_\_\_\_ day of September, 2013. Kansas Special Education Regulations provide no further appeal.

APPEAL COMMITTEE:

\_\_\_\_\_  
Colleen Riley, Chair

\_\_\_\_\_  
Stacie Martin

\_\_\_\_\_  
Jana Bradfield

# 14FC11

## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

### REPORT OF COMPLAINT FILED AGAINST PUBLIC SCHOOLS # ON NOVEMBER 19, 2013

DATE OF REPORT: DECEMBER 17, 2013

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

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with \_\_\_\_\_ Assistant Director of the \_\_\_\_\_ Educational Services Interlocal Cooperative # \_\_\_\_\_ on November 22 and December 2 and 10, 2013. The investigator spoke by telephone with the student's mother on December 10, 2013.

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

- Notice of Meeting signed by parent on April 15, 2013
- IEP for this student dated May 10, 2013
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent signed by the parent on May 10, 2013
- IEP Amendment to the student's IEP signed by team members including the parents on September 13, 2013
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent form dated September 13, 2013
- IEP Amendment Form for Minor Changes Not Requiring a Full IEP Team Meeting dated November 15, 2013
- Explanation of Minutes provided by the district IEP Specialist
- Written responses from the district for each of the issues specified in the complaint including the following:
  - On/Off Task observation data covering the period of September 9-16, 2013
  - Phonological Awareness Skills Test dated September 5 and 6, 2013
  - Reevaluation report dated April 26, 2013
  - DIBELS assessment completed August 2013

- Informal Reading assessments completed by the special education teacher in August 2013
- Summative report on the student's reading achievement completed by the special education teacher
- "IEP Team Rationale" provided to the parent by the special education teacher following the September 13, 2013 IEP Team meeting
- Observation notes completed by the Intellectual Disabilities Specialist on August 29 and September 3 and 10, 2013
- "Student Observation" report completed by the Behavior Specialist on September 5, 2013
- IEP Progress Reports dated September 13 and October 17 and 18, 2013
- General education progress report covering the first quarter of the 2013-14 school year
- Visual and Manipulative Supports for (the student) developed by the student's special education teacher
- Photos of "First/Then" schedule, choice icons, daily schedule, free choice options, and motivators
- Report of classroom observations conducted by the Behavior Specialist for the Cooperative dated September 5, 2013
- Report of classroom observations conducted by the Intellectual Disabilities Specialist for the Cooperative on September 3 and 10, 2013
- Email dated August 20, 2013 from the special education teacher to the parents regarding the use of "calming sensory activities"
- Daily schedule for the student for the period of August 15 through September 13, 2013
- Email to the parent from the student's Occupational Therapist dated November 21, 2013
- Updated daily schedule
- Description of sensory activities

### **Background Information**

This investigation involves a 6 year-old girl who is enrolled in a full day Kindergarten in her neighborhood school. The student has been diagnosed with Down Syndrome. She received Infant/Toddler services through and entered public school Early Childhood services beginning at age 3. Last year, the student was served through a Reverse Mainstream preschool setting for four days a week.

### **Issues**

In her complaint, the student's mother has outlined four issues:



**Issue One: The district added a Behavior Intervention Plan (BIP) to the student's IEP without consulting the parent and without obtaining her consent.**

Federal regulations, at 34 C.F.R. 300.324 (a) state that, when developing an IEP for a student, the IEP Team must consider – among other things – whether the student exhibits behavior that impedes the child's learning or that of others. In the case of a child whose behavior does impede learning, the team ***must*** "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior."

Kansas statutes, at K.S.A. 72-988(b)(2), require that Prior Written ***Notice*** be provided to the parent when the school proposes to make any change in services or any change in placement.

In addition, some changes to services or placements in a student's IEP also require written parental consent. Kansas statute, K.S.A. 72-988(b)(6), provides that parents have the right to consent, or refuse to consent, to any substantial change in placement of their child or to any material change in services as outlined in the student's IEP. Also, K.A.R. 91-40-27 (a)(3) states that "...an agency shall obtain written parental consent before making a...substantial change in the placement of...an exceptional child..." As defined by K.A.R. 91-40-1(sss) "(s)ubstantial change in placement' means the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment." K.A.R. 91-40-27(mm) defines a "material change in services" as an "increase or decrease of 25% or more of the duration or frequency of a special education service, related service, or supplementary aid or service specified on the IEP of an exceptional child."

The parent contends that she did not consent to the inclusion of a BIP in the student's IEP. She states that she asked the district to study the frequency of her daughter's inappropriate behaviors, to examine the setting in which those behaviors were occurring, to provide established accommodations, and to try classroom interventions before making any change to the student's IEP including the addition of a Behavior Intervention Plan.

An IEP Team meeting was held on September 13, 2013. Signatures on the IEP document reflect that both of the student's parents attended the meeting. According to district staff that attended the September 13<sup>th</sup> meeting, the complainant actively participated in the team discussion.

Under item 7 of the "IEP Team Checklist" the student's May 2013 IEP was modified to indicate that the student's behavior impeded her "learning or that of others." A new "Positive Behavioral Intervention Plan" was added to the IEP to address target behaviors of "throwing materials, grabbing items...hiding work

materials, closing eyes, laying on the floor, spitting, hitting, (and) kicking.” Several preventative measures were outlined including the following:

- “Provide instruction to student with manipulatives and in about 15 min. time spans.
- Picture schedule with 1<sup>st</sup>, next, then
- Visuals...use them for directional cues such as wait, sad, happy, good, bad, (the student's) turn, not (the student's) turn, yes, no, etc.
- Give sensory breaks to help calm – sensory room, outside swing, lotion w/compressions, walk”

At the meeting, the district presented the parent with a form entitled Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent.” According to that form, the district proposed to “add a behavior plan with specific strategies to manage and redirect (the student) throughout the school day.” According to the form, the addition of the BIP represented a change to the IEP, “not involving services and placement” and, therefore, the consent of the parent was not required.

However, in the opinion of the investigator, the addition of a new BIP to the student's IEP does represent a material change in service. A Behavior Intervention Plan is a “service.” Adding a BIP to an IEP when no plan had previously been in place is a 100% change in both the frequency and duration of a service. Such an action would require that the parent be notified of the proposed change and give written consent for that change before the plan could be implemented.

Because the district did not obtain the written consent of the parent before implementing a Behavior Intervention Plan for the student, a violation of special education laws and regulations is substantiated on this issue.

**Issue Two: The district moved the student to a more restrictive setting for reading instruction without the consent of the parent.**

As stated above under Issue One, Kansas statute, K.S.A. 72-988(b)(6), provides that parents have the right to consent, or refuse to consent, to any substantial change in placement of their child or to any material change in services as outlined in the student's IEP. Also, K.A.R. 91-40-27 (a)(3) states that “...an agency shall obtain written parental consent before making a...substantial change in the placement of...an exceptional child...” As defined by K.A.R. 91-40-1(sss) “(s)ubstantial change in placement’ means the movement of an exceptional child, **for more than 25 percent of the child's school day** (emphasis added), from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment.”

The "Special Education Services" section of the student's May 2013 IEP states,

"For the 2013-2014 school year, (the student) will receive special education services in a special education classroom in a regular education building for Math and Written Expression 5 days weekly for the same amount of time as her general education peers. Daily instruction will be in a one to one setting or in small/large group settings taught by special education staff.

For the 2013-2014 school year, (the student) will receive special education support in a general education classroom for social interaction during activities, including but not limited to opening, ending, snack, lunch, recess, PE/Music, library, **reading** (emphasis added), centers, and classroom parties.

For the 2013-2014 school year, (the student) will receive targeted one on one adult support throughout her entire school day in a regular or special education classroom, in a regular education building."

As the 2013-14 school year began, staff became concerned about the student's progress. They conducted a series of observations on September 9<sup>th</sup> and 16<sup>th</sup> of 2013 to study on-task/off-task behaviors. That data indicated that the student was most frequently on-task and engaged during 1-on-1 (80%) or small group (69%) work in the special education classroom. When working in the general education classroom in a whole group setting, the student's rate of on-task behavior dropped to 35%.

Reading assessments were completed which showed the student to be struggling with the Kindergarten curriculum despite modifications and accommodations.

Reports of classroom observations completed by the special education teacher, the Intellectual Disabilities Specialist, and the Behavior Specialist during August and September of 2013 reflected behavioral and academic concerns.

On September 13, 2013, an IEP Team Meeting was convened to discuss the student's needs. Both of the student's parents were in attendance. The IEP Team determined that the student's May 2013 IEP should be amended. The following statement was added to the "Special Education Services" section of the IEP:

"9-13-2013 - For the duration of this IEP, (the student) will receive special education services in a special education classroom in a regular education building with daily instruction on a one-to-one basis and in small group settings for math and handwriting. (The student) will receive (sic) special education services in the regular education classroom for 15 min of

Reading application on a daily basis. *She will receive (sic) special education services in a special education classroom for reading instruction for 45 min.* (emphasis added). Services will be provided by special education teacher, regular education teacher, para-educator(s), or support staff with minutes as following for the week: 165, 235, 185, 235, 215.

(The student) will receive special education support in a general education classroom for social interaction during activities, including but not limited to opening, ending, recess, PE/Music, lunch, library, computer lab, art, read alouds, centers and classroom parties for 170 min a day for 5 days a week.”

A “Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent” form was given to the parent at a Team Meeting on September 13, 2013 notifying her that the district proposed a “change in Placement” that did not require parental consent because the proposed change was “not a substantial change in placement from a less restrictive environment to a more restrictive environment, or from a more restrictive environment to a less restrictive environment.”

The prior written notice form contained the same statement regarding services as is outlined above for the student’s IEP.

According to the parent the district’s proposed change to the student’s placement for reading instruction was made 18 days into the school year and without her consent.

The district contends that the proposed change (45 minutes per day of additional special education support in a special education classroom setting) did not represent a substantial change in placement or a material change in services, and, therefore, the written consent of the parent was not required. According to the district, the time specifications on the amended IEP and associated prior written notice form on September 13<sup>th</sup> (“165, 235, 185, 235, 215”) were, however, incorrectly calculated. While recognizing this error, the district asserts that services to the student in the special education classroom have been increased by only 45 minutes per day as described in the prior written notice form presented to the parent at the meeting.

On November 15, 2013, the district presented the parent with another prior written notice form intended to correct the earlier error and to clarify how and where reading-related services to the student were to be delivered.

The November 2013 prior notice form states,

“(The student) will receive special education services in a special education classroom in a regular education building for Math and Written Expression for the same amount of time as her general education peers. ***(The student) will also receive special education services in a special education classroom for reading instruction for 45 minutes*** (emphasis added). Instruction occurring in the special education classroom will be in a one-to-one setting or in small group settings taught by special education staff.

***(The student) will receive special education services in the regular education classroom for 15 minutes of Reading application*** (emphasis added). (She) will also receive special education support in a general education classroom for social interaction for the same time as her regular education peers for opening, ending, snack, lunch, recess, PE/Music, read alouds, library, centers, and classroom parties.

The statement in the special education services section of (the student’s) IEP which included minutes...was...inaccurate and are not necessary to describe the special education services (the student) receives.”

An “IEP Amendment Form for Minor Changes Not Requiring a Full IEP Team Meeting” was also sent to the parent on November 15<sup>th</sup>. Under the “Changes” section of the form, the district included the first two paragraphs cited above.

While the student has since the beginning of the 2013-14 school year received special education services support for reading, that support was – until September 13, 2013 – provided solely in the general education setting. After the IEP Team Meeting of the 13<sup>th</sup>, the district pulled the student into the special education classroom for 45 minutes a day to work with her on reading.

The student is in school from 8:35 AM to 3:50 PM each day – a total of 435 minutes. Prior to September 13<sup>th</sup>, the student had been removed from the general education setting for a total of 90 minutes a day for work on math and written expression. After the 13<sup>th</sup>, she was removed from the general education setting for 135 minutes a day – a 45-minute change in her educational placement to a more restrictive setting. Forty-five minutes is approximately 10% of the student’s school day. This 10% change in placement falls well below the 25% change level at which parental consent would have been required. The district provided the parent with prior notice of the proposed change. A violation of special education laws and regulations is not substantiated on this issue.

**Issue Three: The district has failed to afford the student with the hourly breaks called for in her IEP.**

Federal regulation, at 34 C.F.R.300.341, state that a student’s IEP must be implemented as written.

According to the parent, the student does not receive hourly *sensory* breaks. Instead, she is given a break upon arrival at school and another after lunch. The parent reports that she observed the student in her classroom on October 9, 2013 and states that the student was given only one break between 12:45 and 3:30 PM. That break was at 12:45.

The "Program Modifications" section of the student's May 2013 IEP states, "(The student) requires breaks throughout her day, away from peers, at least at 1 hour intervals for calming strategies to be implemented. She has responded positively to deep pressure input like massages, dimmed lights, and quiet work tasks. She easily escalates with movement activities."

The district defines "breaks" as "not doing academic work that required (the student) to sit and attend to a speaker or be engaged with a learning task. Bathroom, recess, and lunch would be breaks as would be sensory (activities) as would be transitioning from one location in the building to another." The district contends that movement breaks such as transitioning from one location to another have not been found to result in an increase in inappropriate behavior this year.

According to the district, the student's special education teacher contacted the student's parents via email on August 20, 2013 to report that "calming sensory activities" would be implemented with the student "1<sup>st</sup> thing in the AM and after noon recess." Per that email, one of the strategies the staff planned to utilize was a "sensory break (sensory room, outside swing, lotion w/compressions, walk)."

A copy of the student's daily schedule covering the period of August 15 to September 13, 2013 shows that between one and four district defined "breaks" were scheduled each hour between the start of the student's school day at 8:35 AM and her departure at 3:50 PM. "Sensory" activities were implemented at 8:35 AM and 12:30 PM. Transitions between instructional settings provided an opportunity for the student to take a walk 9 times during her school day (at 9:30, 10:20, 11:30, and 11:45 AM and at 12:10, 1:45, 2:00, and 3:00 PM). Recess was scheduled at 10:05 AM and 12:10 and 2:30 PM. Lunch fell at 11:45 AM. Bathroom breaks were scheduled at 8:35 and 10:20 AM and at 12:30, 2:00, and 3:30 PM.

An email to the parent from the student's Occupational Therapist dated November 21, 2013 indicates that as of October 10, 2013, the student was "using the sensory room, wt'd backpack, carries something wt'd, & attempted to pull the wt'd cart...& lotion rubs." According to the email, "sensory breaks" were – as of October 15, 2013 – scheduled for 8:45 and 10:20 AM and for 12:35, 1:30, and 2:50 PM. As of that date, "breaks include sensory room, weighted back pack, roll on ball and over back, & carry crate."

An updated schedule provided by the district shows that five sensory breaks are still being provided at or near the times stated in the above email. According to the district, sensory break activities include time spent in the sensory room (5-10 minutes away from peers), walking while wearing ankle weights or a backpack, walking while carrying a crate, using a ball, having lotion applied with compression, or rocking in a rocking chair.

In the opinion of the investigator, the parent and the district are not in complete agreement with regard to the definition of the term "breaks." Under the parent's definition, "breaks" are exclusively "sensory breaks" wherein the student participates in specifically structured calming activities in a quiet location. The definition of "breaks" used by the district is broader and includes – among other acceptable calming strategies – transition walks.

The student does have hourly opportunities for activities that do not require her to engage in or attend to academic tasks (the district's definition of a break). However, the majority of these district-defined breaks are for lunch, recess, occasions to use the restroom, or transition walks from one instructional location in the school to another. Several of these activities – lunch (or snack time), recess, and some transition walks – do not afford the student the opportunity to be "away from peers" as outlined in the Program Modifications section of the student's May IEP. Breaks for structured sensory activities are scheduled 5 times during the seven and a half hour school day and do not occur hourly. Because the student is not given breaks *at 1-hour intervals* for calming strategies to be implemented *away from peers*, a violation of federal laws and regulations is substantiated on this issue.

**Issue Four: The district has failed to provide the visual schedule, manipulatives, and visual aids specified in her IEP.**

Federal regulation, at 34 C.F.R.300.341, state that a student's IEP must be implemented as written.

Under the "Supplementary Aids and Services" section, the student's May 2013 IEP states, "(The student) will receive picture supports and a visual schedule throughout her day to help her transition and answer questions in the regular or special education classroom."

In September 2013, the following statements were added to the "Supplementary Aids and Services" section of the May IEP:

- "Across all settings (the student) will have access to manipulatives to be used for answering questions and showing knowledge of skills for the duration of the assignment or activity on a daily basis."

The parent contends that while the student does have a visual schedule for her day, she does not have access to visual aids across all settings nor does she have separate schedules for the individual settings she moves through during her school day. According to the parent she has visited the school on several occasions and has observed instruction occurring for the student without the use of visual aids. The parent reports that the special education teacher has on many occasions stated that the student is more engaged and on-task and that she displays more appropriate behavior when visual aids and manipulatives are used.

According to the district, the student has extensive access to visual schedules, manipulatives, and visual aids. On a daily basis, across all educational settings, the student is provided with

- a schedule book with a daily picture schedule of her AM/PM activities that shows which staff member the student will be working with for any given activity;
- a "first, next, then" visual schedule that outlines her schedule throughout the day;
- pictures of motivators used to support the student;
- pictures of "relax/break" choices from which the student can make selections;
- "free choice" selection pictures;
- pictures that represent activities in large group settings such as library, PE, and music; and
- additional visuals used to help with redirection of the student in large group, small group, and/or one-to-one settings.

The district contends that during large group reading instruction, letter manipulatives are utilized for word building and blending activities. An alphabet strip is used with the student for identification of letters and letter sounds. The teacher uses a dry erase board to model letters in upper case format that the student then traces – sometimes using highlighters. Pictures support learning and sorting beginning consonant sounds.

The district asserts that during one-on-one or small group pull out reading instruction, letter manipulatives are used with the student in word building. Picture cards are used to show the words being built. Sight word flash cards are used to instruct the student on high frequency words, the days of the week, and color words. Letter cards are used with the student to help her with blending. To work on sequence, picture cards showing up to three events are utilized. Picture cards showing objects in various positions are employed to teach spatial concepts such as "on," "under," and "in." When teaching comprehension, pictures reflecting two choices are used.



During small group, pull out instruction for handwriting; staff uses highlighters or markers for modeling letters, "Handwriting Without Tears" wood pieces and letter mats, and 1" box paper.

For one-on-one math instruction during pull out, counters are used for addition, and flash cards are employed for number identification. A dry erase board is used when asking the student to select options for missing number strands. Bears, beans, buttons, macaroni and other manipulatives are used for One-to-one counting. File folder activities include pictures for counting groups of from 1 to 10 items. Visuals of written numbers are employed when the student practices rote-counting skills. Number lines with visual numbers are also used with the student.

When providing other math related instruction, the student has a clock for telling time to the hour and digital visuals of clocks for reading time to the hour. Coins and \$1 bills are used for matching to pictures of coins and matching to values. Pictures aid in 1-to-1 counting groups and for identification of "bigger/smaller" groups. Picture manipulatives are employed for making patterns. Measurement tools such as a ruler are provided to the student, as are pictures of non-standard measurement tools. Worksheets used with the student include pictures of groups for counting and matching number values.

The Behavior Specialist for the Cooperative conducted one-hour observations in the student's Kindergarten and special education classrooms on September 4 and 5, 2013 (prior to the IEP Team Meeting of September 13, 2013 wherein the student's IEP was modified to specify that manipulatives, visual aids, and a visual schedule would be used). In reporting on those observations, the Specialist described the use of icons for choices, reinforcers, a white board, and highlighters.

The Intellectual Disabilities Specialist for the Cooperative conducted observations on September 3 and 10, 2013. The report completed by the Specialist referenced the use of manipulatives and visual aids.

In the opinion of the investigator, there is ample evidence to show that the district has routinely provided the student with visual schedules, visual aids, and manipulatives across all general and special education settings. 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. Violations have occurred in two areas:

- 34 C.F.R.300.341 states that a student's IEP must be implemented as written. Specifically, the district failed to provide the student with breaks away from people at one hour intervals for calming strategies to be implemented; and
- K.A.R. 91-40-27 (a)(3), which requires an agency to obtain written parental consent before making a material change in the services to or a substantial change in the placement of an exceptional child. Specifically, the district failed to obtain the written consent of the parent before implementing a proposed behavior intervention plan.

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 Special Education Services stating that it will comply with
  - a. 34 C.F.R.300.341, by implementing this student's IEP as written, specifically including breaks away from peers at one hour intervals for calming strategies to be implemented; and
  - b. K.A.R. 91-40-27 (a)(3), by obtaining parental consent before making a material change in the services to or a substantial change in the placement of an exceptional child.
- 2) Upon receipt of this report, immediately schedule an IEP Team meeting to be held within 20 school days to discuss the delivery of behavior intervention services to this student. If the parties agree to a specific behavior intervention plan before this meeting, they may use the IEP amendment process to add the plan to the IEP instead of conducting a meeting.
- 3) Provide Special Education Services with a copy of the notice of the meeting referenced above in Item 2 and with a copy of any proposed behavior intervention plan.
- 4) If the IEP Team referenced in Item 2 determines that a behavior intervention plan will be added to this student's IEP, provide Special Education Services with a copy of the written notice of the proposed change, and the written consent for that change, that has been signed by this parent.

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.

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Diana Durkin, Complaint Investigator

## 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).

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JUL 14 2014

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

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #  
ON MAY 22, 2014**

**DATE OF REPORT: JUNE 27, 2014**

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 Assistant Director of the \_\_\_\_\_ Area Educational Services Interlocal Cooperative # \_\_\_\_\_ on June 4 and June 12, 2014. The investigator spoke by telephone with the student's mother on June 6, 2014.

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

- IEP for this student dated January 28, 2013
- Emergency Safety Intervention (ESSI) Reporting Form dated November 7, 2013
- Portions of the January 24, 2014 IEP for this student
- Notification of Disciplinary Incident dated April 8, 2014
- Manifestation Determination Review dated April 8, 2014
- Minutes of April 8, 2014 IEP Team meeting
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated April 8, 2014
- Written Report of the Findings and Results of an Extended Term Suspension or Expulsion Hearing dated April 14, 2014
- Revised Supplementary Aids and Services section dated May 16, 2014
- At a Glance dated May 16, 2014
- Revised Positive Behavioral Intervention Plan dated May 16, 2014
- Undated letter to the parent from the Expulsion Hearing Officer for the district
- Formal Complaint received in the office of Early Childhood, Special Education and Title Services on May 22, 2014
- Follow-up letter from the parent dated May 28, 2014

## Background Information

This investigation involves a 14 year-old boy who has just completed the sixth grade. The student has been diagnosed with Childhood Disintegrative Disorder, Adjustment Disorder, and Moderate Mental Retardation. Medical reports also indicate diagnoses of complex partial seizures, sleep apnea, and asthma.

Between April 9, 2014 and the end of the 2013-14 school year, the student was served in a day-school program sponsored by the Interlocal. At the start of the 2014-15 school year he will receive services in a district middle school.

## Issues

The office of Early Childhood, Special Education and Title Services received the parent's complaint on May 22, 2014. The formal complaint did not contain specific allegations regarding the violation of special education law, and the parent was asked to submit a document that included such allegations. That document was received on May 28, 2014.

In her second submission, the student's mother has outlined three issues:

**Issue One: The district failed to follow the student's Behavior Intervention Plan (BIP).**

Federal regulations, at 34 C.F.R.300.341, state that a student's IEP must be implemented as written.

The January 28, 2013 IEP for the student contains a section entitled "Positive Behavioral Intervention Plan." That section includes the following statement:

"(The student) has had some difficulty with transitioning from play activities to work activities. Some environments, such as indoor recess time, are high stimulation places for him. Unless a special education para is with him during those times, (the student) will spend indoor recesses in the FAA room playing with toys, games, puzzles, or on the computer. ***(The student) should be always be (sic) given cues that playtime will soon be ending to prepare him for the transition*** (emphasis added). Highly competitive games in physical education class may be difficult for (the student) to handle. Para will ask (the student) to go for a walk around the building to regain control and discuss possible ways to deescalate and rejoin the activity. When activities occur that are not in (the student's) normal routine, he will be warned of it prior to its occurrence, particularly those involving noise to prepare him."

The section also notes that the student requires "intrusive procedures (physical guidance, physical restraint, seclusion time-out, inhibiting devices, etc.)" as a part

of his BIP. In the event the student becomes violent, "he will be escorted from the area to a quiet place by school staff. Non-physical deescalation (sic) techniques will be used to calm (the student) until he regains control. If he is a danger to himself or others, he may be restrained by NCI (Nonviolent Crisis Intervention) trained personnel following Coop procedures. School Resource Officers and parents may be called at that time."

The parent contends that she had spoken with the special education teacher about the student's need for transition prompts. According to the parent, the student was on November 7, 2013 involved in a game of money bingo. When the bell rang for the end of the class period, the student was – without any transition prompts – told to pause his game and prepare to move on to his next class. The student became agitated to the point that restraint was required.

It is the parent's contention that had the behavior plan been followed, the student would have been provided with prompts to prepare him for upcoming transition and restraint would not have been needed.

The description of the incident is contained in an "Emergency Safety Intervention (ESI) Reporting Form" dated November 7, 2013. According to the report, the student was told that the game would be left out and he could return to it the following day. That report contains no indication that the student was given prompts to alert him to an upcoming transition and the need to end his game.

It is the position of the district that staff has implemented the student's behavior plan. However, on the occasion specified in this complaint, the district stipulates that the student was not provided with the transition cues called for in his IEP.

Because, on the occasion specified in this complaint, the district did fail to implement the student's IEP as written, a violation of special education laws and regulations is substantiated.

#### District Mitigation Plan

The district states that the student's IEP was modified on May 16, 2014 to enhance specificity regarding transition procedures. In August 2014, prior to the start of the 2014-15 school year, the student's IEP – including the revised transition procedures – will be reviewed with the staff of the middle school the student will be attending. Additionally, the IEP team determined that the parent, the student's special education teacher, and the student's Case Manager from an outside agency will conference weekly at least for the first two months of the school year to ensure communication regarding the student's progress and to – among other topics – review prompts. Relevant information will also be included in an IEP At a Glance which will be shared with general education teachers, all service providers, transportation personnel, and at least one building administrator during the August meeting.



Because the district has developed and in part implemented a plan to address the violation identified in this issue, no additional actions other than the assurances specified in the Corrective Action portion of this report will be required.

**Issue Two: The Behavior Intervention Plan (BIP) was removed from the student's IEP without the knowledge of the parent.**

Federal regulations, at 34 C.F.R. 300.324 (a) state that, when developing an IEP for a student, the IEP Team must consider – among other things – whether the student exhibits behavior that impedes the child's learning or that of others. In the case of a child whose behavior does impede learning, the team must “consider the use of positive behavior interventions and supports, and other strategies, to address that behavior.”

Kansas statutes, at K.S.A. 72-988(b)(2), require that Prior Written Notice be provided to the parent when the school proposes to make a material change in services.

Not every change to a student's IEP requires written parental consent. Kansas statute, K.S.A. 72-988(b)(6), provides that parents have the right to consent, or refuse to consent, to any substantial change in placement of their child or to any material change in services as outlined in the student's IEP.

A Behavior Intervention Plan is a “service,” thus the removal of a BIP from the student's IEP represents a material change in service. Further, removing a BIP from an IEP when a plan had previously been in place is a 100% change in both the frequency and duration of a service. Such a change would require that the parent be notified of the proposed change ***and*** give written consent for that change before the plan could be implemented.

The parent contends that no BIP was included in the student's January 2014 IEP and that she did not consent to the removal of a BIP from the student's IEP.

According to the district, a BIP was a part of the student's January 2013 IEP under the section entitled “Positive Behavioral Intervention Plan.” At the annual IEP review in January 2014, the team enhanced the plan to include a “Stress/Anxiety Cycle – CS.” Documents provided by the district show that all BIP-related elements of the January 2013 BIP were maintained in the “Positive Behavioral Intervention Plan” section of the January 2014 IEP including the following statement:

“Highly competitive games in physical education class may be difficult for (the student) to handle.”

There is no evidence to show that a Behavior Intervention Plan was removed when the district developed the student's January 2014 IEP. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

**Issue Three: The district inappropriately suspended the student from school even though the behavior that led to the disciplinary action was determined to be a manifestation of his disability.**

When a child commits a violation related to weapons, drugs, or **serious bodily injury** (emphasis added), the school officials may initially suspend the child for up to 10 school days without educational services (if the suspension includes the 11th cumulative day of suspension in the school year, educational services should begin on the 11th day).

Federal regulations, at C.F.R. 300.530(e)(1) state that as soon as practical, but not later than 10 school days after the date on which the decision is made to change the placement of a child with a disability because of a violation of a student code of conduct, the representative of the school, the parent and other relevant members of the child's IEP team, as determined by the parent and the school, must meet to determine if the conduct in question was:

- a) caused by, or had a direct and substantial relationship to the child's disability; or
- b) the direct result of the school's failure to implement the child's IEP.

If it is determined by the group that the conduct of a child was a result of either "a" or "b" above, then the conduct must be determined to be a manifestation of the child's disability. Subsequent disciplinary actions by the district are driven in part by the manifestation determination.

School officials may remove a child with a disability to an interim alternative educational setting (IAES) for up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the school district or the State (K.S.A. 72-991a(a)(3); 34 C.F.R. 300.530(g)).

Kansas statutes, at K.S.A. 72-991 (g)(h), define "serious bodily injury" as an injury that involves one or more of the following: "a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

As stated above under Issue Two, prior written notice must be provided to the parent when the school proposes to make a material change in services or a

substantial change in placement of a student. (K.S.A. 72-988(b)(2); 34 C.F.R. 300.503(a)).

It is the parent's position that the student's actions were a manifestation of his disability and therefore all reference to the district-imposed suspension should be removed from the student's record.

According to the "Notification of Disciplinary Incident" form dated April 8, 2014, the student was on April 7<sup>th</sup> playing a game and became upset over losing. A paraeducator followed the student when he left the classroom and explained that the game was "for fun." The student became upset and kicked and hit the para. Another paraeducator attempted to intervene. The student again engaged in aggressive behavior, hitting and kicking a paraeducator. When an "Emergency Safety Intervention" was implemented, the student struck a paraeducator's jaw with his own head. The School Resource Officers were called. After assessing the situation, Emergency Medical Services were contacted to transport the paraeducator to a local hospital where it was determined that the paraeducator's jaw was badly bruised but not broken. According to the Assistant Director, the bruising incurred by the paraeducator did not meet the definition of a "serious bodily injury."

Following the incident, the student was given a 9-day suspension and notice of a proposed expulsion was provided. This was the first disciplinary action taken during the 2013-14 school year to result in the student's removal from school.

On April 8, 2014, a Manifestation Determination meeting was held. The IEP Team determined that the behavior exhibited by the student on April 7<sup>th</sup> was related to his disability.

According to minutes of that April 8<sup>th</sup> meeting, the parent stated that she wanted to have the student placed in "an alternative setting somewhere else no matter what." The parent expressed a preference for a placement at Heartspring; the team discussed the district's obligation to serve the student in the least restrictive environment. After also considering homebound services, the IEP Team, including the parents, determined that the student should attend the Interlocal Day School for the remainder of the school year rather than returning to the middle school where the incident occurred.

Parents were given prior written notice of proposed changes to the student's program including his attendance at the Day School, the provision of transportation to and from that program, and additional behavior supports for the student. The notice indicated that the student would be in a more restrictive setting where he would not be "with gen ed peers, but academic and behavior growth outweighs (sic) the harmful effects."

The student's mother stipulates that she gave written consent for the transfer

although she did not consider the Day School to be the optimal placement for her son.

On April 11, 2014, the district held a hearing on the matter and determined that the student should be suspended from school. It was – as stated in the report of that hearing – determined that the behavior subject to disciplinary action was related to the student's disability. The district supported the option of placement in an alternative education setting for the remainder of the 2013-14 school year.

On May 21, 2014, the Assistant Director of the Special Education Cooperative asked the district to rescind the suspension. The Expulsion Hearing Officer for the district sent a letter to the student's mother on May 21<sup>st</sup> to notify her that the "expulsion from April 11, 2014 is null and void, due to the fact that the manifestation determination was determined to be a part of (the student's) disability." According to the district, all documentation from the hearing regarding suspension has been expunged from the student's file.

In summary, a behavioral incident involving the student occurred on April 7, 2014. At the time of the incident, the district believed that the student's actions had resulted in the serious injury of a district employee. The student was given a 9-day suspension from school. The day following the incident, the district held an IEP Team meeting to determine whether the student's behavior was a manifestation of his disability. By the time of this meeting, the district had determined that the injury to the paraeducator did not meet the Kansas statute definition of "serious bodily injury." The team determined that the student's behavior was related to his disability and decided that the student would be best served by not returning him to the setting where the behavioral incident occurred. The parent gave her written consent for the student's transfer to a Day School program. However, three days after the district determined that the student's behavior was a manifestation of his disability, a district hearing committee, while supporting the option of an interim placement, concluded that the student should be suspended for the rest of the school year. The student was transferred to the Day School program and continued to receive special education services for the remainder of the 2013-14 school year. All records of the suspension were removed from the student's file.

The district did, on paper, impose a 41-day suspension as a consequence of behavior that was determined to be a manifestation of the student's disability. However, the actions of the district did not result in any actual disruption to the student's education because he was, within less than 10 school days following the behavioral incident, attending a Day School program recommended by his IEP Team and consented to by his mother. The hearing committee report recommending his suspension from school has been removed from the student's file. Under these circumstances, a violation of special educational laws and regulations is not substantiated on this issue.

### Additional Comments

Kansas statute, K.S.A. 72-988(b)(6), provides that parents have the right to consent, or refuse to consent, to any substantial change in placement of their child or to any material change in services as outlined in the student's IEP. Also, K.A.R. 91-40-27 (a)(3) states that "...an agency shall obtain written parental consent before making a...substantial change in the placement of...an exceptional child..." As defined by K.A.R. 91-40-1(sss) "'(s)ubstantial change in placement' means the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment."

In the course of the investigation of this complaint, the investigator reviewed the prior written notice form provided by the district and signed by the parent at the time the district proposed to transfer the student to the Day School program. That document informed the parent that the district was proposing a change to the services provided to the student and that the student would receive these services at the Interlocal Day School. However, the form fails to indicate that the transfer to the Day Program also represented a change in the **placement** of the student to a more restrictive setting that reduced his opportunities to participate with general education peers.

It is clear to the investigator that the parent preferred to have her son served in the Day School program rather than returning him to the middle school program in which the April 7<sup>th</sup> behavioral incident occurred and that the parent understood and consented to the district's proposal. However, the district failed to provide appropriate prior written notice of the change in placement. Under these circumstances, a procedural (not substantive) violation of special education laws and regulations has been identified.

### **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. Violations have occurred in two areas:

- 34 C.F.R.300.341 state that a student's IEP must be implemented as written, and
- K.S.A. 72-988(b)(2), which requires an agency to provide prior written notice before making a change in the placement of an exceptional child. Specifically, the district failed to appropriately notify the parent that a transfer to the Day School program represented a change to the student's placement.

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. 34 C.F.R.300.341, by implementing this student's IEP as written, and
  - b. K.S.A. 988(b)(2), by appropriately notifying the parent before making a change in the placement of an exceptional child.

Further, USD # [redacted] 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).

RECEIVED

MAR 28 2014

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES

KSDE

REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #:  
ON FEBRUARY 20, 2014

DATE OF REPORT: MARCH 24, 2014

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

### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with [redacted] Director of the [redacted] Special Education Cooperative, on February 27, 2014.

On February 25 and March 7, 2014 the investigator spoke by telephone with the student's mother. The investigator spoke with [redacted] Case Manager from Developmental Services of [redacted], on March 3, 2014.

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

- IEP for this student dated November 14, 2012
- Service Coordination Activity Summary completed by [redacted] Case Manager for the period of March 1 through May 31, 2013
- Project STAY Observations & Considerations draft report dated April 22, 2013
- Service Coordination Activity Summary completed by [redacted] Case Manager for the period of September 1, 2013 through January 31, 2014
- Email from the parent to the district Autism Consultant dated September 12, 2013
- Email from the parent to district staff dated September 24, 2013
- Project STAY Observations & Considerations report dated October 22, 2013
- Evaluation of Program and Recommendations Report from Heartspring dated December 18, 2013
- Email to the parent from Project STAY staff dated January 3, 2014
- Letter from the Director to the parents dated January 23, 2014 regarding the parent's request for compensatory services
- Letter from the student's neurologist dated February 4, 2014
- Email from the parent to the investigator dated March 12, 2014 regarding observations



- Special Education Record Timeline prepared by the district

### **Background Information**

This investigation involves a 10 year-old boy who is enrolled in the 4<sup>th</sup> grade. The student suffered from an intrauterine stroke and experienced a hypoxic event at birth. He has multiple disabilities, cognitive delays, cortical visual impairment, optic nerve atrophy, rotary nystagmus, and hyperopia. He has been diagnosed with Autism and refractory epilepsy and experiences between 50 and 100 absence seizures a day.

The student was adopted at age three. He is one of eight children, four biological and four adopted. All of the children except for the student either are or have been home schooled. The student first received special education services through Early Childhood programming in \_\_\_\_\_ and has been enrolled in his current district for four years.

According to his mother, the student has responded well to the structured environment of his home. She reports that the family has implemented a behavior plan with the student for seven years and states that the student is able to successfully participate in home and community activities.

In 2012, one of the student's siblings was diagnosed with cancer. That child received medical treatment in Chicago and Washington, D.C. during 2012 and 2013. As a result, that child and the student's mother were away from home for extended periods of time, and the student's father and an older sibling managed the care of the student.

The mother reports that in January 2013 the student's school behavior – which to that point had been unremarkable – became unmanageable. The mother reports that the family began receiving calls from the school asking that someone come get the student and take him home.

Medication changes followed over the spring and summer, and the student's school behavior continued to be very problematic. In April 2013, the district brought in an observer from Project STAY (Supporting Teachers and Youth) to assist the team.

A new teacher was assigned for the student in the fall of 2013. After a "honeymoon" period, the student's inappropriate behaviors escalated. Another observation by Project STAY staff was conducted in October 2013, and in December of 2013, a team was brought in from Heartspring to conduct another observation.

In November 2013, the student underwent a procedure wherein a vagus nerve stimulator was implanted for the purpose of seizure management. The student

missed little school for the implant, but he developed an infection that necessitated the removal of the stimulator and led to his being out of school for the first two weeks of January.

On February 4, 2014, the student's neurologist wrote a note stating that the student was experiencing an increase in seizure activity, and on February 10<sup>th</sup> the parents requested homebound placement. The IEP Team supported that request, and the district provided the parents with written notice of a change of placement for homebound services to begin February 10<sup>th</sup> and end on February 28<sup>th</sup>.

On February 18, 2014, the parents notified the district of their concerns regarding the adequacy of special education services. On March 4, 2014, the parents gave their written consent for a 90-day residential evaluation placement at Heartspring in Wichita, Kansas. That placement began on March 10, 2014.

### Issue

In their complaint, the parents have outlined the following issue:

**The district has not consistently implemented the student's behavior plan as it is written.**

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

The current IEP for the student was developed on May 8, 2013. A Functional Behavior Assessment (FBA) had been completed prior to the meeting and was used by the team when developing the Behavior Intervention Plan (BIP) for the student.

The May IEP for the student contained "Positive Behavioral Interventions and Supports" including procedures for

- Reinforcement – earning a rubber duck for completing a task,
- Choice-making – using objects, pictures, or an electronic choice board,
- Transitions – including the use of a chip to signal a transition, a picture or object to indicate the next activity, and a check-in station for each activity, and
- Calming – specifying responses to avoidance behaviors including the use of red and green cards, MANDT techniques, and timers.

Replacement behaviors were specified, as were the following twelve immediate intervention strategies:

- 1) "Give choices whenever possible to allow (the student) the opportunity to indicate his wants.
- 2) Reinforce (the student's) participation in activities with verbal praise and the rubber duck reward chart.
- 3) Give processing time.
- 4) Give sensory breaks.
- 5) Counting to FIVE before the activity ends (5, 4, 3, 2, 1, finished).
- 6) Using object and simple verb to explain transition.
- 7) Visual to explain appropriate behaviors (red/green card).
- 8) First/Then (visual and object representation of activities).
- 9) Using motivating materials that are linked to student interests.
- 10) Avoid tasks that frustrate the student due to level of difficulty.
- 11) Activities are ready when student arrives to minimize wait time.
- 12) Adult interaction (deep pressure, VERBAL PRAISE).

The May 2013 IEP also contained a Behavior Intervention Plan that included the FBA. The IEP specified that the student's school day would include "1/3 direct instruction, 1/3 leisure activities, and 1/3 generalization of skills with an attempt at peer interaction" under specified parameters. As the student demonstrated behavior that met established criteria, his level of integration with peers would be increased.

In November 2013, the parents expressed concern regarding the Behavior Plan and requested that another FBA be completed. The parent gave written consent for that assessment on November 14, 2013. On November 18, 2013, the student's BIP was amended and a procedure was added to address "inappropriate behaviors." On December 17, 2013, the district presented the completed FBA and the IEP Team updated the student's BIP based upon this new information.

The parent contends that the district has not followed the BIP outlined in the student's IEP. She states that during seven observations conducted between September 25, 2013 and February 14, 2014, she observed failures on the part of district staff to implement the established plan. Specifically, she reports that she saw the following:

- On September 12, 2013, no red/green cards were used when the student twice demonstrated inappropriate behavior.
- On September 25, 2013, during direct instruction, the "rubber duck" reinforcement procedure was not utilized.
- On September 26, 2013, when the student was attempting to bite and then pull hair, no red/green cards were shown to the student.
- On October 3, 2013, after the student grabbed the teacher's whistle, no green card was shown to the student upon his release.

- On October 18, 2013, visual aids were not in place for use with the student, and the rubber ducks were managed by the staff rather than the student.
- On November 18, 2013, materials were not on the table ready for the student when he arrived for work, and the rubber duck reinforcement procedure was not utilized by the paraeducator working with the student.
- On February 3, 2014, when the parent arrived at the school to drop off the student's medication, she saw that he had dropped to the floor in a tantrum, but no red/green cards were used.
- During homebound instruction on February 13, 2014, the district behavior specialist opted to remove himself from the instructional setting rather than utilizing other prescribed calming strategies when the student began exhibiting negative behaviors.

The parent contends that no choice board was in place in the classroom from the start of the school year until October 14, 2013. She further contends that between February 3 and February 14, 2014, no choice board was made available to the student while homebound services were being delivered. The board was made available on February 15, 2014 after the student's mother asked where it was. However, the board was not used consistently during the remainder of the period of homebound service.

In Service Coordination Activity Summary notes dated September 25, 2013, the student's Case Manager writes regarding a team meeting she attended, "(District staff reports) they are starting to use the red/green card again...The red card is to be used for ANY unacceptable behavior." The Case Manager also notes that one staff member would be receiving MANDT training the week of September 30, 2013 and two other staff members who worked with the student would receive MANDT training in October 2013.

In an email to the student's mother dated January 3, 2014, a consultant from Project STAY states, "We have also identified observations indicating IEP protocols are not being consistently utilized, much less with regard to the fidelity with which they are implemented (and that) there have been noted observations by the parent and outside consultants, that the positive behavioral supports and protocols identified in the IEP have not been used with consistency..."

The district believes that it has been responsive to the concerns of the parents and has made wide-ranging efforts to address those concerns. The district contends that the student's behavior plan is extensive and complex and states that it is possible that "from time to time – in a moment of crisis or student emergency, a provider may omit a step in the plan in order to address the immediate service needs of the student." No evidence was provided by the district to refute the parents' specific allegations regarding the implementation of

the BIP during daily instruction or when addressing inappropriate aggressive behaviors.

In the course of her inquiry, the investigator has determined that there have been several instances in which the behavior plan for this student has not been implemented as written. There are documented cases where the red/green card system specified for calming the student was not used, where the rubber duck reinforcement system was not in place or was utilized incorrectly, and where the choice board called for with regard to the choice-making procedure was unavailable. These implementation failures include but are not limited to the particular crisis-related situations noted by the district.

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

### **Corrective Action**

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations on the issue presented in this complaint. Specifically, a violation was established with regard to 34 C.F.R.300.341, which requires that a student's IEP must be implemented as written. In this case, the district did not implement the student's behavior plan as outlined in the student's IEP.

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 Special Education Services stating that it will comply with 34 C.F.R.300.341 by implementing this student's IEP as written.
- 2) No later than two weeks prior to the end of the student's placement at Heartspring, present to the parents a copy of a plan to ensure that all staff members who will be working with the student when he returns to services in the district will be trained on the implementation of the student's BIP.
- 3) Provide Special Education Services with a copy of the plan referenced above in Item 2.

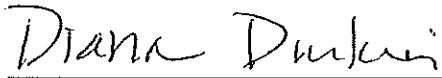
Further, USD #     shall, within 10 calendar days of the date of this report, submit to Special Education Services one of the following:

- 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

Special Education Services

## Complaint Investigation Report

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

**Richard J. Whelan**  
**November 25, 2013**  
**December 12, 2013**  
**14 FC**

This report is in response to a complaint of noncompliance filed under K.A.R. 91-40-51. \_\_\_\_\_, a resident of \_\_\_\_\_, Kansas USD \_\_\_\_\_, filed the complaint on behalf of her daughter, \_\_\_\_\_ [DOB: \_\_\_\_\_]. USD \_\_\_\_\_ is a member district of the \_\_\_\_\_ Special Education Services, which is located in \_\_\_\_\_, Kansas.

During the 2012-2013 school year, the student is in the 11<sup>th</sup> grade at the \_\_\_\_\_ High School. Her special education primary classification is "Autism [K.A.R. 91-40-1 (f)] and her secondary classification is "Mental retardation" [K.A.R. 91-40-1 (oo)]—now Intellectual disability.

### Complaint Concern

The parent's **primary concern** is that the district is not implementing the student's current IEP. Specifically, the parent alleged:

1. The student is eating lunch in the classroom instead of the lunchroom with peers.
2. The student is being allowed to sleep during school hours even though the parent at an IEP meeting requested that she not be allowed to sleep.
3. The student's gym period now consists of running three laps around the school instead of socialization and exercise with three other girls as required by the IEP.
4. The district has not given her a copy of the current IEP.

### Documents and Interviews

The CI reviewed the following documents (referred to as D in this report) related to the concerns:

1. The parent's formal written complaint.
2. The student's current IEP and Behavior Plan [10-15-2013].
3. The parent's written consent on 10-15-2013 to implement the student's current IEP.
4. The student's school attendance record since 08-23-2013 through 12-03-2013.
5. Written statements regarding the parent's concern from the Cooperative's Director, the student's special education teacher and the physical education teacher.



6. A copy of a 12-03-2013 certified letter with a copy of the student's IEP the Cooperative sent to the parent, and 12-04-2013 receipt signed by the parent indicating that the letter was received.

The CI and Cooperative's Director exchanged several e-mail letters about the parent's concern. On December 10, 2013, the CI and the student's mother had a telephone discussion about the concern.

### **Facts and Conclusion**

The parent's **primary concern** is that the district is not implementing the student's current IEP. Specifically, the parent alleged:

1. The student is eating lunch in the classroom instead of the lunchroom with peers.
2. The student is being allowed to sleep during school hours even though the parent at an IEP meeting requested that she not be allowed to sleep.
3. The student's gym period now consists of running three laps around the school instead of socialization and exercise with three other girls as required by the IEP.
4. The district has not given her a copy of the current IEP.

In regard to 1 above, the student's IEP [D 2] does not address lunch arrangements. However, her special education teacher stated [D 5] that eating in the lunchroom with peers is offered and encouraged, but she elects to eat lunch in the special education classroom because there are "too many people...and I don't like crowds." Based upon these facts, the CI could not substantiate noncompliance with the IEP.

Referring to 2 above, frequent rest breaks are provided in the student's IEP supports section because of mood fluctuations and variations in daily health status as indicated by frequent absences because of illness and medical appointments [D 4]. Her Behavior Plan states that upon "signs of struggling (becomes tired or has other physical or behavioral symptoms) she will have time to rest and regroup." While this second part of the concern, i.e., sleeping in class, was discussed at the 10-15-2013 IEP meeting, the only IEP change was to "record time resting/sleeping and the student's father gave written consent [D 3] for this action. In addition the father gave written consent to implement the student's IEP including the addition noted above. Based upon these facts, the CI could not substantiate noncompliance with the IEP.

For 3 above, the physical education class is not described in the IEP special education and related services lists nor is it identified as an elective activity within those lists or elsewhere in the IEP. Therefore, the IEP does not contain any statements regarding the parent's concern about the physical education class providing "socialization and exercise with three other girls as required by the IEP." Under parent concerns in the IEP, a written note stated the parents "would also like to see her back in physical education." The physical education teacher stated that the student "is welcomed in first hour Lifetime Fitness any time." "When she comes in, M. participates at her own pace in our workout videos." In the part of the IEP which addresses participation in regular education programs the following statement was added: "M is currently participating in a regular

content art class.” “The remainder of the school day is in the resource room.” Physical education was omitted from this IEP statement even though the student attends a general physical education class when her health status for that day supports participation. In addition, the IEP’s page for support services indicated that the student had “paraprofessional assistance” for the entire school day inclusive of the art class and a physical education class. Because the student’s IEP required supports for her participation in a general physical education class, the IEP should have contained a clear statement, as it did for the art class that the student would attend the class a specified number of days per week. However, that statement was missing from the IEP and the district did not provide a prior written notice that physical education was added to the student’s IEP subsequent to its 10-15-2013 effective date.

Based upon these facts, the CI determined that the district did not comply with requirements regarding IEP contents, and parental participation, including notification of proposed IEP changes, when it initiated the student’s participation in the general physical education class. However, it is noted that this noncompliance is a procedural deviation which did not affect the student’s receipt of a free appropriate education. Nevertheless, it is an error that requires correction.

As to 4 above, the parent (student’s mother) attended the 10-15-2013 IEP meeting [D 1] but did not sign the IEP attendance page [D 2]. [Also, she did not sign the request for consent page to implement the IEP [D 3]. However, the student’s father attended the IEP meeting and gave written consent to implement the IEP.] In addition, the father indicated by his initials on the 10-15-2013 IEP attendance page that he had received a copy of the IEP. An additional copy of the student’s IEP was received by the parents on 12-04-2013 [D 6]. Based upon these facts, the CI could not substantiate noncompliance with the IEP because both parents attended the IEP meeting and the student’s father received a copy of the student’s IEP at that time. Federal regulations at 34 CFR 322 (f) requires that the district “must give the **parent** (emphasis added) a copy of the child’s IEP...” The district is not required to give both parents a copy of the IEP when, as in this case, both parents share the same address [D 1 and 2], and both attended the 10-15-2013 IEP meeting. Additionally, the district sent an IEP copy to the parents’ home on 12-03-2013 [D 6].

### **Corrective Actions**

Based upon the **Facts** and **Conclusions** stated above, a corrective action for #3 of the parent’s primary concern is required.

The cooperative’s director of special education, within 15 school days from the date of this report, shall correct the procedural error related to the general physical education class within the student’s IEP by scheduling an IEP meeting or using the IEP amendment process to place a statement in the IEP addressing the circumstances under which the student will participate in a general physical education class. A copy of the corrected IEP and a prior written notice of IEP changes shall be given to the parent.

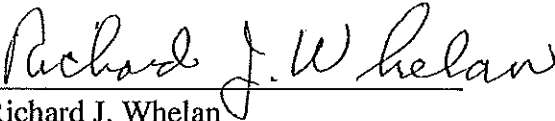
The cooperative's director of special education shall send a copy of the required documents noted above to Mr. Mark Ward, KSDE/SES; 900 SW Jackson Street, Suite 620; Topeka, Kansas 66612-1212 on the same date the documents are given to the parent.

Finally, the cooperative director, within 10 calendar days from the date of this report, shall submit to Mr. Ward 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, 120 SE 10<sup>th</sup> Avenue, Topeka, Kansas 66612-1182 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.

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- (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).

# 14FC15

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT \_\_\_\_  
PUBLIC SCHOOLS  
ON FEBRUARY 6, 2014

DATE OF REPORT: MARCH 4, 2014

This report is in response to a complaint filed with our office by \_\_\_\_ the parent 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 parent alleges that, on January 24, 2014, school staff members used "verbal aggression" and "threats" to "bully" and "intimidate" the student to the extent that it has interfered with his education and violated provisions in his IEP.

## Investigation of Complaint

The investigator interviewed the parent by telephone on February 11, 2014 and reviewed the complaint submitted by the parent. The investigator also reviewed the student's IEP and written statements from the student's teachers and from witnesses to the events on January 24, that are the subject of this complaint. Written statements were submitted by: the student's Math teacher, Interrelated teacher, Shop teacher, Speech/ English teacher, Economics teacher, Biology teacher and Weight Training instructor, two high school office employees, the High School Counselor and the School Superintendent. .

## Background Information

The student is an 16 year-old. boy, in the 10<sup>th</sup> grade. The incident which forms the basis of this complaint began in shop class on the morning of January 24, 2014. The student told the shop teacher he had a doctor's note indicating that he was not to lift heavy objects. The shop teacher gave the student a hall pass so he could go to the office to get the doctor's note. The office did not have a doctor's note, so the student called his mother.

The school counselor saw the student on the phone and reminded him students were not to leave class to use the phone

unless there was an emergency. The counselor told the student he needed to return to class. The student left the office but did not return to the shop class.

At the beginning of 5<sup>th</sup> hour, about 11: 30 a.m., the school counselor again saw the student in the office on the phone. The counselor went into the office, where office workers indicated they had instructed the student not to use the phone. The counselor instructed the student to hang up the phone and call his mother at lunch. The school counselor indicated that the student responded in a disrespectful manner. At that point, the Superintendent, who was in the building because the principal was not in, was asked for help. The Superintendent walked with the student to an outer office of the counseling room and sat at the East table with the door open to discuss the situation with the student. No disciplinary action was taken against the student.

#### Discussion

ISSUE: THE PARENT ALLEGED THAT SCHOOL STAFF MEMBERS USED "VERBAL AGGRESSION" AND "THREATS" TO "BULLY" AND "INTIMIDATE" THE STUDENT TO THE EXTENT THAT IT HAS INTERFERED WITH HIS EDUCATION AND VIOLATED PROVISIONS IN HIS IEP.

At the outset, it is important to note the limited investigative jurisdiction of the State Department of Education in a special education complaint. Pursuant to Federal Regulations, at 34 C.F.R. 300. 153, a State Department of Education has jurisdiction to investigate only allegations of a violation of Part B of the Individuals with Disabilities Education Act (IDEA). Part B of the IDEA does not address issues regarding verbal aggression, threats, intimidation or bullying.

The parent submitted with her complaint a copy of Kansas law K. S.A. 72-8256, which requires each board of education to adopt a policy to prohibit bullying and to adopt and implement a plan to address bullying. If the parent believes the district is not in compliance with this statute, the parent may elect to address this issue with the USD \_\_\_ Board of Education.

For the reasons stated above, this investigation was focused on the parent's allegation that interactions of staff members with the student interfered with the student's education and violated provisions in the student's NEP.

In the telephone interview with the parent, the investigator discussed the parent's allegation that the student's IEP clearly states his triggers that shut him down academically, " that were allegedly ignored by the school counselor. However, this investigator finds that the student's IEP does not identify triggers to academic shut-down. The only violation of the TEP the parent could specifically cite was that while the student was in the office, and later in the outer office in the counseling room, he was not in class receiving special education services. In the opinion of this investigator, this time out of class was not a failure to implement the student's IEP. The student went to the office of his own volition, and refused to follow instructions to get off the phone and return to his assigned classroom. After a thorough review of all the evidence presented, including written statements from the student's teachers and witnesses to the interactions in the office area, this investigator was unable to substantiate any inappropriate action on the part of school personnel or any educational detriment to the student resulting from the interactions between the student and school staff members on January 24, 2014.

#### Conclusion

A violation of special education laws and regulations is not substantiated on this 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, Landon State Office Building, 900 SW Jackson Street, 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 Programs

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).



JUL 14 2014

Kansas State Department of Education

Early Childhood, Special Education and Title Services

KSDE

Complaint Investigation Report

Complaint Investigator (CI): Richard J. Whelan
Complaint Filed: June 19, 2014
Report Completed: July 9, 2014
Complaint Number: 14 FC

This report is in response to a complaint of noncompliance filled under K.A.R. 91-40-51. Catherine E. Johnson, an attorney at the Disability Rights Center of Kansas, located in Topeka, Kansas, filed the complaint on behalf of her client, [DOB: ], and his mother, , are residents of , Kansas USD , USD is a member district of the Special Education Cooperative # which is located in , Kansas.

During the 2013-2014 school year for the time period from October 10, 2013 through the end of the 2014 spring semester, the student was in the 2nd grade at the School, a cooperative program located in , Kansas. His primary special education classification is "Autism" [K.A.R. 91-40-1 (f)].

Background

The student has been diagnosed by professional mental health staff at the Center [ , KS and , KS] with Pervasive Developmental Disorder Not Otherwise Specified (including Atypical Autism), and Disruptive Behavior Disorder Not Otherwise Specified. These diagnoses are based upon criteria from the American Psychiatric Association, Washington, D.C. He takes medication for mood stabilization, hyperactivity, sleep aid, and attention problems.

As of October 10, 2013, until the end of the 2014 spring semester, the student received special education services provided by his IEP in a Special Day School operated by the cooperative in , Kansas, and indirect related services of Occupational Therapy and Speech/Language Therapy. Special education services included direct instruction in all academic subjects, instruction for prosocial behaviors, individual therapy and group therapy.

The student's October 10, 2013 IEP's Positive Behavior Intervention and Support plan is based upon teaching expectations for appropriate behaviors. When the appropriate behaviors occur as responses to teacher instructions, the student earns points which may be traded for tangible rewards, e.g., computer time.

The Behavior Intervention Plan (BIP) in the October 2013 IEP states that the principal or counselor will remove the student from the classroom when the student does not follow

directions from the teacher or paraeducator, or does not respond to attempts by classroom staff members to stop misconduct and return to classroom tasks.

The student's April 8, 2014 IEP described the BIP in more detail. It is a summary of a more extensive description of the school's Motivation System which uses a levels approach to teach child self-regulation skills. This approach starts at level one with specific behaviors with extrinsic rewards for compliance, and ends at level three when a student has acquired skills in selecting appropriate responses in a school setting. The system is individualized in that behaviors requiring intervention are unique to the student as are the points awarded for appropriate behaviors or withdrawn for inappropriate behaviors. For example, the school staff used visual schedules to remind the student of instructional tasks and cues for acceptable behavior; red and green circles to help him make choices; and a scale to help the student assess his affective feelings, be they anger or calm, with the expectation that he would learn acceptable ways to express them.

The school staff members used a form to record incidents when the student was placed in seclusion. When the student behaved inappropriately during class sessions or other places in the school, staff members asked him to go to the seclusion room. Behaviors listed on the form that resulted in seclusion placement included disruptive actions, disrespect toward staff, vulgar language and gestures, out of control, destruction of property, threatening others/self, and refusal to work or comply with staff requests.

One form described the student scratching a desk with scissors prior to placement in the seclusion room. Other forms indicated that the student was hitting himself, kicking the desk, making loud comments, throwing objects and turning over desks, and refusing to do school tasks. Another form described an incident during which the student threw his "belongings" at a staff member when he was leaving the school bus. These incidents are consistent with the behaviors listed on the form. The remaining forms described behaviors that resulted in the student being placed in seclusion: left room without permission; sitting under desk; left the classroom and sat down in the hallway; plays with food at breakfast; argued with staff about a referral he needed to complete; and refusing to enter the school.

While in the seclusion room, the student exhibited a variety of behaviors. For example, he frequently went to sleep, urinated on the floor and rolled in it, pounded the door, twirled, cried, whined, made verbal threats toward staff members, kicked the wall, covered his head with a blanket, made growling noises, threatened to kill himself, and made statements such as "I hate my life; nobody cares about me." Other behaviors included self-biting and biting staff members, kicking the room door, tearing off a baseboard and trying to eat it, taking off his clothes, and kicking staff members who stayed in the room to protect him from self-injury and to help him regain self-control.

When the student was in the seclusion room, staff members used a variety of procedures to calm him and to teach alternative responses to those that resulted in his removal from the classroom. Also, staff members conveyed to him the importance of completing school tasks and the positive consequences for doing so. In these circumstances, the student

mostly ignored the suggestions to return to the classroom after a brief rest break, and then exhibited behaviors that ensured his continued placement in the seclusion room. However, the written log notes also contained frequent references to staff members talking to the student about “giving up points”; “pay off a penalty”; “write an apology”; “accept consequences for damages to Mrs. S’s class”; “work on referral”; and “clean up mess” as conditions for return to the classroom. These phrases were part of the school’s motivation system. For instance, “clean up mess” referred to the student picking up objects he threw in the classroom, and returning desks to their upright position. A penalty referred to points withdrawn for broken items. The student’s most frequent reaction to a request to accept consequences upon leaving the seclusion room was a verbal refusal to do so, and reescalation of the behaviors that initially resulted in his placement in the room.

From October 10, 2013, when the student transferred from a USD elementary school to the cooperative’s special day school, to mid-December 2013, he had seven seclusion days: 5 in October and 2 in December. He spent 22 hours in the seclusion room, an equivalent of 3 school days.

Each form from the 2013 fall semester and the 2014 spring semester describing incidents included a moment by moment anecdotal account of the rationale for the student’s placement in the seclusion room, his behavior while in the room and staff interactions with him. These accounts clearly show that keeping the student engaged in classroom tasks specified in his IEP was not successful for the 7 fall school days and 23 spring school days [6 in January; 2 in February; 5 in March; 9 in April; and 1 in May, 2014] the student was placed in a seclusion room. The accounts also show staff efforts to help the student acquire self-regulation skills that would enable him to function successfully in school. During the 2014 spring semester, the student spent 105 hours in seclusion, an equivalent of 19 school days.

The student’s teacher described the days when seclusion did not occur. Typically, the student would complete academic tasks for 10 to 20 minutes, and then requested time in the seclusion room. He did not have difficulty during a lunch period with other students. The cooperative scheduled two IEP meetings during the 2014 spring semester to address concerns about the student’s continued pattern of noncompliant behaviors even though the team tried many variations in the point system generally described in the BIP. However, the student’s number of placements in the seclusion room, and the amount of time in this room, did not decrease during the school year, a clear indication that the procedure did not help him spend more time in the classroom.

### **Complaint Allegation, Facts, and Conclusions**

The written formal complaint **alleged** that the district and the cooperative failed to provide the student with a FAPE due to inappropriate use of seclusion and restraint.

The use of seclusion or restraint are not part of federal and state special education laws and regulations and so cannot be addressed through special education complaint

allegations; see 34 CFR 300.153 (b) (1). Therefore, the CI investigated whether the cumulative time the student spent in seclusion deprived him of the opportunity to receive the special education and related services in his IEP.

From October 2013 through May 2014, the student was placed in the seclusion room 30 times. The student spent approximately 127 clock hours in the seclusion room during this time period. These clock hours are the equivalent of 19 school days during which he missed services from his effective IEP. The number of hours in seclusion during the 30 school days ranged from .5 to 7.5. The median number of hours away from the classroom was 5.5. In brief, placing the student in seclusion substantially decreased the time he spent in the classroom receiving IEP services.

The cooperative did schedule IEP meetings to address concerns about the student's status. At a January 2, 2014 IEP meeting the team discussed the student's transportation from school to his home when his behaviors are noncompliant. However, the notes did not indicate that changes in the IEP and the BIP were discussed. On January 6, 2014, school staff met with the student's mother and members from the student's Prairie View Treatment Center team. The participants agreed that a member of the cooperative's autism team would observe the student during his school day. One observation was on January 30 for 45 minutes and January 31 for 40 minutes. The observation report described one incident when the student did not comply with staff request and was placed in seclusion. Comments about the second observation indicated that the student did comply with a staff request to complete a task, although he did attempt to negotiate the conditions under which he would do the work. The report did not make any recommendations about changes in the IEP or the BIP. On April 7, 2014, the IEP team met to review the student's reevaluation report and the student's IEP. During the meeting the parent stated that the student was getting worse, and is spending too much time in seclusion. The IEP was not changed and the meeting notes did not reflect any discussion about changes in the BIP. During the 2013-2014 school year, the cooperative did not use an external consultant or agency with professional credentials to address the behavioral and instructional concerns presented by the student, and did not propose changes to the IEP or the BIP even when confronted with consistent documentation that the student was not making progress.

The Office of Special Education Programs (OSEP), U.S. Department of Education, determined that a district, in response to an uncooperative student, as is the case here, stated that the failure of a student to cooperate with school staff in implementing his/her IEP does not relieve the district of the responsibility to provide a FAPE, nor to make good faith efforts to do so. And, the parent has the right to file a complaint if efforts are not being made. [See Letter to Borucki, OSEP, April 11, 1990.] The facts noted above document that the district/cooperative did not make sufficient efforts to ensure that the student received a FAPE.

OSEP has also determined that the state education agency (SEA) can, on a case by case basis, conclude that a student's IEP, and its implementation, does not provide a FAPE and can require the district to develop a remedy for the noncompliance. Therefore, the CI

concluded that because of the time spent in seclusion the student missed a substantial number of hours of IEP services, and that those missed hours denied the student the opportunity to receive a free appropriate education (FAPE) as required by 34 CFR 300.17 (d): special education and related services provided in conformity with an IEP. In this instance, the student did not receive services in conformity with his IEP because the hours in seclusion precluded provision of many of the hours of services per day and days per week specified in his IEP. [See Memorandum to Chief State School Officers, OSEP, July 17, 2000.]

### **Corrective Action**

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

The student's attorney submitted several recommendations for resolution of the complaint. One was for compensation of the IEP services missed while the student was in seclusion. In some circumstances this option would be appropriate, but it is not in this circumstance given the facts in this case. First, according to the student's academic performance status described in his IEPs and the April 2014 reevaluation report, his cognitive ability is well above average. His achievement scores in the reevaluation report varied from high average to low average. The reevaluation report noted that he could focus on a task for only a brief time which may be caused by emotional problems, or medication side-effects. Second, absent a change of placement and/or significant changes in the IEP, adding hours to the same program in which numerous seclusion incidents were not effective in increasing the student's classroom time would not accomplish the purpose of compensation for lost academic engagement time.

The cooperative director shall, within 28 calendar days from the date of this report:

Send a written plan to address the student's special education needs 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. The plan shall include the following parts:

1. A schedule to convene the student's IEP team to consider whether a change of placement is needed. If a change in placement is made that is not in a district served by the cooperative, part 2 below need not be completed. Conversely, if the change is to a placement located in a district within the cooperative, part 2 shall be completed. A written summary of the meeting, including decisions made, shall be sent to ECSETS within two calendar days after the meeting.
2. A schedule to contract with an individual or individuals, or an agency (e.g., Project Stay), to complete an FBA, propose a BIP, develop guidelines for using seclusion and restraint, and assist the IEP team as it plans special education and related services for this student. The contract shall provide that the individual(s) or agency selected shall remain available throughout the 2014-2015 school year to

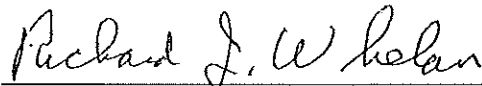
monitor the student's progress on at least three intervals, and to recommend IEP changes as needed. During the 2014-2015 school year, the director, or designee, shall submit written monthly student progress reports regarding the student's academic performances, disciplinary actions, and seclusion incidents, to the individual(s) or agency referred to above and to ECSETS. Upon its completion, a copy of the contract shall be sent to ECSETS.

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.



Richard J. Whelan  
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).

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## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

RECEIVED

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KSDS

### REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # ON OCTOBER 10, 2013

DATE OF REPORT: NOVEMBER 15, 2013

This report is in response to complaints filed with our office by \_\_\_\_\_ on behalf of her daughter, \_\_\_\_\_. In the remainder of this report, \_\_\_\_\_ will be referred to as "the student."

#### Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with the Director of Special Education for the \_\_\_\_\_ Public Schools, \_\_\_\_\_, on October 21 and November 1, 2013. The investigator spoke by telephone with the student's mother on November 1, 2013.

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

- Extended School Year Documentation of Need dated April 19, 2013
- The IEP for this student dated May 6, 2013
- Summaries of Assistive Technology (AT) consultation meetings dated September 6, 2013
- Written response from the Physical Therapist who serves this student dated October 18, 2013 regarding complaint issues
- Email correspondence between the student's mother and the special education teacher dated September 10 and 11, 2013
- Detailed Report for Students completed by the PT for the period of August 1 through October 5, 2013
- District response to complaint dated October 25, 2013
- Progress Report dated November 1, 2013
- USD # \_\_\_\_\_ policies related to "Supervision of Medication"
- Relevant sections of the Kansas Special Education Services Process Handbook
- Copies of the student's Planner covering the period August 19 – November 6, 2013



## Background Information

This investigation involves a 9 year-old girl who is enrolled in the 4<sup>th</sup> grade. She has been diagnosed with Wolf-Hirschhorn Syndrome, a genetic disorder. The student takes medications to address recurring seizures.

The student has moved this year with her same age peers to a larger 4<sup>th</sup> through 6<sup>th</sup> grade school with a total enrollment of approximately 560 students having last been enrolled in a smaller K-3 grade school with approximately 230 students. She receives 210 minutes per day of services in a special education setting and an hour a week of Adaptive Physical Education. Forty minutes per week of direct service is provided by a Physical Therapist in order to work on transfers, mobility, and the use of assistive technology. Both an Occupational Therapist and a Speech Language Pathologist provide additional consultative support. The student is nonverbal.

## Issues

In her complaint, the student's mother outlines four areas of concern:

- 1) The district has failed to properly address four of the eight goals outlined in the student's May 6, 2013 IEP;
- 2) the 240 minutes of "inclusion" outlined in the student's IEP have not been used appropriately;
- 3) the district has failed to provide the parent with the documentation she has requested; and
- 4) the district failed to administer medications which the parent had sent to school for the student.

## Issue One

The parent contends that because the district has failed to appropriately address four of the student's IEP goals, the student has failed to make progress in key areas.

Federal regulations at 34 C.F.R. 300.341 state that a student's IEP must be implemented as written. Kansas statutes at K.S.A. 72-987 specify that a student's IEP must contain a statement of "**measurable** (emphasis added) annual goals."

A student's IEP should function as the tool that directs and guides the development of meaningful educational experiences, thereby helping the child learn skills that will help them achieve his or her goals. Utilizing baseline data

established in the present levels of academic achievement and functional performance (PLAAFPs), the IEP team must develop measurable annual goals, including academic and functional goals that meet the child's needs and enable the child to be involved in and make progress in the general education curriculum.

As stated in the Kansas Special Education Services Process Handbook, ***measurable annual goals*** are descriptions of what a child can reasonably be expected to accomplish within a 12-month period with the provision of special education (specially designed instruction) and related services. "Baseline data provides the starting point for each measurable annual goal" and ***any goal written should have the same measurement method as was used in collecting its baseline data***. Also, when selecting baseline data it needs to be (a) specific – to the skill/behavior that is being measured, (b) objective – so that others will be able to measure it and get the same results, (c) measurable – it must be something that can be observed, counted, or somehow measured, and (d) able to be collected frequently – when progress reports are sent out the progress of the student toward the goal will have to be reported using the same measurement method as used to collect the baseline data."

**Goal 1:** By May 2014, (the student) will independently propel herself, following visual signs to a prompted location within the school 4 out of 5 times."

The student's May 2013 IEP indicates that at the end of the 2012-13 school year she had the physical capability to propel herself throughout her school environment although extra time might be needed for her to do so. She was working to improve the speed in which she travels to a prompted location within the school, and had reduced the time it took her to travel 800 feet from 25 minutes to 3. The IEP also stated that the student would follow signs and icons. However, according to the "Baseline" statement associated with Goal 1, the student was only able to propel herself 15 feet before stopping.

The parent reports being told by the Physical Therapist (PT) and by classmates of the student that staff and students have been pushing the student's wheelchair rather than allowing her to propel herself.

By report of the district, the student is able to propel herself over distances of up to 430 feet. The district states that in every transition the student is required to propel herself with no physical assistance although verbal cues are required about 40% of the time.

According to the district the only time the student's wheelchair had been pushed by staff was at the end of the school day on the way to the bus if the departure time was imminent or at the beginning of the day when many students were unloading from the bus and staff was concerned about the student maneuvering through a crowd. The district reports that since the filing of this complaint the

student is now following her fourth grade classmates down the hallway propelling herself at all times.

The parent reports that at the time of the filing of her complaint on October 10, 2013, only a few signs were posted around the school for her daughter's use, and there were no signs pointing to the bathroom used by the student or to the classrooms to which she goes during the school day.

The district contends that signs are posted directing the student to the music room, the gymnasium, the lunchroom, both of her classrooms, and the library and has provided the investigator with photographs of those signs. The district acknowledges that there is no sign to indicate where the restroom used by the student is located. According to the district no sign has been posted for the restroom because the restroom is situated directly across from the special education classroom, and the student has not demonstrated a need for a directional sign for that location.

In email correspondence with the mother on September 11, 2013, the special education teacher stated that visual signs were available for the student "throughout the building." According to the teacher, staff directed the student's attention to those signs and encouraged her to follow them. At that time, the student was according to the teacher "looking at the sign and following it" approximately "1 time out of 5."

Progress on this goal was monitored on October 19, 2013. According to a Progress Report sent to the parent, the student has worked on Goal 1 on a daily basis. "With verbal cues, she is able to propel herself from her classroom to the IRC (special education) room 2/2 trials a week during her PT session."

A "Detailed Report" of services completed by the Physical Therapist covering the period of August 22 through October 1, 2013 shows that the student required "frequent verbal cues and frequent breaks to move herself from her classroom to the gym" during her first therapy session of the year. On September 10, 2013, the therapist noted that while the student was "showing some improvement with propelling her wheelchair...she continues to want to stop and go into other classrooms." However, by September 29, 2013, it was noted that only "two verbal prompts" were necessary in order for her to complete the transition.

**Goal 2:** By May 2014, (the student) will feed herself in the cafeteria among general education classmates with minimal assistance at the elbow 4 out of 5 attempts."

The "Math" section of the student's May 2013 IEP states that she is "learning to feed herself by scooping and taking the spoon to her mouth with assistance at the elbow." According to Baseline information in the student's May 2013 IEP, the

student was feeding herself with "assistance at the elbo (sic) 1 out of 5 tries." Neither the goal nor the Baseline information specified any type of food. The parent reports that the student's teacher told her that the student was only working on self-feeding solid foods such as yogurt and Jell-O because the soups available to her were too runny. The parent feels that staff has not been properly trained to know how to feed soups and so are failing to do so.

According to the district, staff has been trained with regard to appropriate feeding techniques to use with the student. After consulting with the Paraeducator who served the student last year, it was determined that the student only ate thicker soups with a spoon; a straw was used with thinner soups.

According to the student's Progress Report for the first quarter of the school year, some regression with regard to independent feeding was observed at the beginning of the 2013-14 school year. The student was struggling when grasping objects including feeding utensils. The district reports that she was initially very distractible in the lunchroom setting. She is now successfully holding utensils but continues to need assistance at the elbow to get the food to her mouth. It is anticipated that the specialized utensils being ordered by the district should better facilitate feeding progress.

**Goal 4:** By May 2014, during a variety of activities throughout her day, (the student) will activate a voice output device or switch to make a request, choice and or comment in 6 or more activities daily."

According to the "Communication – Expressive/Receptive Language" section of her May 2013 IEP, the student was using "single output voice devices and 4 output voice devices throughout her day...(and would) access a switch fairly consistently when used as a part of her daily routines." The "Baseline" statement associated with Goal 4 indicated that at the time the IEP was developed the student was consistently using these devices 4 times a day.

According to the parent, voice output devices were not in use until mid-September. The parent states that although she had been told in the first IEP Team meeting of the year that staff had been trained to use these devices, the Physical Therapist who serves the student reported to her that the devices remained in the same box in which they had been delivered to the classroom. The parent reports that it was not until the therapist followed up with the teacher that switches were put to use with the student.

The parent states that she has requested documentation as to when the switches are being used but has not to date received any such documentation.

The district reports that in a telephone conversation on September 9, 2013, the PT told the parent that she had "seen several AT devices in the IRC classroom in

the box that (was used for initial delivery) but did not know if they were used daily because (the PT) was not in the IRC or regular education classroom daily.”

The district contends that as of the first day of school on August 16, 2013, switches were in place in the restroom and computer lab, on the student's desk, and at various doors and that voice output devices were in place at a variety of locations in the school as of September 3, 2013.

An email sent by the special education teacher to the mother on September 11, 2013 contains a daily work schedule. According to that schedule, thirty minutes per day were specifically devoted to “switch work; iPad, switch devices; turning on and off items, knocking to get into rooms.”

A review of the student's Planner for the dates of August 19 through November 1, 2013 shows that the first specific reference to a “switch” appeared on September 6<sup>th</sup>. Thirteen additional references were noted in September, and thirteen references were seen in the month of October.

The district states that the student currently uses switches to select 4 activities a day. Switches are available on her classroom desk for daily use, at an activity choice station (used 2-3 times per week), and at a sensory table (also used 2-3 times per week) as well as in the restroom.

**“Goal 8:** By May 2014, (the student) will demonstrate an understanding of one to one correspondance (sic) by selecting the schuedule (sic) icon which corresponds to her current location in 4 out of 5 trials.”

Baseline information in the May 2013 IEP indicates that at the time the IEP was written the student was selecting the schedule icon corresponding to her current location from a field of two icons on 2 of 5 trials.

According to the parent, the student's teacher has told her that the class schedule is reviewed every morning. The parent contends that this activity does not properly address the student's goal because it is implemented as a group – rather than an individual – activity.

The district reports that in addition to the group review of the daily schedule, the student also carries a portable schedule with her. That schedule is used to allow the student to select from a field of two icons the one that represents her current location and the once representing the location toward which she is moving.

The district notes that the student initially struggled with learning a new routine at her new school with new staff. In a September 11, 2013 email to the parent, the special education teacher noted that the student had a “first and next schedule on the door” but needed “much prompting to complete this task.” Now, however, the district contends she is consistently able to select correct icons at least twice

each day and has been able to select correctly 4 times during some school days. She is consistently successful in identifying where she needs to go after lunch and after finishing work in reading centers.

### Findings

The investigator believes that the district has delivered services intended to address the four goals specified in this complaint.

However, Kansas Statutes at K.S.A. 72-987 require that Benchmarks or Short Term Objectives (STOs) be included in the IEP of any student with a disability who takes an alternate assessment aligned to alternate achievement standards such as the Kansas Alternate Assessment (KAA). Benchmarks are major milestones that describe content to be learned or skills to be performed in sequential order. They establish expected performance levels that coincide with progress reporting periods for the purpose of gauging whether a child's progress is sufficient to achieve the annual goal. It is important to note that the term "benchmark," as it is used in the IEP, should not be confused with the term "benchmark" as it is used in state and local standards. In the curricular standards, a benchmark is a specific statement of what a child should know and be able to do. In the context of IEPs, benchmarks measure intermediate progress toward the measurable annual goal.

By monitoring a student's progress toward attainment of Benchmarks and annual goals, the IEP Team is able to effectively make decisions when planning the student's program and can implement instructional changes if they are needed.

The May 2013 IEP for this student states, "due to (her) cognitive impairments and her academic abilities an alternate assessment is required for state testing (of the student)." In the course of this investigation, the investigator determined that the May 2013 IEP does not include Benchmarks or STOs for any of the goals developed for the student.

According to the Director of Special Education, the special education teacher for the student realized in August of 2013 that the May 2013 IEP did not contain Benchmarks. The district states that Benchmarks "have now been added (to the IEP) and (the district) will meet with parents to review" them.

The district reports that because the teacher who was responsible for the development of this student's May 2013 IEP is no longer with the district, it is not possible to determine whether the omission of Benchmarks was a technical or human error.

Because the IEP for this student did not contain either Benchmarks or Short-Term Objectives as required for a student taking an alternate assessment, a violation of special education laws and regulations has been identified.

### Additional Comments

In the opinion of the investigator, there may not be consensus between the parent and the district as to what specific skills are to be monitored/measured with regard to the goals referenced in this complaint. The investigator would urge the district and the parent to develop a clear, shared understanding of the skills that are to be targeted by each goal. It may be helpful for additional baseline data to be collected that can help the team make a tighter connection between the student's present level of performance, goals, and baseline statements associated with those goals. By clarifying the conditions under which targeted behaviors will be assessed, all parties involved in data collection will know precisely what behaviors to look for, and the parent will get a clearer picture of the student's progress.

### Issue Two

Federal regulations at 34 C.F.R. require that a student's IEP be implemented as written. The Kansas Special Education Services Process Handbook states with regard to educational placement in the least restrictive environment, "All children with disabilities have the right to an education in the least restrictive environment based on their individual educational needs...Schools must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled."

However, federal regulations, in provisions related to the IEP process, contemplate that the academic curriculum "may be modified to accommodate the individual needs of students with disabilities." Additional guidance on the decision-making process was provided in 1993 in *Oberti v. Board of Education of the Borough of Clementon School District*. In that case it was determined the federal regulations do not require that "the same educational experience (be provided) to a student with disabilities as is generally provided for students without disabilities...To the contrary, (districts) must address the unique needs of a child with disabilities, recognizing that the student may benefit differently from education in the regular classroom than other students." If an entirely different curriculum is needed for the student to achieve his or her goals, it needs to be determined if appropriate special education supports (for both the child and teacher) can be most appropriately provided within the context of the general education classroom.

The parent states that the student's IEP calls for her to have 240 minutes of "inclusion." According to the parent, she was sent a picture showing the student and a Paraeducator seated at the rear of the classroom working hand-over-hand on a jigsaw puzzle. No other student photographed in the classroom was working on a puzzle. The parent contends that the student is not appropriately included if she is not working with other fourth grade students on class assignments.

According to her May 2013 IEP, the student has a significant delay in fine and gross motor development compared to age peers and "is not able to independently participate in or access the school curriculum or environment." She is "working to answer yes and no questions with icons (and) progressing towards locating and recognizing her name." She "participates in general education small group rotations, engaging in peer interactions and participating with accommodations (but) does not have the ability to write or independently complete grade level tasks." Due to her cognitive impairments, the student is "unable to complete grade level academic tasks. She requires adult guidance, supervision and modification to be successful with third grade activities." The student "does not understand language at the level of her same age peers impacting her ability to progress in the General Education curriculum." She "is nonverbal and...needs...assistive technology devices to help her interact with other(s) and communicate in her environment."

According to the May IEP, the student was to receive 240 minutes per day of "inclusion services" beginning in August 2013. While the student's unique needs dictated that the student's curriculum would need to be significantly modified from that of her grade level peers, she would nonetheless have the opportunity to interact with non-identified peers in a general education setting. Instruction on a modified curriculum could be provided through the use of a Paraeducator working with the student in the fourth grade classroom.

The district states that as reflected in Work Schedule sent via email to the parent by the special education teacher on September 11, 2013, the student spends 240 minutes each day receiving instruction in the general education setting with assistance from a Paraeducator. She engages with classmates during transitions and during activities such as the Listening Center, and she interacts actively with peers at recess. Because of her disability, classroom time is often focused on individualized academic tasks, modified to meet the student's unique educational needs.

Because the student is served in the general education setting for the 240 minutes specified in her May 2013 IEP and receives instruction in a modified curriculum as called for in that IEP, a violation of special education laws and regulations is not substantiated on this issue.

### **Issue Three**

The Family Educational Rights and Privacy Act (FERPA) of 1974, as amended (2006) as well as State special education laws and regulations require schools to have reasonable policies in place to allow parents to review and inspect their child's educational records. "Educational record" means those records that are directly related to a student and maintained by an educational agency and may include (but are not limited to) records associated with academic work completed and level of achievement. Federal regulations at 34 C.F.R. 300.613, require that



a district provide a parent, upon request, access to the child's records, and under certain circumstances, a copy of the records. Regulations state that the district must comply with a request such as this "without necessary delay...and in no case more than 45 days after the request has been made."

According to an email dated September 10, 2013, the mother requested that the teacher provide her with documentation regarding "what (the student) is doing in order to accomplish her IEP goals, how long and how often is she working on these, and who she is working with and how she is doing so far in each. Also, can you include a more detailed daily schedule (when is she using the toilet system, switches, learning how to get to her classroom, morning routines, reg. classroom time, etc.)."

The district reports that the classroom teacher responded to the parent on September 11, 2013, providing her with a daily schedule and a brief summative statements regarding the student's progress on each of her eight goals. The response included the following statement: "As for who works with her when. Depending on the schedule of (the student) and the other students as well as their needs each staff member has and will continue to work with her throughout the day."

The parent stipulates that the district did provide the above-mentioned schedule and summative information and further stipulates that she has received a Progress Report for the first quarter but contends that she should have been given more specific documentation regarding the student's progress on her goals.

In the course of this investigation, the investigator determined that prior to October 28, 2013 the district did not collect any data related to the goals specified in this complaint. It does not appear that any relevant records were withheld from the parent. Under these circumstances, a violation of special education laws and regulations is not substantiated with regard to this aspect of the complaint.

#### **Issue Four**

The student does not have a Health Care Plan and the May 2013 IEP contains no reference to the management of prescription medications. District policy – under a section entitled "Supervision of Medication" - prohibits staff from keeping prescription medication for students in the classroom and requires written permission from parents in order for these medications to be administered by school staff.

On the first day of the 2013-14 school year, the parent took her daughter to see a doctor who prescribed antibiotics and pain medication for the child. Subsequently the parent sent those medications to school in the student's

backpack along with completed paperwork allowing the district to administer them. According to the parent, the student's teacher indicated in a telephone conversation that she would "handle" things, but the student returned home with all medications unused and with a note from the teacher stating that the student could not be given medications until required forms had been received. The parent contacted the teacher the following morning and told the teacher that the necessary forms had been sent in the student's backpack. The teacher reported that she had not searched the student's backpack for the forms.

The signed paperwork was located after the parent contacted the school, and the student began taking her medication one day after it was initially sent.

It appears to this investigator that what occurred was an unfortunate case of flawed communication. However, no violation of special education laws and regulations is substantiated.

### **Corrective Action**

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations specifically with regard to 34 C.F.R. 320 (a)(2)(ii) which requires IEP Teams to develop Benchmarks or Short-Term Objectives for any student with a disability who takes an alternate assessment such as the Kansas Alternate Assessment. Therefore, USD #480 is directed to take the following actions:

- 1) Within 10 calendar days of the receipt of this report, submit a written statement of assurance to Special Education Services stating that it will comply with 34 C.F.R. 320(a)(2)(ii) by developing Benchmarks or Short-Term Objectives for any student with a disability served by the district who takes the Kansas Alternate Assessment (KAA), and
- 2) Within 10 calendar days of the receipt of this report, schedule a date for an IEP meeting to develop Benchmarks or Short-Term Objectives related to this student's established Annual Goals.
- 3) Within 5 calendar days of the scheduling of the meeting outlined in paragraph 2 above, submit to Special Education Services a copy of the form providing parents with prior written notice of that meeting.
- 4) No later than 5 calendar days following the meeting outlined in paragraph 2, submit to Special Education Services a copy of a revised IEP for this student reflecting the addition of Benchmarks or Short-Term Objectives for each of the student's goals.

Further, USD #      shall, within 14 calendar days of receipt 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 (f).

### **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 10<sup>th</sup> 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 (c), which is attached to this report.



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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  
SPECIAL EDUCATION SERVICES**

**KSDE**

**REPORT OF COMPLAINT  
FILED AGAINST  
PUBLIC SCHOOLS #  
ON MAY 6, 2014**

**DATE OF REPORT: JUNE 3, 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 \_\_\_\_\_, Director of Special Education for USD # \_\_\_\_\_, on May 13, 2014. On May 29, 2014, the investigator again spoke via conference call with the Director and with Assistant Director \_\_\_\_\_. The investigator spoke by telephone with the parent on May 29, 2014.

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

- Letter from parent dated May 23, 2013 requesting that the student be evaluated
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated September 4, 2013
- Letter from Assistant Principal received by parents on September 20, 2013 in response to the parents' May 2013 request for evaluation
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated November 19, 2013
- Evaluation Report dated February 28, 2014
- IEP for the student dated February 28, 2014
- Meeting Notes dated February 28, 2014
- Notice of Meeting dated April 1, 2014
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated April 11, 2014

## Background Information

This investigation involves a 16 year-old boy who was enrolled in the 10th grade at the time this complaint was filed. An independent evaluation in May of 2009 resulted in diagnoses of dyslexia and dysgraphia. The Kansas school district subsequently developed a Section 504 Accommodation Plan for the student which was first implemented at the beginning of the student's sixth grade year.

Upon his transfer to the Public Schools as a seventh grader, the student was enrolled in reading support classes. He continued to have the support of a Section 504 Accommodation Plan. Audio books and dictation supports were provided to the student during 8<sup>th</sup> grade.

The student failed math classes in both 8<sup>th</sup> and 9<sup>th</sup> grades. During his freshman year, the student's parents requested that he be evaluated, but the school district did not feel that data supported the need for a special education evaluation.

The parents again requested that the student be evaluated in May of 2013 and followed up with the district regarding this request in the Fall. The district provided prior written notice to the parents on September 4, 2013 of its refusal to conduct an evaluation.

The parents subsequently initiated an evaluation of the student through the University of Kansas Center for Psychoeducational Services in October of 2013. The evaluation determined that the student processes information slowly and needs additional time to complete tasks.

At the time of the October evaluation, the student was still being supported under a 504 Accommodation Plan though records indicate there were problems with the consistent implementation of that plan. Grade reports show that he received a number of D's and F's during the first semester of the 2013-2014 school year. On November 19, 2013, the school district asked the parents for their consent to conduct an initial evaluation of the student to determine his eligibility to receive special education services. Parents provided written consent for that evaluation on November 19<sup>th</sup>.

At the beginning of the second semester of the 2013-14 school year, the student's parents enrolled him in the Virtual School (LVP) for core courses. He continued to attend High School for elective classes.

## Issue

In her complaint, the student's mother outlines the following concern:

**“After several years working to get testing completed and determining (the student) is eligible for services, the IEP that was written after the actual meeting was wholly inadequate and inappropriate according to KS IEP procedural handbook. After writing a letter and a second meeting the issues are still not resolved and (the parent) still (does) not have a copy of the current IEP 3 weeks following the meeting.”**

In support of her complaint, the parent presented facts related to process and procedures as well as to the content of the IEP proposed by the district. These topics are addressed below.

### Initial Evaluation Timeline

The timeline for conducting the initial evaluation starts upon receipt of written parental consent to conduct the evaluation, and ends with the implementation of an IEP if the child is found eligible for special education services. Kansas has established a 60 school-day timeline consistent with federal regulations (K.A.R. 91-40-8(f); 34 C.F.R. 300.301(c)).

The parent provided her written consent for the district to conduct an evaluation of the student on November 19, 2013. According to the parent, the district did not provide her with a copy of a finalized IEP until the end of May 2014, though the student has been receiving special education services since February 28, 2014.

The district received the written consent of the parent to conduct an initial evaluation of the student on November 19, 2013. On February 28, 2014 (60 school days from the date the parent’s signed consent was received), the student was determined to be eligible for and in need of special education services. Drafts of proposed IEPs were developed and presented to the parent on March 3 and April 11, 2014, but the district did not provide the parent with its final proposed IEP until May 27, 2014.

The district far exceeded the 60 school-day timeline for completing the initial evaluation process. A violation of special education laws and regulations is established with regard to this aspect of this issue.

### Development of an IEP

An IEP Team must meet and develop an IEP within 30 calendar days of determination of eligibility (34 C.F.R. 300.323(c)(1) and K.A.R. 91-40-8(h)). Comments regarding 34 C.F.R. Part 300 note on page 46678 of the Federal Register, August 14, 2006, that “public agency staff (should) come to an IEP Team meeting prepared to discuss...preliminary recommendations.” Districts are not encouraged to “prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child’s needs.”

The student was determined eligible for special education services on February 28, 2014. The district had not developed a draft IEP but did discuss the contents of a proposed IEP during the February 28<sup>th</sup> meeting. An initial draft of the document was sent to the parent on March 4, 2014.

According to the district, the parent sent a letter to the district expressing concerns about the content of the proposed IEP. The School Psychologist worked with the parent to set a follow-up meeting for April 11, 2014.

According to the parent, the district was not prepared to address her concerns at the April 11<sup>th</sup> meeting. No draft IEP was available at the second meeting, and not all of the points she had raised were discussed.

The district agrees that no draft IEP was made available to the parent at the time of the April 11<sup>th</sup> meeting. However, the district contends that the parent's concerns were addressed, and suggested revisions were proposed. Those revisions included the following:

- Adding a writing goal measured by the 6 trait writing rubric
- Including present level information from the initial evaluation report in the Present Levels of Academic Achievement and Functional Performance (PFAAFP) for each goal
- Addressing Social/Behavioral needs through accommodations on the IEP Considerations page
- Addressing Assistive Technology through accommodations on the IEP Considerations page
- Expanding Accommodations to include "use notes during tests, use of word banks, study guides, notes. Student may use student materials made by student, teachers, or learning coach, such as formulas, charts and class Power Points"

According to the district, a revised IEP was not sent to the parents in a timely manner following the April 11<sup>th</sup> meeting. On April 22, 2014 the parent emailed the special education teacher inquiring about IEP revisions. The teacher responded that she was still collecting baseline data on the writing goal suggested by the parent. The parent then offered a suggestion for a different writing goal. On April 29, 2014, the parent again emailed the teacher to check on the status of revisions. The district stipulates that the parent was not provided with a copy of a finalized IEP until May 27, 2014.

While the district was not required to develop draft IEP documents prior to the meetings of February 28 and April 11, 2014, the district must complete the development of an IEP within 30 calendar days of determining that a student is eligible to receive special education services. The student was determined eligible to receive services on February 28, 2014, but the district had not finalized



an IEP until well beyond the 30-day limit. A violation of special education laws and regulations is substantiated on this issue.

### Consent for Special Education Services

Once the IEP team has made the decision on the initial placement of a child with an exceptionality, the parents must be provided Prior Written Notice about the placement decision and requested to provide consent before initial provision of special education and related services in the proposed placement. This notice must be provided to parents within a reasonable amount of time before the date the school proposes to initiate or change the identification, evaluation, educational placement of their child, or the provision of special education and related services (FAPE) to their child. Kansas statutes, at K.S.A. 72-990, specify the required content of the Prior Written Notice which include the following:

- **a *description*** (emphasis added) of the action proposed or refused;
- an explanation of why the school proposes or refuses to take the action;
- a description of each evaluation procedure, assessment, record, or report the school used as basis for proposed or refused action;
- a description of the other options the IEP team considered and reasons why they were rejected;
- a description of any other factors relevant to the proposal or refusal;
- a statement that the parents have parental rights under the law; and
- sources for parents to contact to assist in understanding their rights.

Federal and State laws and regulations have specific requirements for requesting parent consent. Consent is always to be "informed consent." In determining that "informed consent" is obtained, the following must be insured (K.A.R. 91-40-1(I); 34 C.F.R. 300.9):

- The parent has been fully informed of all information relevant to the activity for which consent is being sought, in his or her native language, or other mode of communication.
- The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity.
- The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

Special education services for the student were initiated on February 28, 2014.

The parent states that at the IEP Team meeting on April 11, 2014 the district asked her to sign a prior notice form giving written consent for the student to receive special education services. According to the parent, that document did not delineate the specific goals or services the student was to receive. The prior notice form states that the student "will receive special education support to

address needs in reading, writing, math, and organizational skills.” According to the parent, she was told that unless she signed the form as written, the district would not be able to provide services.

The parent states that she agreed that the student needed special education services and did sign the form as it was presented to her. It is, however, the position of the parent that the prior notice form presented to her by the district did not sufficiently describe the services the student was to receive.

The “Special Education and Related Services and Supplementary Aids and Services” section of the draft IEP proposed by the district on April 11, 2014 states the “student will receive ten minutes 4 days a week of home-based instructional support through Blackboard, phone, or email conferences...(and) ten minutes indirect transition services every four weeks to aid in career exploration and post-secondary education/training/employment opportunities.” However, the parent had still not seen a finalized IEP at the time the district requested her consent for placement.

By report of the parent, when she inquired as to who would be providing the services and when the math and writing goals would be addressed, she was told that the student would need to work with the general education math and English teachers to receive instruction.

The district stipulates that the parent did not provide written consent for the provision of special education services to her son until several days after those services were initiated. The district further stipulates that the prior written notice form provided to the parent on April 11<sup>th</sup> did not include an adequate description of the services the district proposed to provide.

Because special education services for this student were initiated prior to the district's obtaining the informed written consent of the parent, a violation of special education laws and regulations is substantiated on this issue.

#### IEP Content

In her complaint, the parent outlined several concerns related to the content of the draft IEP document she was given on March 3, 2014. Both the district and the parent agree that additional revisions to the IEP were anticipated. Because the March 3<sup>rd</sup> document was not a finalized version of the IEP, issues related to the content of that IEP were not investigated.

#### Additional Comments

As of the date of this report, the parent confirms that she has received copies of the district's proposed IEP and a revised copy of prior written notice of the district's proposal regarding placement and services for the student. Therefore,

the district will not be required to provide the parent with additional copies of those documents as a part of corrective actions associated with this complaint.

### **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. 91-40-8(f), which requires that the initial evaluation of a student be completed within 60 school days;
- K.A.R. 91-40-8(h), which requires that a student's IEP be completed within 30 calendar days of the determination of eligibility; and
- K.A.R. 91-40-1(l), which requires that written consent be obtained from the parent before special education services are initiated.

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 Special Education Services stating that it will comply with
  - a. K.A.R. 91-40-8(f) by completing initial evaluations within 60 school-days;
  - b. K.A.R. 91-40-8(h) by implementing completing IEPs for all students within 30 calendar days of the determination of special education eligibility; and
  - c. K.A.R. 91-40-1(l) by obtaining written parental consent before initiating special education services.
- 2) By September 10, 2014, distribute a copy of the written statement of assurance referred to in paragraph 1 above, along with an explanation that the statement was required to be issued due to findings in a special education formal complaint investigation, to all instructional special education staff members at \_\_\_\_\_ High School, and provide Early Childhood, Special Education and Title Programs with written documentation of the distribution.

Further, USD # \_\_\_\_\_ shall, within 10 calendar days of the date of this report, submit to Early Childhood, Special Education and Title Programs 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).

# 14FC19

## KANSAS STATE DEPARTMENT OF EDUCATION SPECIAL EDUCATION SERVICES

### REPORT OF COMPLAINT FILED AGAINST UNIFIED SCHOOL DISTRICT # PUBLIC SCHOOLS ON NOVEMBER 25, 2013

DATE OF REPORT: DECEMBER 31, 2013

This report is in response to a complaint filed with our office by \_\_\_\_\_; the education advocate 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 five allegations: (1) the student is not receiving special education services for the number of minutes stated in his IEP; (2) the student's communication needs are not being met on bus rides to and from school; (3) school staff are not following the instructions regarding vomiting in the student's IEP; (4) school staff do not believe the student is safe; and (5) the student has been assigned to a different classroom for one period of the school day.

This investigator did not investigate allegation number (4). 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 education advocate did not allege any violation of special education law regarding this issue because special education law does not address issues regarding safety. As such this investigator does not have the authority to investigate this concern.

#### **Investigation of Complaint**

The investigator reviewed the complaint submitted by the education advocate, the student's current IEP, and the complaint response letter from the \_\_\_\_\_ Public Schools' Director of Special Education. Additionally, the investigator interviewed the education advocate by telephone on December 17, 2013, and reviewed an email sent by the education advocate on December 24, 2013.

#### **Background Information**

The student is a 13 year-old boy in the sixth grade and has been identified as an exceptional child. The student has a hearing impairment, and his IEP stated that he has also been diagnosed with intellectual deficiency. The student's current IEP was initiated

on April 26, 2013, and stated that for the 2013–14 school year the student will attend School.

### **Issues and Conclusions**

**ISSUE 1: THE STUDENT IS NOT RECEIVING THE NUMBER OF MINUTES OF SPECIAL EDUCATION SERVICES AS STATED IN THE STUDENT'S IEP.**

Special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. § 300.323(c)(2). The student's IEP stated that the student will receive special education services from 7:30 a.m. to 2:30 p.m., Monday through Friday. The education advocate alleges that the student leaves school to take the bus home between 2:00 and 2:10 p.m. each school day and, therefore, is not receiving the number of minutes of special education services as stated in the IEP.

In the response letter from the Director of Special Education, she stated that the student does not leave school each day until 2:15 p.m. She also stated that the education advocate requested that a paraprofessional possessing sign language skill be assigned to accompany the student on the bus to and from school. Due to scheduling issues with the available paraprofessionals and the bus company, school staff determined that the student's school day needed to be adjusted to 7:15 a.m. to 2:15 p.m. In the response letter, the Director of Special Education stated that school staff requested that the student's IEP be amended to reflect this and other changes, but the education advocate refused. When asked about the change in the student's school schedule the education advocate responded that she was not aware of any change in the start or end times of the student's school day.

Other than the statements provided by the education advocate and the Director of Special Education, there has been no other evidence provided about the student's schedule. If the student's school day has been changed, as stated by the Director of Special Education, he is still attending school for the same number of minutes as stated in the IEP. Based on a lack of evidence, this investigator cannot substantiate a violation of special education law related to this issue.

**ISSUE 2: THE STUDENT'S COMMUNICATION NEEDS ARE NOT BEING MET ON THE BUS RIDE TO AND FROM SCHOOL.**

Special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. § 300.323(c)(2). In the section of the student's IEP titled "Supplementary Aids and Services" there are two statements relevant to this issue. One reads "[s]igning paras will be provided for student." The other reads "[student] will have a para trained to assist with his specific health, behavioral, and communication needs on bus rides to/from school."

The first statement, regarding signing paras, does not include the frequency, duration, or location of this service. Therefore, it is unknown whether the IEP team intended for

the service of this signing paraprofessional to take place on bus ride to or from school. The investigator, however, finds that the para services specified in the first statement were not intended to be provided on the bus because the student's communication needs on the bus were directly addressed in the second statement. The second statement, addressing the student's communication needs on the bus, does not require a signing para. Accordingly, the advocates' concern regarding the sign language proficiency of paras on the bus will not be addressed in this report.

In the Director of Special Education's response, she stated that no concerns have been documented by transportation staff regarding their ability to adequately communicate with the student on bus rides to and from school. The education advocate did not voice any specific concerns over the student's communication needs not being met on bus rides to and from school.

Note: While this investigator has not substantiated a violation of special education law on the precise issue presented by the education advocate, it is the finding of this investigator that the IEP statement: "[s]igning paras will be provided for student," is vague because it does not specify the frequency, location and duration of that service. The investigator believes this ambiguity, at least in part, resulted in the filing of this complaint. The investigator finds that this statement in the student's IEP violates special education law.

In Appendix A to 34 C.F.R. pt. 300, Federal Register, March 12, 1999, p. 12479, the Office of Special Education Programs (OSEP) offers an interpretation of the previous regulations found in 34 C.F.R. pt. 300. 34 C.F.R. § 300.347(a)(6) (currently 34 C.F.R. § 300.320(a)(7)) requires that each student's IEP contain the frequency, location, and duration for special education and related services, supplementary aids and services, as well as program modifications or supports for school staff that will be provided to the child. In Appendix A, OSEP explains this requirement by saying that "[t]he amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members." The level of clarity required by special education law is lacking in this student's IEP.

### ISSUE THREE: SCHOOL STAFF ARE NOT FOLLOWING THE VOMIT/DIARRHEA PROTOCOL LISTED IN THE STUDENT'S IEP.

The district is required to provide the student with the related services specified in the student's IEP. 34 C.F.R. § 300.323(c). In the section of the student's IEP team that reads "Health/Physical Status" it stated:

His current team has observed that vomiting is not typically a sign of illness in [the student], so it is recommended that the school team rely upon the nursing staff and parent's evaluations to determine when it is necessary to take additional steps based on the district's policy for illness.



The school district's policy stated that students are not to return to school until he or she is free of vomiting and/or diarrhea for 24 hours. This policy is found in the district's student handbook.

In the Director of Special Education's response, and this investigator's phone interview with the education advocate, the same incident was cited as the basis for this issue. On November 18, 2013, the school nursing staff observed the student to be pale in complexion and lethargic following vomiting and continuous episodes of diarrhea. School nursing staff found these symptoms to be unusual in the student and contacted the education advocate and asked that the student be picked up from school. The Director of Special Education stated in her response that the education advocate was called just before 9:00 a.m.

The education advocate did not contact the school during the remainder of the school day of November 18 to discuss the student's condition. School nursing staff also did not contact the education advocate to initiate this discussion. Citing the district policy and a lack of communication from the education advocate, school staff did not pick up the student for school the next morning. The education advocate contacted the school principal on the morning of November 19 and asked that the student be picked up for school. The student was picked up and arrived at school at approximately 9:00 a.m., according to the Director of Special Education's response.

The statement in the student's IEP addresses the steps that should be taken when the student has vomited. It permits implementation of the school policy within the judgment of the nursing staff and also in accordance with parent evaluations. Moreover, this statement does not speak to incidents involving diarrhea. The incident that occurred with this student involved vomiting and diarrhea. Under the circumstances in this case, the district was permitted to follow its policy to not allow the student to come to school for 24 hours following an incident of diarrhea. Therefore, this investigator does not substantiate a violation of special education law on this issue.

Note: This investigator does not substantiate a violation of special education law on this issue and therefore cannot issue corrective action as to this issue. However, because the IEP statement regarding the student's Health/Physical Status is only a recommendation, its utility is questionable. More importantly, it is another 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 process to be used when the student vomits, 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 to the education advocate. If the IEP team intended for the statement to also cover incidents involving diarrhea then it should also include that provision in the IEP statement. The process for a discussion between the nursing staff and the parent as to whether the district's illness policy will be followed should be more clearly defined. It is unknown who should call whom to begin the discussion as to whether the child is ill.

## ISSUE FIVE: THE STUDENT HAS BEEN ASSIGNED TO A DIFFERENT CLASSROOM FOR ONE PERIOD OF THE SCHOOL DAY.

A student's placement is defined as "the instructional environment in which special education services are provided." K.A.R. § 91-40-1(t). A substantial change in placement may not be made for a student without the consent of the student's parent. K.S.A. § 72-962(b)(6). A substantial change in placement is defined as "the movement of an exceptional child, for more than 25% of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment." K.S.A. § 72-962(aa).

In this student's case, the education advocate alleges that the student is not permitted to attend his Language Arts class in his Language Arts classroom due to an issue with the Language Arts teacher. Instead, based on this issue with the Language Arts teacher, school staff decided that the student would attend Language Arts in another classroom. In the Director of Special Education's response she stated that due to an alleged incident of teacher misconduct the student was removed from his Language Arts classroom and assigned to another sixth grade teacher to receive instruction in Language Arts during this period of the school day. The Director of Special Education further stated that this alleged incident of teacher misconduct could not be substantiated, but the student was removed from the classroom during this period to alleviate any possible discomfort. The Director of Special Education stated that the teacher who is now instructing the student in Language Arts is equally qualified to provide the student with this instruction.

The relevant portion of the student's IEP stated, "[The student] will [not] participate in general education classes at . . . School." Thus, the student's IEP team has determined the appropriate placement for his entire school day is in a special education classroom. By moving the student from one special education classroom to another school staff has not moved the student to a more restrictive environment. Accordingly, there has been no substantial change of placement and consent of the education advocate is not needed. Therefore, a violation of special education law is not substantiated as to this issue.

### **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. § 300.320(a)(7) to specify the frequency, location, and duration of services of "signing paras" in a manner that is clear to both school personnel and the education advocate as to what the level of the school's commitment is for these para resources. Therefore, the following corrective action is issued.

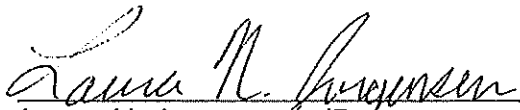
1. Within 10 days of the date of this report, the district shall schedule an IEP meeting to discuss the frequency, location, and duration of the services to be provided by "signing paras." When a date has been set for this meeting, the district shall send to the

education advocate a Notice of Meeting and forward a copy of this notice to Special Education Services.

2. At the IEP meeting referred to above, the IEP team shall modify the student's IEP to specify the frequency, location, and duration in which "signing paras" will be provided for this student, and will provide the education advocate with a Prior Written Notice of its decision, and provide Special Education Services with a copy of the Prior Written Notice given to the education advocate.

### **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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*Early Childhood/Special Education and Title Programs*  
*Kansas State Department of Education*  
*Landon State Office Building*  
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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).

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Kansas State Department  
of Education

Special Education Services

### Complaint Investigation Report

**Complaint Investigator (CI):** Richard J. Whelan  
**Complaint Filed:** April 15, 2014  
**Report Completed:** May 7, 2014  
**Complaint Number:** 14 FC

This report is in response to a complaint of noncompliance filed under K.A.R. 91-40-51. [redacted] and [redacted], residents of [redacted], Kansas USD [redacted], filed the complaint on behalf of their daughter, [redacted] [DOB: [redacted]]. USD [redacted] is a member district of the [redacted] Interlocal # [redacted] which is located in [redacted], Kansas.

During the 2013-2014 school year, the student is in the 7<sup>th</sup> grade at the [redacted] Middle School. Her special education classification is "Autism [K.A.R. 91-40-1 (f)]."

#### Complaint Concerns

Based upon the CI's analysis of the parents' formal written complaint and a determination from Mr. Mark Ward KSDE/SES that a bullying allegation should be addressed by the USD [redacted] Board of Education or the Office for Civil Rights, the following concerns were identified:

1. The student attends general education classes even though her current IEP requires all special education classes.
2. The student's attendant care was stopped at the start of current school year without parental written consent.
3. The student's Behavior Intervention Plan (BIP) in the IEP is not implemented by the special education teacher and the paraeducator.
4. The student's paraeducator is not supervised by the special education teacher, and the student's paraeducator is violating the student's privacy rights by audio/video-taping the student in the classroom with her personal cell phone.
5. The district imposed two out-of-school-suspensions (OSS) on the student for behaviors related to her disability and included in her BIP.

#### Documents and Interviews

The CI reviewed the parents' formal written complaint and the following documents (referred to as D in this report) related to the concerns:

1. [redacted] IEP, 02-20-2013: Accepted by district IEP team on 04-15-2013.
2. Meeting Notes 04-15-2013: Student enrolls in district middle school.

3. Prior Written Notice (PWN), 04-15-2013: Parental written consent for IEP services and placement.
4. Meeting Notes, 10-14-2013: After 1<sup>st</sup> OSS.
5. Meeting Notes 12-18-2013: Develop current IEP.
6. PWN, 12-18-2013 – Parental written consent to add general education classes with paraeducator support to student’s current IEP.
7. Current IEP including BIP, 12-18-2013.

The CI and Cooperative’s Director exchanged several e-mail letters about the parents’ concerns. On April 24, 2014, the CI and the student’s mother had a telephone discussion about the concerns.

### **Facts and Conclusion**

The **first concern** was that the student attends general education classes even though her current IEP requires all special education classes.

When the student was at the \_\_\_\_\_, a special day school setting located in \_\_\_\_\_ Kansas, her IEP did not provide services in general education classrooms [D 1]. When the student returned to the USD \_\_\_\_\_ on April 15, 2013, the IEP team adopted the Center IEP and implemented it as written, i.e., no IEP services in general education classrooms [D 3].

On December 18, 2013, the students IEP team revised the services plan and placement to include general education science and physical education classes [D 5 and 7]. The parents gave written consent for the IEP changes on December 18, 2013.

Based upon these facts, the CI could not substantiate noncompliance with special education laws and regulations for this concern.

The **second concern** was that the student’s attendant care was stopped at the start of current school year without parental written consent.

When the student started the current academic year in USD \_\_\_\_\_ the \_\_\_\_\_ for \_\_\_\_\_ Services, Inc., which is located in \_\_\_\_\_ Kansas, provided the student with some attendant assistance during the school day. However, this service was reduced during the school year because the Center determined the service was no longer needed. Since January 2014, the only remaining attendant service provided for this student by the \_\_\_\_\_ for \_\_\_\_\_ Services is an attendant who works with a lunch group that includes the student every day except Friday [cooperative director’s written statement].

The student receives supervised para-educator support throughout the school day. However, there was no attendant care service in the IEP from [D 1]. Also, there is no attendant care service included in the student's current IEP [D 7].

Based upon these facts, the CI could not substantiate noncompliance with special education laws and regulations for this concern.

The **third concern** was that the student's Behavior Intervention Plan (BIP) in the IEP is not implemented by the special education teacher and the paraeducator.

The student's current IEP has two goal which addresses conduct such as rudeness, disruption, cursing, aggression toward others, and running away. The BIP stresses positive consequences for engaging in appropriate behaviors. Staff members collaborate each day in completing a behavior chart which is used as a record of points the student acquires and subsequently spends at a school store.

The student's special education teacher submitted the following comments in response to this concern:

Student's behavior management plan which was rewritten on the December 18, 2013 IEP basically lists 6 things:

#1 Student receives positive reinforcement throughout her day when she is engaging in appropriate behaviors. Staff does provide her with positive reinforcement throughout the day. Staff gives her verbal praise, high fives, and extra Viking bucks. Student is very inconsistent in how she responds to this. At times she responds negatively to the positive attention or will try to ignore it. She does like getting candy from one of the special education teachers.

#2 Student has a point sheet which she fills out with staff to evaluate each hour of her day. She receives a smiley face for having appropriate behaviors during the hour. Student has a point sheet that is completed each day. The para that goes to classes with her originally tried having her assist in filling out her sheet. Student did not respond well to this so staff was just completing the point sheet. On March 24<sup>th</sup>, when we adjusted my schedule to be at the middle school all day, due to increased behavior concerns, I was asked by my coordinator to make sure we did this. We began implementing this by having the special education teacher in the functional room ask Student to evaluate the hour that just ended. Even if she had been perfect that hour, she would often times escalate when asked how it went. If there was an issue to discuss, she just wanted to argue. I spoke with mom and my coordinator about this and we decided to discontinue this beginning

on April 9<sup>th</sup>. This was also documented in documentation that was emailed to mom on April 7<sup>th</sup> concerning that day's behavior. Student goes home with her point sheet daily. There have been a few days when the paper accidentally doesn't make it home and I generally will text mom and let her know Student doesn't have it. We then send it the next day. I also complete a monthly tracking form for my record. Mom asked if she could receive that, so we send that home as well. Student's mom asked me on April 21<sup>st</sup> if we could provide documentation for every tally mark as she needed this information for when Student transitioned to \_\_\_\_\_, so they could better understand the behaviors she was having. We have also done that.

#3 Student has the opportunity to earn a Viking Buck every day that she has at least 7/8 smiley faces. Whether she gets the reward is documented on her point sheet and the monthly tracking form as well as what the reward was. The Viking Bucks can then be used on Fridays at the Viking store to make purchases.

#4 Student can earn 3 Viking Bucks each day that she has all smiley faces. Once again this is documented on her daily point sheet and the monthly tracking form.

#5 Student has some leisure time built into her day in order to give her a break from the challenges and demands of her academics. Student's schedule for 2<sup>nd</sup> semester was made specifically for this reason. She starts the day with expo, which is currently a play dough expo in the general education classroom with para support. She goes to 7<sup>th</sup> grade science 1<sup>st</sup> hour with a para. Second hour she goes to the functional room to complete a vocational task for the first half and MobyMax on the computer for the 2<sup>nd</sup> half. Third hour she goes upstairs to another special education resource room for math, the para also goes with her. Fourth hour she returns to the functional room for leisure then Navigators and Lunch. She has para support at lunch as well. Fifth hour she goes back upstairs to another special education resource room for reading. Once again the para goes upstairs. Sixth hour she is in the workshop which is a special education class with one other student. Seventh hour she is in PE and has para support.

#6 Student is able to choose computer time, during leisure, if she does not have any strikes on her. Student does very well with this and if she forgets she has a strike, she will generally find a different activity. Strikes do not affect her MobyMax as this is part of her schedule and is academically based. The point sheet also indicates that she does not go to the Viking store on Friday's if she has 3 strikes.



The behavior plan also lists those behaviors being charted which are the same behaviors that are on the point sheet and tracking form. Student receives a strike if the staff specifically says you have a reasonable request to do \_\_\_\_\_. This was the terminology from \_\_\_\_\_ that was recommended when she transitioned to us. The plan indicates that if she is being rude or disruptive, the staff will inform her and encourage her to make a different choice. If she continues to escalate she is given an option of a cool-down. We offer this, but Student has not chosen to take a cool-down the majority of the time. Generally she will refuse. Staff is then to walk away and ignore. We have done this to the extent we feel is safe due to the other students who are in the room. We have recently begun removing the other students as soon as she gets to the disruptive level.

Student's mom had requested that we contact her if her behaviors continued to escalate to the point that others would need to be called in. We had been communicating with mom via text or phone call until after the March 10<sup>th</sup> meeting that the parents had with my coordinator. At that point I was told that the parents had been informed that the school would handle the behaviors and not bother mom while she was working. We would send home her point sheet as we had been as documentation of her day. It also indicates that administration and/or the SRO will be called if the classroom staff feels it is necessary to do so only as a last resort. This was something that mom wanted in the behavior plan. We have also tried to follow this, but if we feel it is necessary we do call for assistance.

While the comments above indicate that the BIP has not resulted in 100% student compliance during school hours, it does confirm that the teachers and paraeducators are implementing it. The comments also confirm that adjustments within the general plan are being made based upon circumstances when the student's responses are not in accord with expectations. The comments show that the student's special education teacher has shared BIP results with the student's mother.

The CI notes that the second intervention in the BIP calls for the student to fill out the point sheet. This practice proved unsuccessful, and after discussion with the parent and special education coordinator, the special education teacher began completing the point sheet herself. The law requires districts to provide special education and related services in conformance with an IEP, including a BIP. Therefore, when an intervention in a BIP proves to be ineffective, there are two options available to change it. First, the IEP team could have convened to determine whether the intervention should be removed from the BIP. Second, the parent and the district could have agreed not to convene an IEP Team meeting for the purposes of making the BIP changes, and instead could have developed a

written document to amend or modify the student's current BIP [34 CFR 300.324 (a) (4)]. Neither option was used in this case. Instead, the district, in accord with the parent's agreement, made the BIP change by an informal process of an e-mail and a phone conversation. However, the United States Circuit Court of Appeals for the 10<sup>th</sup> Circuit (and Kansas is in the 10<sup>th</sup> Circuit) has ruled that not every deviation from an IEP is a violation of law. That court stated that school officials should have some flexibility, and that merely minor deviations from an IEP do not rise to a violation of the requirement for schools to provide a Free Appropriate Public Education [See, L.C. and K.C. v. Utah St. Bd. Of Ed., 105 LRP 12668 (10<sup>th</sup> Cir. 2005)]. In this case, the point sheet is completed each day and sent home with the student. The only deviation from the IEP is that the teacher is recording the points instead of the student. Although, the CI recommends the IEP team address this issue at its next meeting, it is the conclusion of the CI that this change of who records the points on the sheet is only a minor deviation from the student's IEP.

Based upon these facts, the CI could not substantiate noncompliance with special education laws and regulations for this concern.

The **fourth concern** is (a) that the student's paraeducator is not supervised by the special education teacher, and (b) that the student's paraeducator is violating the student's privacy rights by audio/video-taping the student in the classroom with her personal cell phone.

In regard to (a) above, from January 7 through March 13, 2014, two special education paraeducators provided the student with services in a vocational class and a leisure class at the district middle school while the student's special education teacher was teaching in the district's high school. The parent alleged that paraeducators were not supervised by the student's special education teacher, other special education teachers at the middle school or the middle school principal.

The leisure special education class does not require direct instruction. Students choose an activity such as puzzles, computer or art and complete it independently or cooperatively with another student. During the time period noted above, the student's special education teacher had frequent direct daily contact with the paraeducators because she was transporting high school students to the middle school. She also traveled to the middle school if called when problems arose.

The vocational special education class provides students with opportunities to practice tasks such as paper shredding, box folding, and cleaning. The student's special education teacher did not have daily contact, except for phone conversations, with the paraeducators, but did go to the school when problems occurred.

When the student's special education was not at the middle school, two middle school special education teachers were the designated supervisors of the paraeducators.

According to the Kansas Special Education Reimbursement Guide (07/09/2013) paraeducators must not be:

Assigned to implement the IEP for students with exceptionalities without direct supervision and involvement from the professional;

A paraprofessional under the supervision of the student's special education teacher is supervised in accordance with the Kansas Special Education Reimbursement Guide requirements in the manner described below:

Unless otherwise indicated, paraeducators must be directly supervised a minimum of 10% of the time they are working with students. In addition to locally determined paraeducator supervision policies, the following supervision requirement applies:

When the assigned *special teacher* is not present, a paraeducator must have a designated principal or teacher available in the building for assistance and supervision as needed.

The cooperative director told the CI that there was a staffing shortage during the time period noted above which was temporarily addressed by the action described above. It should also be noted that the split school schedule for the student was stopped at the parent's request because she believed the transition from one school to another had a negative effect on the student's adjustment to the school day.

While the temporary arrangement during the 3<sup>rd</sup> nine-weeks of the spring semester was not optimal, the CI could not substantiate noncompliance with special education laws and regulations for the (a) part of this concern. That is, the district complied with paraeducator supervision requirements.

In regard to (b) above, according to the cooperative's director, the paraeducator decided to tape as video/audio documentation of the student's behavior in the classroom. However, there was no stated purpose for the documentation, e.g., social skills instructional planning, identifying antecedent events for misconduct. The student's version of this incident, as conveyed to her mother, was that the paraeducators taping elicited the student's disruptive behavior by starting the recording and not stopping it when asked.

This video/audio taping was done by a paraprofessional without the classroom teacher's knowledge or direction. The video/audio recording was never shared with anyone other than the classroom teacher and has since been destroyed. Because the recording was not

disclosed to unauthorized persons there is no privacy violation from recording the student on a personal cell phone. Finally, the director has resolved the part of the parents' concern that the paraeducator no longer be assigned to the student.

Based upon these facts, the CI could not substantiate noncompliance with special education laws and regulations for the (b) part of this concern.

The **fifth concern** was that the district imposed two out-of-school-suspensions (OSS) on the student for behaviors related to her disability and included in her BIP.

The misconduct identified in the student's BIP includes rudeness, disruption, aggression, cursing, noncompliance and elopement.

As of April 25, 2014, the student had four OSSs imposed for a total of seven school days during the current school year. Each of the four OSS was for behaviors included in the BIP. The BIP does not include any reference that would preclude the district from using OSS for student misconduct. Also, special education laws and regulations provide that a district may suspend a student with disabilities for 10 school days during a school year for behaviors that are unrelated or related to the disability, and even though the behaviors are addressed in a behavior management plan. [See 34 CFR 300.530 (b).]

On April 22, 2014, the student was removed from a workshop class for two school days for misusing a power tool and "aiming a stool at staff." The parent alleged that this action was an in-school-suspension (ISS) that did not allow the student to receive IEP services. An ISS does not count as an OSS if the student still receives IEP services, attend instruction in the general education curriculum, and participates with students without disabilities [Federal Register, August 6, 2006, p.46715]. There is no documentation that these services were not available. Moreover, even if these two school days did count as an OSS, they would only have been the eighth and ninth days of suspension during this school year, which school authorities had authority to impose without educational services.

As part of this concern, the parent stated that the school staff was not using time-out or a quiet room when the student needed withdraw from ongoing activities. The current IEP, under Supplementary Aids and Services, provides frequent breaks (time-out or time-away) that may be initiated by the staff or the student [D 7]. According to the student's special education teacher, time-away space is available in the classroom, but the student has never asked to use the space, and resists using it when suggested by staff. "Her day is broken up so that she has less stressful times after the academic times and during those times she will often work away from others. We have a puzzle table away from the center of the room against the wall and this she will often choose" [teacher statement].

The parent also alleged that the student did not have a visual schedule to follow as required by her IEP. The current IEP, under accommodation/modification, provides that the student have task cards to help her prepare for science and resource room reading and math [D 7]. There is no reference to a required visual schedule in the current IEP. Finally, the student has a leisure class in her daily schedule at which time she uses a computer.

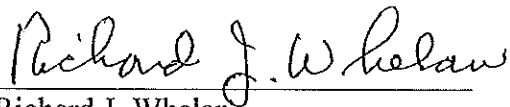
Based upon these facts, the CI could not substantiate noncompliance with special education laws and regulations for the general concern and its sub parts.

### **Corrective Actions**

Based upon the Facts and Conclusions stated above, no corrective actions are required.

### **Right to Appeal**

Either party may appeal the findings of this report by filing a written appeal with the State Commissioner of Education, 120 SE 10<sup>th</sup> Avenue, Topeka, Kansas 66612-1182 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).