Special Education Formal Complaint Decisions 2019-20

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 20FC01 signifies a Formal Complaint filed in the 2019 fiscal year (July 1, 2019 to June 30, 2020). The case citation of 20FC02 Appeal Review signifies the decision of the state appeal committee for case number 20FC02. All files are PDF.

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| 20FC01 | | 20FC18 | |
| 20FC02 | | 20FC19 | Appeal Review |
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**KANSAS STATE DEPARTMENT OF EDUCATION**
**SPECIAL EDUCATION AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON JULY 1, 2019

DATE OF REPORT: JULY 30, 2019

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

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on July 1, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on July 30, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on July 23, 2019 as part of the investigation process. Teresa Beaudry, Parent Health Information Specialist at Families Together, was also interviewed by telephone on July 23, 2019 with parent permission.

____ _____, Director of _____ Cooperative, was interviewed on July 5, 2019.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by USD #___:

- Reevaluation and Eligibility Team Report dated September 11, 2013
- Prior Written Notice (PWN) for Reevaluation and Request for Consent dated September 13, 2016

- Reevaluation Not Needed Agreement Form dated September 8, 2016
- Individualized Education Program (IEP) dated September 8, 2016
- _____ Cooperative IEP Amendment Between Annual Meetings dated November 28, 2016
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent dated November 28, 2016
- Amended IEP with Behavior Intervention Plan (BIP) dated August 11, 2017
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on August 11, 2017
- IEP with BIP dated September 6, 2017
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on September 6, 2017
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent dated October 3, 2017
- _____ Cooperative IEP Amendment Between Annual Meetings dated January 4, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on January 4, 2018
- _____ Cooperative IEP Amendment Between Annual Meetings dated February 14, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on February 14, 2018
- _____ Cooperative IEP Amendment Between Annual Meetings dated March 28, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on March 28, 2018
- IEP Amendment dated August 9, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on August 9, 2018
- IEP with BIP dated September 4, 2018

- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on September 4, 2018
- IEP Amendment dated September 26, 2018
- Conference Summary: IEP Team Meeting Considerations dated September 26, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on September 26, 2018
- IEP Amendment dated November 9, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on November 9, 2018
- IEP Amendment dated December 18, 2018
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on December 18, 2018
- IEP Amendment dated February 13, 2019
- PWN for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent signed by the parent on February 13, 2019
- USD #___'s summary of the Transition Meeting held on May 9, 2019
- IEP Goal Progress Report dated March 15, 2018
- IEP Goal Progress Report dated May 17, 2018
- IEP Goal Progress Report dated March 8, 2019
- Grade card for the 2016-17 school year (sixth grade)
- Grade card for the 2017-18 school year (seventh grade)
- Grade card for the 2018-19 school year (eighth grade)

## Background Information

This investigation involves a male who was enrolled in the 8th grade at _____ Middle School in USD #___ during the 2018-19 school year. Per parent report, USD #___ initially identified the student for special education services under the exceptionality category of Developmental Delay at age three and the student received early childhood special education services for two years at the _____ Early Childhood Center. He continued to receive special education services at _____ Elementary School for kindergarten, first grade, and the beginning of second grade. The student was placed in an in-patient mental

health treatment facility for the majority of his second grade school year. He returned back to live with the parent at the end of second grade and USD #___ placed the student in a specialized classroom at _____ Elementary School. The student was reevaluated for special education at the beginning of third grade and it was determined that the student continued to be eligible for special education services under the eligibility category of Emotional Disturbance. The student continued to display significant problem behaviors during third and fourth grades resulting in multiple out of school suspensions and placement for homebound instruction. At the end of fourth grade, the Kansas Department of Children and Family Services placed the student in a residential facility in Parsons, Kansas. The parent reported the student missed the majority of fifth grade while in the residential placement. The student returned to live with the parent prior to the beginning of sixth grade during the 2016-17 school year. The most recent reevaluation was waived on September 8, 2016 through an agreement between the parent and the school district. The student attended _____ Middle School for sixth, seventh, and eighth grades.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to develop an Individualized Education Program (IEP) reasonably calculated to provide the student with a free appropriate public education (FAPE) during the past 12 months.

## Parent Position

The parent alleges USD #___ has failed to develop IEPs for the student not only during the past 12 months but also for all three years the student has been enrolled at _____ Middle School. The parent alleges these IEPs continue to require the student to "earn" time at school for appropriate behavior even though the student continues to display inappropriate behavior despite the services provided in these IEPs. The parent believes the student's exceptionality of emotional disturbance is not being addressed so the student is not able to continuously display appropriate behavior at school resulting in the student never being able to attend school for a full school day. Because of this shortened school schedule, the student has not been provided appropriate instruction in the core academic subjects and the parent believes this lack of instruction and lack

of access to the general education curriculum is part of the reason the student's problem behaviors continue to occur in the school setting.

The parent reported the student received academic instruction as well as behavior support while attending school in a self-contained special education classroom for full days when enrolled in USD #___ until fourth grade when the student was placed on homebound instruction and then in an in-patient treatment facility. Since his return to USD #___ in sixth grade, the student's IEPs have always required the student to "earn" time in school. The parent indicated the most the student has ever been able to "earn" is three hours per school day during the past three school years. The parent also reported the student's IEPs have included essentially the same goals for all three school years in middle school. The parent stated that student has made minimal progress on his IEP goals and has failed every class during sixth, seventh, and eighth grades.

The parent reported he met with school staff on multiple occasions during the past three school years to amend the student's IEP. Most recently, he met with school staff from _____ Middle School and _____ High School to discuss the student's transition to high school. The parent disagrees with the IEP team's recommendation that the student be promoted to ninth grade with the same goals and with the student beginning the school year attending school for only two hours per school day with the opportunity to "earn" more time in school. Instead of continuing a plan that doesn't work for the student, the parent requested the student receive special education services to address his emotional disturbance at _____ ___, the district's program for students with significant mental health concerns; however, school staff verbally told him that this program was not appropriate for the student.

**School District Position and Documentation**

____ _____, Director of _____ Cooperative, reported USD #___ has provided the student with FAPE in light of the student's exceptionality of emotional disturbance. He indicated the IEP team at _____ Middle School met on multiple occasions to review and revise the student's IEPs in order to meet the student's needs over the past three school years. USD #___ provided documentation of the three annual IEPs and nine IEP amendments that were developed for the student while enrolled in the sixth, seventh, and eighth grades as well as the most recent reevaluation of the student.

Documentation shows the parent and _____ _____, Principal of _____ Middle School, agreed that the required three-year reevaluation was not

necessary on September 8, 2016. The Reevaluation Not Needed Agreement Form states, “A reevaluation for the student is not necessary at this time, and therefore no reevaluation will be conducted.” The form lists the date of the last evaluation/reevaluation as September 11, 2013.

A reevaluation without assessment was conducted at the beginning of the third grade to determine if the student continued to be eligible for special education services. The Reevaluation and Eligibility Team Report dated September 11, 2013 states, “The student was placed in the self-contained EBD (emotional behavioral disturbances) program at _____ last school year (4/4/13). Prior to that, he attended _____ Elementary and received services in math and reading. He has a behavior plan or reference to behavior difficulties since preschool.” Current medical diagnoses of ADHD, ODD, and Mood Disorder were documented in the report. The student scored significantly below expectations for academic skills with reading skills falling at the first percentile and math skills falling at the eighth percentile when compared to same grade peers. The summary of cognitive/adaptive behavior reflected the student was making slow progress and displaying below grade level skills in core academic subjects as well as requiring small group or 1-1 direct instruction to display focus/attention. Communication skills were rated as age appropriate.

Informal observations in the area of social/emotional/behavioral skills noted the student had experienced some success in a highly structured therapeutic learning center (TLC) classroom with smaller numbers of students and a low student/adult ratio. The function of the student’s inappropriate behavior was determined to be mostly for attention. The report states, “The student responds well to the structure of the classroom and positive feedback, praise, and consequences. At first, he struggled with managing his emotional responses to frustration, disappointment, feedback, and non-preferred directions. He has since begun to use coping strategies to help manage himself in a safe and productive way, but at times still exhibits dangerous behaviors. The student may express his feelings impulsively; he may make spontaneous noises (farting noises, randomly hollering single words, other noises); leave his assigned area and run/crawl around different areas of the school, or become aggressive (throwing furniture, hitting, kicking, biting).” Summarized data from the TLC classroom shows the student respected the boundaries of others 88% of the time during fourth quarter of second grade and 95% of the time during first quarter of third grade; and met school expectations 78% of the time during fourth quarter of second grade and 87% of the time during first quarter of third grade. Data showing the frequency of interventions used to manage disruptive/dangerous behaviors during this same time period were reported as follows: Time away – 5

instances; Time-out – 41 instances; Safe room (open) – 7 instances; Safe room (closed) – 5 instances; and Classroom Evacuation – 4 instances. The report concludes that the student continues to be eligible for special education and related services under the exceptionality category of Emotional Disturbance. The report also states, “The student may also have a learning disability, but this cannot be determined as long as he experiences emotional disturbance. The student also continues to require specialized instruction for the majority of his school day to learn coping skills as well as be instructed on his own level in core academics.”

Documentation shows three annual IEPs were developed for the student while enrolled at _____ Middle School. The annual IEP for sixth grade was developed on September 8, 2016 and was amended twice; the annual IEP for seventh grade was developed on September 6, 2017 and was amended five times; the annual IEP for eighth grade was developed on September 4, 2018 and was amended three times. The chart below shows a comparison of these IEPs:

| Sixth grade | Seventh grade | Eighth grade |
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| Annual IEP: 9/8/16<br>Amended: 11/28/16<br>8/11/17 | Annual IEP: 9/6/17<br>Amended: 9/18/17<br>10/3/17<br>1/4/18<br>2/12/18<br>3/28/18 | Annual IEP: 9/4/18<br>Amended: 9/26/18<br>11/9/18<br>12/18/18<br>2/13/19 |
| Present Level of Academic and Functional Performance (PLAAFP) | | |
| Strengths: “Student is a very capable student. He has shown that when he puts his mind to it, he is very capable of doing work that is given to him. He has a great memory and ability to understand concepts that are shown to him. He like to help others out when they are having trouble. He has a great ability to tell stories and is really inquisitive about life. He has a good sense of humor. He like to play with Thera putty.” | Strengths: copied from previous IEP. Added that student is “strong in life skills” and deleted that the student like to play with Thera putty. | Strengths: copied from previous IEP. Added that student is “student is fiercely loyal to those he forms strong relationships with. Student is very social and can talk to anyone.” |

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| Vision: No concerns – screened 9/8/15<br><br>Hearing: No concerns – screened 1/22/14<br><br>Health: Diagnoses of ADHD, ODD, and Mood Disorder; no currently taking medication<br><br>Motor: No concerns<br><br>Intellectual / Adaptive Behavior: "No formal testing has been conducted however, the initial evaluation team felt his cognitive skills are developing lower rate than typical same age peers. Student is below grade level in all core academic subjects. When things are read to him, he is able to reason and problem solve within range for his age, however, when he is dependent on reading, his skills are much lower. His cognitive ability will impact his ability to progress through general education curriculum at same rate as peers."<br><br>Reading: Skills are consistent with 1st grade reading level. Deficits in comprehension, decoding, and fluency.<br><br>Math: Still struggles with two-digit addition and subtraction. Unable to solve problems involving regrouping. Knows multiplication table for 0, 1, and 2. Needs reading support to solve word problems. Working on 3rd grade level.<br><br>Written expression: Letters | Vision: Same – screened 2/18/16<br><br>Hearing: Same – screened 2/18/16<br><br>Health: No concerns<br><br>Motor: No concerns<br><br>Intellectual / Adaptive Behavior: Copied from previous IEP.<br><br>Reading: copied from previous IEP. Removed reference to grade level and added "Behavior can interfere with progress and be able to assess his true skill level."<br><br>Math: Copied from previous IEP. Still working at 3rd grade level.<br><br>Written expression: copied from previous IEP. Added he | Vision: Same – screened 2/27/18<br><br>Hearing: Same as previous IEP<br><br>Health: Added the information that was included in the 9/4/16 IEP.<br><br>Motor: No concerns<br><br>Intellectual / Adaptive Behavior: Copied from previous IEP.<br><br>Reading: copied from previous IEP. Added reference to 4.4 grade level at Level S.<br><br>Math: Copied from previous IEP. Still working at 3rd grade level.<br><br>Written expression: copied from previous IEP. Added, "When student writes, he often |

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| are difficult to read. Uses short sentences. Does not consistently use correct punctuation, spelling, and capitalization,<br><br>Communication: No concerns<br><br>Social/Emotional: "Student struggles to accept feedback and/or consequences for negative behavior. Depending upon his mood, he may respond to the support he is given or may escalate because of the support." Noted that because special education services are provided in alternate setting, student is unavailable for instruction within a classroom setting for large portions of the school day. | is spelling at 2nd grade level.<br><br>Communication: Same<br><br>Social/Emotional: copied from previous IEP. Added reference to medical diagnoses. Removed reference to instruction being provided in alternate setting and replaced with "Student's disruptive and noncompliance negatively impacts his access to general curriculum. | writes a few words to represent a full complex thought."<br><br>Communication: Same<br><br>Social/Emotional: Copied from previous IEP |
| Annual Goals | | |
| Goal 1: Answer "wh" questions with 80% accuracy from 2nd grade reading passage<br><br>Goal 2: Identify main topic of multi-paragraph passage and focus of each paragraph with 80% accuracy from 2nd grade reading passage<br><br>Goal 3: Solve addition and subtraction problems with regrouping with 85% accuracy<br><br>Goal 4: Write a 3 to 5 sentence paragraph on the same topic with correct spacing, spelling, and punctuation/capitalization with two or fewer errors.<br><br>Goal 5: improve positive | Goal 1: Answer questions to demonstrate understanding of reading passage at 2nd or 3rd grade level with 85% accuracy<br><br>Goal 2: Same as goal 3 from previous IEP<br><br>Goal 3: Write a minimum of 3 complete sentences with correct punctuation, capitalization, and spelling<br><br>Goal 4: Will comply with directions within 30 seconds with no argument or comment 80% of the time | Goal 1: Read at the 5th grade comprehension level<br><br>Goal 2: Use addition, subtraction, multiplication, or division to solve practical problems involving integers with 75% accuracy<br><br>Goal 3: Same as previous IEP<br><br>Goal 4: Be safe, teachable, and respectable 85% of the day |

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| behaviors to attend school full days | | |
| Special Education and Related Services | | |
| 9/8/16: 60 minutes of special education in an alternate setting 5 days per week<br><br>11/28/16: 60 minutes of homebound special education in an alternative setting 4 days per week<br><br>8/11/17 (for 7th grade): 340 minutes per day of direct special education services in the EBD classroom; 45 minutes per day direct special education support in the general education classroom | 9/6/17: 385 minutes per day of direct special education in EBD classroom 5 days per week<br><br>9/18/17: 60 minutes per day of direct special education services in alternate setting (juvenile detention center) 4 days per week<br><br>10/3/17: 60 minutes per day of direct special education services in homebound or alternate setting 4 days per week<br><br>1/4/18: "Student will return to _____ Middle School for one 48 minute class period from 1:52 – 2:40 p.m. He will continue homebound for 60 minutes 4 days per week as he reintegrates into _____ Middle School. Upon completion of 8 successful days, the student will return to _____ Middle School for two 48 minutes class periods from 1:02 – 2:40 p.m. and discontinue to homebound services."<br><br>2/12/18: 180 minutes per day of direct special education in an EBD classroom 5 days per week<br><br>3/28/18: Added transportation as a related service 5 days per week<br><br>8/9/18 (for 8th grade): 50 minutes per day of direct | 9/4/18: 48 minutes per day of direct special education in EBD classroom 5 days per week; 170 minutes per day of direct special education support in the general education classroom 5 days per week; shortened school schedule from 10:45 a.m. to 2:50 p.m. daily; Added direct intervention when student is at "Level 3" emotional state with a social worker to assist with calming student to "Level 2" or below when a social worker is available.<br><br>9/26/18: 60 minutes per day 4 days per week in an alternate placement; Reintroduction to _____ Middle School will be evaluated when student has had four successful consecutive weeks.<br><br>11/9/18: 96 minutes per day of special education support in the general education classroom 5 days per week; additional hours will be added for 15 successful days as noted by 80% or better on daily behavior sheets<br><br>12/18/18: 144 minutes per day of special education support in the general education classroom 5 days per week; additional hours will be added for 10 successful days as noted by 80% or better on daily behavior sheets<br><br>2/13/19: 90 minutes per day |

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| | special education in EBD classroom 5 days per week; 170 minutes per day of direct special education support in the general education classroom 5 days per week; shortened school schedule from 10:45 a.m. to 2:50 p.m. daily | of special education support in the general education classroom 5 days per week; additional hours will be added for 4 out of 5 successful days as noted by 80% or better on daily behavior sheets |
| Parent Concerns: | | |
| "Dad continues to stress he would like to see student back in school all day but supports the school in current services. He has concerns with reading and math skills." | "No concerns beyond what has been addressed in the IEP." | "Parent reports no concerns at this time." |
| Behavior Intervention Plan | | |
| Added in 8/11/17 IEP amendment. Earn points every 15 minutes for appropriate behavior. | 9/6/17: Same as 8/11/17 version | 9/4/18: Earn points every 45 minutes for appropriate behavior. |
| Summary of Progress (IEP goals and grades) | | |
| No IEP goal progress reports provided | <u>IEP Goal Progress (5/17/18)</u><br><br>Goal 1: Currently reading on level R (no grade level reported)<br><br>Goal 2: Not addressed due to behavior<br><br>Goal 3: Not addressed due to behavior<br><br>Goal 4: percentages of compliance for 4th quarter: 100% - 13 days; 90-99% - 10 days; 80-89% - 5 days; 70-79% - 1 day; 60-69% - 1 day; 50-59% - 2 days; 40-49% - 1 day; 0% - 6 days | <u>IEP Goal Progress (3/8/19)</u><br><br>Goal 1: Currently reading on level U (5.3 grade level)<br><br>Goal 2: Not addressed during 3rd quarter due to behavior<br><br>Goal 3: "MIRP (Monitoring Independent Reading Practice) log shows he is making progress on writing three complete sentences with support when his behavior is such that he has access to the reading curriculum"<br><br>Goal 4: Averaged 84% during the two class period shortened schedule |

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| Grades: (semester 1 / 2)<br>Advisory: P / P<br>Eng 6 (mod): F / B<br>Rdg 6 (mod): F / F<br>Study Skills: F / B | Grades: (semester 1 / 2)<br>Advisory: F / P<br>Eng intervention: F / n/a<br>Personal Dev.: A / n/a<br>Life Skills: n/a / D<br>Rdg 7 (mod): B / C<br>Intensive Rdg: A / n/a<br>Science 6 (mod): A / A | Grades: (semester 1 / 2)<br>Life Skills: A / n/a<br>Math 8 (mod): F / F<br>Rdg 8 (mod): F / F |

The September 4, 2018 IEP also includes a plan for coordinated transition services for the student. The student expressed an interest in becoming a fire fighter and attending college after high school graduation. In order for the student to achieve these goals, the IEP team determined the student needed to improve his reading comprehension and his ability to follow directions and use appropriate behavior. An anticipated graduation date of May 20, 2023 is projected with the 8th grade course of study including Advisory, Career & Life, Modified Math, History 8, Science 8, English, PE 8 and Intensive Reading.

Notes from the IEP Team meeting held on September 26, 2018 to amend the IEP document the student's behavior "is such that the team agrees the best plan for the student is to go back to base level and work his way back into the school environment." The notes indicate school staff asked the student if he was interested in taking medication. The parent explained that previous DNA testing shows the student does not respond to the medication and gave the district permission to contact Central Kansas Mental Health in regards to the student.

Notes from the Transition Meeting held on May 9, 2019 show the following persons met to discuss the student's transition to high school and to introduce some of the 9th grade staff at _____ High School: _____ _____, _____ Social Worker; ____ _____, _____ School Psychologist; _____ _____, _____ EBD Special Education Teacher and Case Manager; _____ _____, _____ High School Psychologist; _____ _____, _____ Assistant Principal; _____ _____, _____ Principal; _____ _____, _____ High School EBD Special Education Teacher; _____ _____, _____ and _____ High School Special Education Coordinator; the student and the parent.

At that meeting, school staff indicated that the current September 4, 2018 IEP that was amended on February 13, 2019 would be implemented at _____ High School with the student attending school for 90 minutes per day in the general education classroom with special education support. The parent disagreed with these services and placement and requested the student attend _____ ___, the district's program for students with significant mental health concerns.

School staff explained the reasons why they believed that program was not appropriate for the student and referred the parent to the Mr. _____, Special Education Director, for the next options and steps if the parent continues to disagree with the _____ High School placement.

**Applicable Regulations and Findings**

Federal regulations, at 34 C.F.R. 300.320(a)(2)(i), require public agencies to develop an IEP that includes a statement of measurable annual goals, including academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability.

The United States Supreme Court's ruling in *Endrew F. v. Douglas County School District* requires schools to provide students with disabilities an education that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1 dated December 7, 2017 published by the United State Department of Education states:

> *While the Court did not specifically define "in light of the child's circumstances," the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA's focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because "the IEP must aim to enable the child to make progress." For example, the Court stated that the IEP Team, which must include the child's parents as Team members, must give "careful consideration to the child's present levels of achievement, disability, and potential for growth."*

It is noted the IDEA allows child complaint investigations to cover a 12-month period from the receipt of the complaint. However, due to the need to ascertain whether the September 4, 2018 IEP developed for the student by USD #___ met the requirement to be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," it was necessary to consider the IEPs developed and implemented over the past three school years.

In this case, the most recent special education evaluation and the PLAAFPs in all three IEPs document that the student learns at a slower rate than peers and that his reading and math skills are significantly below average as compared to same grade peers. It is also reported that the student's medical diagnoses of ADHD, ODD, and Mood Disorder negatively affect attention and behavior, which directly affects learning and the student's participation in both the general education and special education classrooms.

The last three IEPs have included goals to increase reading, written expression, and math skills as well goals and BIPs to increase appropriate behavior. A review of these IEPs shows the reading goals have all addressed reading comprehension incorporating increasingly higher-grade level reading materials. This documents that the student has progressed in this area from the original baseline of reading at a 1st grade level to reading at the 5th grade 3rd month level over the course of three school years.

However, the goals for written expression, math, and appropriate behavior have remained essentially the same over this same period and progress reports show little to no progress in these areas. In fact, documentation showed the student's inappropriate behavior interfered to the point that the written expression goal was not addressed during 7th grade and the math goals were not addressed at all during the past three school years.

While the IEP team met on multiple occasions and changed the amount and location of the special education instruction, there is no documentation to show the IEP goals, the BIP, or the transition plan were reviewed and revised based on the student's lack progress towards the IEP goals.

It is noted that the most recent reevaluation was waived, and the most recent assessment of academic and social/emotional skills was from over six years ago. This makes determining if the student's IEP is reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances* very difficult.

Based on the foregoing, the allegation of a violation of special education laws and regulations of failing to develop an IEP reasonably calculated to enable the student to make progress during the past 12 months and thus provide FAPE to the student is substantiated.

This investigation also found through parent report and school district's documentation that the parent requested the student receive special education services to address his emotional disturbance at _____ ___, the district's

program for students with significant mental health concerns on May 9, 2019. Following this request, school staff verbally told the parent that this program was not appropriate for the student and referred him to speak to Mr. _____, the Special Education Director, to explain his next options and steps.

Federal regulations, at 34 C.F.R. 300.503, require that prior written notice must be given to parents when the responsible public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The written notice sent to parents by the responsible public agency must contain a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action as well as how to obtain a copy of the IDEA procedural safeguards.

In this case, the parent made a request for a change of services and placement at a meeting with school staff while discussing the transition of the student to high school and the implementation of the current IEP. School staff verbally explained why this request was being refused and then referred the parent to another school staff to explain to the parent what the next options and steps were if he continued to disagree with the services and placement in current IEP.

Based on the foregoing, a violation of special education laws and regulations related to providing appropriate prior written notice to the parent following the parent request for a change of services and placement at the May 9, 2019 transition meeting is found.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.320(a)(2)(i), require public agencies to develop an IEP that includes a statement of measurable annual goals, including academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability.

The findings of this investigation show USD #___ failed to identify the current needs of the student in the areas of academic and social/emotional skills with the most recent evaluation in these areas being at least 6 years old. In addition, the PLAAFP statements and IEP goals for math, written expression, and behavior have remained essentially the same over the past three school years.

B. Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents a reasonable time before the responsible public agency initiates or changes the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student.

The findings of this investigation show USD #___ failed to respond appropriately to the parent's request for a change of services and placement for the student to be placed in the _____ ___ program instead of the shortened day program at _____ High School made at the May 9, 2019 Transition Meeting.

Based on the foregoing, USD #___ 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 and Title Services stating that it will:

   a) Comply with 34 C.F.R. 300.320(a)(2)(i), by ensuring that each IEP is developed to include a statement of measurable annual goals, including academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability.

   b) Comply with 34 C.F.R. 300.503 by appropriately responding to parent requests for changes to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student each time a request is made.

2. No later than August 8, 2019, USD #___ will provide the parent with a prior written notice of a proposal, and a request for consent, to conduct a

reevaluation of the student. Within 30 days of receipt of consent to conduct a reevaluation, the district shall follow appropriate procedures to conduct the required three year reevaluation of the student in accordance with the requirements in 34 C.F.R. 300.304 through 300.311. USD #___ will provide appropriate documentation of the prior written notice and request for consent, the parent's response to the request for consent, and, if consent is obtained, the reevaluation of the student to SETS.

3. No later than September 15, 2019, the student's IEP Team will review and revise the student's IEP based upon the most recent reevaluation of the student. No later than October 15, 2019, USD #___ will provide appropriate documentation of this IEP team meeting to SETS.

4. No later than September 30, 2019, USD #___ will provide training to the Lakewood staff who worked with the student regarding when and how to respond to parent requests for changes to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. This training will be provided by a person approved by the KSDE. USD #___ will document who provided the training and the content of the training and send that documentation to Special Education and Title Services within 5 days of completion of the training.

5. No later than August 15, 2019, USD #___ shall provide the parent with appropriate prior written notice regarding the parent's request related to services being provided at _____ ___. If the parent disagrees with the action described in the prior written notice, the parent will then have the right to file for due process as described in the Parent Rights in Special Education (Procedural Safeguards).

6. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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 (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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
_____ SCHOOLS, USD #___
ON JULY 22, 2019

DATE OF REPORT: AUGUST 22, 2019

This report is in response to a complaint filed with our office on behalf of _____ _____ by her 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 _____ _____, General Counsel for the _____ Cooperative (_____) on July 30, 2019. The investigator spoke by telephone with the parent on July 31, 2019.

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

- IEP for this student dated October 23, 2018
- Email exchange December 17, 2018 between the parent and the special education teacher
- Email dated December 17, 2018 from the special education teacher to the building principal
- IEP Progress Report for student reflecting monitoring on January 4 and May 24, 2019
- Letter dated July 31, 2019 to the student's parents from the Assistant Director of the Cooperative
- Email dated August 7, 2019 from the parent to the Assistant Director of the Cooperative
- Spring Semester Final Exam Schedule for periods 1, 3, 5, and 7
- Spring Semester Final Exam Schedule for Academic Support and periods 2, 4, and 6
- Course and Final Exam grades for the student for the 2018-19 school year
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated August 20, 2019

## Background Information

This investigation involves a 15-year-old girl who will be enrolled in the 10th grade at her neighborhood high school for the 2019-20 school year. The student was determined to be eligible for and in need of services under the primary exceptionality of Learning Disability. She struggles with reading fluency and therefore needs more time to complete reading tasks and process the information she has read. Her reading level at the time her IEP was last revised on October 3, 2018 was fourth grade.

## Issues

In her complaint, the parent raises three issues:

**Issue One: The district has failed to provide the student with extended time to complete final assessments at the end of both the first and second semesters of the 2018-19 school year as required by her October 2018 IEP.**

Federal regulations, at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulations at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

### Parent's Position

According to the parent, the plan to allow the student extra time to complete her final assessments at the end of the first semester of the 2018-19 school year as required by the student's October 23, 2018 IEP was not properly executed because the student had not started her finals ahead of her classmates. The parent states that she notified the student's case manager that the extra time accommodation had not been implemented. By report of the parent, the case manager told her that the student could come in the day after the end of the semester to complete the assessments, but the parent found that plan unacceptable. The building principal then proposed an alternative time for the assessments to be completed which the parent deemed satisfactory, and the student was able to complete her final assessments.

The parent contends that, at the end of the second semester, the district again failed to allow the student extra time to complete her finals. According to the parent, the student rushed through some of her assessments in order to complete them within the same time limit as was afforded to other students. While the parent does not believe that there is a current, specific remedy

available to appropriately compensate the student for the district's failure to allow extra time for the completion of final assessments, the parent believes that the student's case manager should be reprimanded for the failure of the district to provide the student with an accommodation that was established in the student's October 2018 IEP.

## District's Position

It is the position of the district that the accommodation regarding the provision of extra time ("1 school day") is poorly written in the student's October 2018 IEP and does not work well when applied to tests. It is the district's plan to offer the parent an IEP meeting to address this issue once the school year has begun.

The district contends that while a plan was worked out by staff to provide the student with extra time on her second semester finals, the student did not choose to use extra time, nor did she appear to need it since her grades on her second semester finals were all at 90% or above with the exception of her Algebra final grade, which was 82%.

## Investigative Findings

Semester finals in the district are administered over the last two days of each semester with half of the courses in which a student is enrolled conducting final exams on one day, the other half on the next day. Spring finals for periods 2, 4, and 6 were administered on May 21, 2019. The Academic Support period was also administered on May 21. Spring finals for periods 1, 3, 5, and 7 were administered on May 22, 2019.

The "Accommodations" section of the student's October 23, 2018 IEP contains the following statement:

> "(The student) will be given extra time [one school day] to complete the assignment when completing an assignment or test in the general education or special education setting…"

According to the parent, the student was to be allowed one additional day to complete every assignment. If, for example, the class was given an assignment on Monday that was to be turned in on Tuesday, the student would have until Wednesday to submit the assignment.

At the time of the first semester finals, the district and the parent did not share a common view regarding the amount of extended time the student was to be given for these exams and how the provision of that time would be implemented.

According to the parent, finals for the student would start one day ***early*** to allow the student two full days for completion because finals are completed on the last day of each semester, and school is not in session again until weeks or months later.

According to the student's special education teacher, the student was to be allowed extra time "in accordance with the IEP...one and a half times that of her peers."

According to the parent, she contacted the student's case manager on the day before finals, December 17, 2018, to ask why the student had not been allowed to begin taking her exams. Emails between the parent and the special education teacher dated December 17, 2018 show that the parent felt that the student was to be afforded "extended time - 1.5 times her non-identified peers" to complete her first semester finals. The parent stated that if non-identified peers were to have 2 days to complete finals, then the student should be allowed three days to complete hers. The parent further asserted that "if teachers are not giving her the extra time per her IEP, they will need to not count problems wrong if she is unable to complete the tests."

The special education teacher responded via email on December 17, 2018 that the student would be allowed an ***extra 45 minutes*** to complete each final, since non-identified peers would be given 90 minutes to finish. The case manager provided the following plan to allow the student to receive extended time:

Day 1:

Go to Academic Support

- Begin Algebra 1 final (If it takes longer we will finish in Study Skills)
- Begin Science final (if it takes longer than the allotted time we will finish in study skills)
- Study skills (Finish tests that are not complete)

Day 2:

- Begin English final (if it takes longer we will finish on Thursday or a time we have free during the rest of the day,
- Health (25 question final. If it takes longer we will finish on Thursday)
- Design Fundamentals (If it takes longer we will finish on Thursday)
- Culinary Essentials (If it takes longer we will finish on Thursday)

"If tests are still not completed we will plan on (the student) coming in on Thursday to finish the finals in my room during the day. This way she will have the time that she needs, and will be provided a quiet environment with special ed. support."

He noted that an open period was available at the start of the day on December 18, 2019 that could be used as extended time and that the Study Skills class time could also be utilized.

The parent wrote back to the special education teacher stating that she found the proposed plan unacceptable because she did not believe the student should have to spend one more day in school than her classmates. The parent also stated that it was difficult for the student to come to school early because the parent dropped the student's siblings off at another location before bringing the student to school. The parent told the special education teacher that the student had "been instructed to let me know if she is unable to complete a test and is not given extra time so that I can speak with the teacher."

Seeing the parent's response, the special education teacher contacted the building principal stating that he was "fine" with giving the student "time and a half for each final" but was "not sure how to proceed" since the parent objected to the plan to have the student return to school on the day after finals if she had not finished her tests by the end of day on December 19, 2018.

An alternative plan for providing the student with extra time was devised and communicated to the parent by the building principal. At 8:12 PM on December 17, 2018, the special education teacher sent an email to the student's first semester teachers outlining the following proposed plan for the provision of extended time:

"Day 1:

- Algebra 1: If [the student] needs additional time to complete the final, please let her know that she will use her Study Skills time to do this.
- Physical Science: If [the student] needs additional time to complete the final, please let her know that she will use her study skills time to do this.

Day 2:

- Freshman English 9: Can begin working during academic support time, or come in early to start final.
- Health: If she completes the final with time to spare, she will complete finals that have not yet been finished.
- Design Fundamentals: You have already communicated that she can do 2 of the 3 drawings to be sufficient.
- Culinary Essentials: Can take the test, or use this time to complete any finals that have not been finished.

IMPORTANT NOTE: *Another way to stay in line with the accommodation is to reduce the number of test questions, so that it can be completed in the given amount of time*."

According to the special education teacher, he told the student's general education teachers that they were "free to pitch in how you would like to address this in your class."

The parent found the revised approach acceptable, and the student was able – with the extra time allowed – to complete her finals.
The student was enrolled in seven classes plus an Advisory Period for the first semester. The classes included Physical Science, Freshman English, Design Fundamentals, Culinary Essentials, Physical Education, Algebra, and Modified Study Skills. Final exams were administered in five of the student's classes. She earned the following grades on her first semester finals:

- Algebra – 81.2%
- Freshman English – 65.83%
- Design Fundamentals – 90%
- Physical Science – 73.95%
- Physical Education – 65%

The parent states that because she had spoken in January of 2019 with someone from the special education cooperative about the district's failure to properly implement the extra time accommodation, she assumed that the district would allow the student to start a day early on second semester finals and did not follow up herself with the student's case manager. The parent did encourage the student to remind her case manager of her need for accommodation, but the parent is not certain the student took any action. At the end of the day before second semester finals, the parent asked the student if she had begun testing and learned that the early start accommodation had not been implemented. According to the parent, the student subsequently completed her finals on the same schedule as her peers but reported to her mother that she "rushed through" the tests in science and math in order to finish.

The student was again enrolled in seven classes plus an Advisory Period for the second semester. The classes included Physical Science, Freshman English, Current Events, Intermediate 2D Design, Physical Education, Algebra, and Modified Study Skills. Final exams were administered in five of the student's classes. A final project was assigned in one class, Current Events. The student earned the following grades on her second semester finals:

- Algebra – 82.45%
- Freshman English – 95%
- Intermediate Design – 100%
- Physical Science – 90.24%

- Physical Education (Health) – 73%
- Current Events – 100% on Final Project

According to the student's Algebra teacher, the plan was for the student to "start the final and then finish it during another class where she did not have a final or had already done the final prior. [A paraeducator] was able to supervise her during the extra time…I can't remember how long it took for her to finish the final but I did make sure to give her every opportunity to be able to finish no matter how much time it would take. I wanted her to be completely satisfied with her answers before she turned it in."

The student's Freshman English teacher reported that the student elected "to go with [a special education teacher] in an alternate location for the final during the scheduled first hour final. We talked to [the student] and said that if she wanted/needed more time for the final, she could come in before it started, use the extra study hall period, arrange another time/solution with us. She didn't communicate with us about using extended time. We asked her if she wanted to start her final early before school started, and she said no. Before [the student] went with [the special education teacher], we told her that should she need extra time, she could just finish the final and [a paraeducator] would bring it back when she was finished. If I remember correctly, [the special education teacher] brought up the final essay after first hour. I believe she used most of the time during first hour…We got an email from [the special education teacher] at 9:05 AM that [the student] was done with her final. [The student] scored a 28.5/30 on the final. She did a very nice job with her responses. The responses were all complete. They were detailed and we could tell and she thought through her responses before writing."

The student's Physical Science teacher stated that "if she needed extra time on the final, we planned for her to finish it during 7th hour. This was her study skills class. If I remember correctly, [the student] did not need the additional time. To the best of my recollection, she completed the final during 6th hour."

The student's Physical Education teacher stated that the student "was to be given extra time to complete her modified final Health exam if that was necessary." According to the teacher, the student "could have come in before school or after finishing another final to finish the exam…[but] did not mention needing any additional time to complete her final exam so none was given." The student "turned in her exam before the period ended…"

With regard to the student's Current Events class, the final was a project that students could complete individually or with partners. Students had the option of several different formats to choose from. The instructor gave the students a full week to complete the final project which was to be turned in on their final day in class. According to the teacher, if the student needed the entire final period to complete their project, then that time would have been allowed. The student

completed her project on time and completed all the required components without the need for extended time.

## Summary and Conclusions

As written in the student's October 23, 2018 IEP, the accommodation related to the provision of extra time to complete assignments and tests does not provide sufficient detail regarding implementation. Certainly, the IEP requirement of "one extra day" can easily apply to assignment deadlines. However, providing an extra day for a test – in this case a final exam – is far more difficult to implement, particularly when final exams are administered over the last two days that students are in attendance for the quarter.

While the parent told the investigator that the student was to be allowed to start her finals a day early in order to receive "one extra day" to complete her exams, that approach is not specified in the student's October 23, 2018 IEP. Additionally, email communication between the student's special education teacher and the parent indicated that both agreed that the student should be allowed 135 minutes to complete her finals while her non-identified peers would be given 90 minutes to complete their finals (1 and ½ more time for the student than her peers).

The October 23, 2018 IEP lacks any detail as to how extra time accommodations for any test were to be implemented. The IEP did not address how the extra time was to be incorporated into the student's schedule. The IEP did not state whether the student was to notify her teachers if she needed extra time or if it was simply to be provided for her. The IEP did not indicate what was to happen if the student completed a final and turned it in before the end of the 90 minutes allowed for all students.

Extra time was provided for the student to complete her first semester finals in a manner that was agreed upon by the parent. The student completed all of her second semester finals within the same time limit as her peers (90 minutes) and in some cases before the end of the allotted time. Had the student required extra time, a plan was in place for that time to be provided.

Although the student reported to her mother that she "felt rushed" to complete some of her second semester tests (specifically Physical Science and Algebra), she completed both of these tests in 90 minutes or less time. The final grades earned by the student at the end of second semester were higher in every case than the grades she earned at the end of the first semester when extra time was provided the student under the plan agreed upon by the district and the parent.

In summary, the student's October 23, 2018 IEP does not clearly specify how the accommodation of extra time was to be applied to semester finals. The parent told the investigator that the student was to be allowed to start her semester finals one day ahead of her non-identified peers, but that requirement is not

spelled out in the student's October 2018 IEP. Email communication between the parent and the student's special education teacher indicated the student was to be allowed 1 and ½ more time than peers to complete her final exams. The district put in place a plan to allow the student extra time to complete first semester finals that was acceptable to the parent and developed a similar plan for the second semester. The student completed her second semester finals within the same time limit (90 minutes) as her non-identified peers. There is no indication that the student was denied FAPE since her grades on her second semester finals were higher than the grades she earned on her first semester finals when extra time was provided. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

Additional Comments

An IEP Team meeting was convened on August 20, 2019. The IEP Team made changes tothe student's IEP including clarification of the accommodations related to the provision of extra time on assignments and tests.

**Issue Two: The district has failed to provide the parent with progress reports for the 2018-19 school year.**

Once an IEP team has developed measurable annual goals for a child, the team must include in the IEP a description of how the child's progress toward meeting the annual goals will be measured (34 C.F.R. 300.320(a)(3)(i)). This measure of progress will enable parents, children, and educators to monitor progress during the year, and, if appropriate, to revise the IEP to be consistent with the child's instructional needs. The idea is to use progress monitoring information in a formative way, to help with decision-making about instructional changes that may be needed.

The IEP must include a description of when parents will be provided periodic reports about their child's progress toward meeting the annual goals. An example might be through the use of quarterly or other periodic reports concurrent with the issuance of district report cards (K.S.A. 72-3429(c)(3); 34 C.F.R. 300.320(a)(3)(ii)). The reporting may be carried out in writing or through a meeting with the parents (including documentation of information shared at the meeting) – whichever method would be a more effective means of communication. Whatever the method chosen, progress toward the goals must be monitored in the method indicated on the IEP and progress reports should include a description of the child's progress towards the child's measurable annual goals.

Parent's Position

The parent asserts that two progress reports should have been provided to her during the 2018-19 school year but none had been provided to her as of June 24,

2019. As a remedy for the alleged violation, the parent has asked that she be provided with a copy of progress reports developed for the 2018-19 school year.

## District's Position

The district contends that the student's special education teacher created progress reports for the student for both the first and second semester. However, the teacher did not provide the district with any documentation showing that these reports were mailed to the student's parents. Therefore, the assistant director of the Cooperative sent a copy of the reports to the parents via email and the parent has acknowledged receipt of those reports.

## Investigative Findings

The "Progress Report" section of the student's October 23, 2018 IEP contains the following statement:

> "Parents will receive progress reports at the same time intervals as general education parents. For this student, this will be through written reports and/or parent conferences."

The district provides general education parents with copies of progress reports twice each school year at the end of each semester. It is also the practice of the district to provide IEP Progress Reports to parents of special education students at the end of each semester.

According to the parent, neither she nor the student's father (who lives at a separate address) have received copies of progress monitoring forms for the student at any time during the 2018-19 school year. Both parents have received monitoring forms for the student's brother who also receives special education services.

No evidence was provided by the district to establish that the special education teacher provided written progress reports to either of the student's parents during the 2018-19 school year.

According to the student's special education teacher, no time was spent during the second semester Parent/Teacher conferences discussing the student's IEP progress because discussion was entirely centered on concerns regarding email communication between the parent and the special education teacher's mentor. The assistant director for the cooperative states that an updated goals and objectives review is not routinely provided to parents during Parent/Teacher Conferences.

On July 31, 2019, the assistant director for the Cooperative mailed both of the student's parents copies of progress monitoring forms for the student for the

2018-19 school year. The parent confirmed receipt of her copy of the progress report in an email sent to the assistant director on August 7, 2019.

On August 5, 2019, the General Counsel for the Cooperative conducted training for all licensed staff members at the mandatory back to school in-service. A copy of the PowerPoint presentation used at that training was provided to the investigator. Among the topics covered in that training was the importance of providing parents with reports of students' progress on IEP goals on the same schedule as parents are provided with grade cards – in the case of this district, twice each school year.

Summary and Conclusions

No evidence was provided by the district to show that the parent was provided with reports of the student's progress toward attainment of her IEP goals on the same schedule as general education parents receive grade reports on their children. Under these circumstances, a violation of special education laws and regulations is substantiated on this issue.

**Issue Three: Statements allegedly made by district staff violate Health Insurance Portability Accountability Act (HIPAA) regulations.**

The Special Education and Title Services (SETS) team has authority to investigate only complaints alleging a violation of special education statutes and regulations. Any issue in a complaint that does not relate to special education requirements will not be investigated. As noted in a letter from Tiffany Hester, Dispute Resolution Coordinator and Legal Consultant for Special Education and Title Services dated July 22, 2019, HIPAA is not a special education law, and SETS has no jurisdiction to investigate an alleged violation of HIPAA.

In a telephone conversation with the investigator on July 31, 2019, the parent also alleged a violation of the confidentiality of information requirements of the IDEA. Therefore, this issue was investigated.

The confidentiality of education records is a basic right shared by all students in public schools and their parents. These fundamental rights are described in the Family Educational Rights and Privacy Act (FERPA) of 1974, as amended. In addition, Kansas Special Education Regulations at K.A.R. 91-40-50 have adopted by reference provisions in 34 C.F.R. 300.612 through 300.624, regarding parental access to educational records and confidentiality of those records.

Unless it has parent consent, or a FERPA exception applies, a district must prevent the disclosure to any unauthorized person of personally identifiable information from educational records. Disclosure is the release, transfer or other

communication of records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic.

“Educational records” are defined as any document or medium on which information directly related to one or more students is maintained by a participating agency. “Personally identifiable” information includes information such as the name of the child, child's parents, or other family member; address; personal identifier such as the child's social security number or student number; or list of personal characteristics or other information that would make it possible to identify the child.

## Parent’s Position

It is the position of the parent that the student’s case manager for the 2018-19 school year, the case manager’s mentor, and other teachers engaged in inappropriate conversation about the parent in a hallway in the presence of other parents and students who were waiting to meet with their respective teachers during parent/teacher conferences in the spring of the 2018-19 school year.

## District’s Position

The district asserts that the incident described by the parent did not result in a violation of FERPA. It is the position of the district that no personally identifiable information regarding the student was disclosed during the exchange between the parent and the special education teacher’s mentor nor was such information disclosed between teachers after the parent left the mentor’s classroom.

According to the district, all conversation within the mentor’s classroom centered on the contents of an email exchange between the parent and mentor. The hallway conversation involving district staff resulted from the concern on the part of other teachers about the mentor’s wellbeing after hearing the loud exchange coming from the classroom.

The district stipulates that ideally the conversation between the parent and the mentor should not have extended into the hallway. This topic was addressed in training by the General Counsel for the Cooperative provided to all licensed staff on August 5, 2019 as a reminder to staff of the need to remain professional in all exchanges with parents.

## Investigative Findings

According to the parent, the mentor for the student’s case manager (a first-year special education teacher) had become involved in email exchanges between the case manager and the parent. The parent received an email from the mentor which was, in the opinion of the parent, unprofessional. At parent teacher conferences in the spring of 2019, the parent raised the topic of the emails with

the mentor. The discussion escalated, and the parent left the room, telling the mentor that she planned to report the incident. According to the parent, the mentor followed the parent out into the hallway and "yelled" at her in front of parents and other students. The parent contends that she and the student returned to the hallway a short time later and overheard the mentor and three other special education teachers talking about her (the parent). The parent asserts that negative comments were made about her as a parent including, "I don't know what she wants; (the student) is not having any problems."

The district provided a statement from a special education teacher regarding the exchange between the parent and the special education teacher and his mentor. The special education teacher stated that she heard "someone talking loudly down the hall but…could not understand what they were saying." When she walked down the hall a few minutes later, she heard the student's special education teacher telling other staff that the parent was angry about the student's Study Skills class and that he had taken the parent to talk with his mentor.

Summary and Conclusions

There is no evidence to show that educational records or personally identifiable information about the student was exposed during the exchange between teachers in the school hallway. Therefore, a violation of special education statutes and regulations is not substantiated on this issue.

## Corrective Action

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

- K.S.A. 72-3429(c)(3) and 34 C.F.R. 300.320(a)(3)(ii), which require that a district provide parents with periodic reports about their child's progress toward meeting the annual goals.

Therefore, USD #___ and _____ Cooperative are directed to take the following actions:

1) Submit, within 10 school days of the date of this report, a written statement of assurance to Special Education and Title Services (SETS) stating that it will comply with

    a. K.S.A. 72-3429(c)(3) and 34 C.F.R. 300.320(a)(3)(ii) by providing periodic reports to parents of special education students about their child's progress toward meeting the annual goals.

2) Because the district has already provided the parent with a copy of the Progress Monitoring Report for the student covering both the first and second semester and has conducted training with all staff regarding the provision of monitoring reports to parents, no additional corrective action will be required.

3) Further, USD #___ and _____ Cooperative shall, within 10 calendar days of the date of this report, submit to 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 (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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), 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).

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

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON JULY 24, 2019

DATE OF REPORT: AUGUST 23, 2019

This report is in response to a complaint filed with our office by ____ and ____ _____, parents, on behalf of their son, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student," ___ _____ will be referred to as "the mother," and both ____ and ___ _____ will be referred to as "the parents."

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on July 24, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on August 23, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on August 12, 2019 as part of the investigation process. _____ _____, Director of _____ Cooperative, was interviewed by telephone on August 19, 2019.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Individualized Education Program (IEP) dated April 4, 2018
- Draft IEP dated May 6, 2019
- Letter to the parents from _____ _____, Director of Special Education, dated June 5, 2019

- Letter to Special Education and Title Services (SETS)at the Kansas Department of Education (KSDE) from Ms. _____ dated June 17, 2019
- 2018-19 Attendance Calendar for USD #373
- 2019-20 Attendance Calendar for USD #373
- Letter to the Investigator from Ms. _____ dated August 16, 2019
- Formal Complaint written by the parents dated July 19, 2019
- Letter to all parents with students receiving speech/language services from _____ _____, Assistant Director of Special Education, dated January 2019
- Email to the parents written by _____ _____, Special Education Teacher, dated March 4, 2019
- Emails between the mother and Ms. _____ dated March 7, 2019
- Monthly Medicaid Speech/Language Therapy Logs for the months of March, April, May, and June 2019

## Background Information

This investigation involves a 14-year-old male who resides with his parents within the boundaries of USD #___. The student has received special education and related services since preschool due to an exceptionality of multiple disabilities including cerebral palsy, cortical vision impairment, and seizure disorder. During the 2018-19 school year, the student was enrolled in the 9th grade at _____ Senior High School in USD #___ through the _____ Cooperative. The student is currently attending _____ Senior High School for 10th grade during the 2019-20 school year.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

**ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individual Education Program (IEP), specifically by not providing speech/language therapy services to the student during the 2018-19 school year.

## Parent Position

The parents allege USD #___ failed to provide the speech/language therapy services required by the student's IEP between August and March during the 2018-19 school year.

The parents indicated they first learned of the lack of speech/language therapy services in January 2019 and requested the compensatory services that were being offered per the letter's instructions; however, they requested the compensatory services not begin until the student had been reevaluated.

The parents noted the student was evaluated by _____ _____, Speech/Language Pathologist (SLP), on March 7, March 21, March 28, and April 4, 2019, and that the results of this evaluation were incorporated into the IEP draft shared with the parents for the May 6, 2019 IEP. However, this IEP meeting was not held because the SLP was unable to attend the meeting.

The mother acknowledged 20 minutes per week of speech/language therapy services required by the student's IEP were provided to the student beginning in April 2019 and continuing through the end of the regular school year in May 2019.

The parents reported receiving a letter dated June 5, 2019 stating the student was owed 480 minutes of compensatory speech/language therapy from the 2018-19 school year. An attached calendar was included with the letter showing when those services would be provided during the summer and at the beginning of the 2019-20 school year. The mother stated the student received a total of 150 minutes of compensatory speech/language therapy services during the month of June. The mother also indicated the student has started to receive 30 minutes per week of compensatory speech/language therapy services in addition to the 20 minutes per week of speech/language therapy services required by the student's current IEP since August 16, 2019, the beginning of the 2019-20 school year.

## School District Position

_____ _____, Director of the _____ Cooperative, acknowledged the district did not provide the speech/language therapy services required by the student's IEP during the 2018-19 school year due to a shortage of qualified speech/language pathologists in Kansas. In January 2019, the parents were informed of the lack of speech/language therapy services and, as a means to

remedy the situation, compensatory services were offered. The parents accepted this offer on March 7, 2019.

Ms. _____ indicated the district made efforts to recruit and hire qualified speech/language pathologists but was unsuccessful until March 2019. At that time, speech/language therapy services were provided to the student per his IEP. However, at parent request, the compensatory services did not begin in order to allow for the completion of the student's reevaluation. The reevaluation was completed and incorporated into the draft copy of the IEP that was shared with the parent for the scheduled May 6, 2019 IEP team meeting; however, the parent ended that meeting because Ms. _____, SLP, was not in attendance.

A plan to provide the student with the compensatory speech/language therapy services was shared with the parent on June 5, 2019. This plan included providing the compensatory services for 60 minutes per week during the month of June 2019 and to continue providing 30 minutes per week of compensatory services through October 8, 2019.

To date, 180 minutes of compensatory speech/language therapy services have been provided to the student. Ms. _____ reported the student is currently scheduled to receive 20 minutes per week of speech/language therapy on Mondays from _____ _____, SLP, as required by the student's current IEP. In addition, the student is scheduled to receive 30 minutes per week of compensatory speech/language therapy from ____ _____, SLP, on Thursdays until October 8, 2019.

**Finding of Facts**

The following facts are based upon interviews and documentation obtained during the course of this investigation.

One IEPs was in effect during the 2018-19 school year. The IEP dated April 4, 2018 required 20 minutes per week of speech/language therapy.

With 36 weeks of school during the 2018-19 school year, the student should have received a total of 720 minutes of speech/language therapy. No speech/language services were provided between August 16, 2018 and March 1, 2019.

In January 2019, USD #460 informed the parents that the speech/language therapy services were not being provided to the student due to difficulty finding appropriately credentialed therapists and offered the parents compensatory

services for all of the services that had not been provided. The parents accepted the offer of compensatory services on March 7, 2019. USD #460 was able to hire additional speech/language pathologists and started to provide the required speech/language therapy services described in the student's IEP beginning in March 2019.

The following chart shows the minutes of speech/language therapy provided to the student between March 2 and the last day of the school year on May 21, 2019:

| Date | Minutes of speech/language therapy |
|---|---|
| Thursday, March 7, 2019 | 20 minutes |
| Thursday, March 21, 2019 | 30 minutes |
| Thursday, March 28, 2019 | 22 minutes |
| Thursday, April 4, 2019 | 20 minutes |
| Thursday, April 25, 2019 | 30 minutes |
| Thursday, May 2, 2019 | 20 minutes |
| Thursday, May 9, 2019 | 20 minutes |
| Thursday, May 16, 2019 | 30 minutes |
| TOTAL MINUTES | 192 minutes |

Based upon the total amount of speech/language therapy services required by the IEPs (720 minutes) and the total amount of speech/language therapy services actually provided (192 minutes), the student was not provided with a total of 528 minutes of speech/language therapy services during the 2018-19 school year.

The student was found eligible for extended school year (ESY) services at the May 6, 2019 IEP Team meeting. However, the IEP team determined that the student did not require any speech/language therapy services during the extended school year.

On June 5, 2019, USD #460 provided the parent with a calendar showing 16 dates between June 1 and October 15 when 30 minutes of compensatory speech/language therapy services were scheduled to be provided. This plan would provide the student with 480 minutes of the 528 minutes of compensatory speech/language therapy services owed.

The following chart shows the minutes of compensatory speech/language therapy actually provided to the student between the start of ESY on June 3 and the week of August 19, 2019:

| Date | Minutes of speech/language therapy |
|---|---|
| Monday, June 3, 2019 | 30 minutes |
| Wednesday, June 5, 2019 | 30 minutes |
| Monday, June 17, 2019 | 30 minutes |
| Wednesday, June 19, 2019 | 30 minutes |
| Monday, June 24, 2019 | 30 minutes |
| Tuesday, August 20, 2019 | 30 minutes |
| TOTAL MINUTES | 180 minutes |

Based upon the total amount of compensatory services owed to the student (528 minutes) and the total amount of compensatory speech/language therapy services actually provided (180 minutes), the student has still not been provided with a total of 348 minutes of the speech/language therapy services required by the student's IEPs during the 2018-19 school year.

USD #___ currently has a plan in place to provide an additional 30 minutes per week of speech/language therapy services to the student on Thursdays through October 8, 2019. This plan would provide an additional 210 minutes of compensatory services to the student resulting in 138 minutes of compensatory services that have not yet been scheduled or provided to the student.

## Applicable Regulations and Findings

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, the IEPs in effect during the 2018-19 school year required 20 minutes per week of speech/language therapy services. Documentation and interviews found the student should have received a total of 720 minutes per week of speech/language therapy services. However, a total of 192 minutes of speech/language therapy services was actually provided during the 2018-19 school year between March and May, resulting in the student not receiving a total of 528 minutes of the speech/language therapy services required by the student's IEPs. While USD #___ has developed a plan to provide compensatory

services, that plan does not address the 138 minutes of compensatory speech/language therapy services still owed to the student.

Based on the foregoing, the allegation of a violation of special education laws and regulations of failing to provide the special education services as required by the student's IEP is substantiated.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Violations have occurred in the following area:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   The findings of this investigation show USD #___ failed to provide a total of 528 minutes of speech/language therapy services to the student as required by the student's IEPs during the 2018-19 school year. It is noted that USD #___ has acknowledged these services were not provided and has offered compensatory services; however, the student has only been provided with a total of 180 minutes of compensatory services to date leaving an additional 348 minutes of speech/language therapy still owed to the student.

Based on the foregoing, USD #___ 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 and Title Services (SETS) stating that it will:

   a) Comply with federal regulations at 34 C.F.R. 300.323(c)(2) requiring school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

2. No later than September 3, 2019, USD #___ shall make a written offer of compensatory speech/language therapy services to the parent continuing

the current plan for providing a total of 210 minutes of compensatory speech/language therapy services. The offer will also include a plan for providing an additional 138 minutes of compensatory speech/language therapy services. The offer must also include a schedule that would accomplish the completion of all compensatory services by the end of the 2019-20 school year. In addition, the offer will describe a plan for handling missed compensatory speech/language therapy services when an appropriately credentialed therapist is not available to provide the compensatory services as scheduled. USD #___ shall provide a copy of this written offer to (SETS) on the same day it is provided to the parent. USD #460 shall notify the parent and SETS when the compensatory services have been completed.

3. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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 (f).

Note that corrective action to address systemic noncompliance is not ordered because the _____ Cooperative is currently completing a Corrective Action Plan for the identified noncompliance including training for staff and a review of policy, procedures and practices to ensure that special education and related services are made available to students in accordance with their IEPs.

**Right to Appeal**

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further

description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
_____ ____ PUBLIC SCHOOLS #___
ON JULY 29, 2019

DATE OF REPORT: AUGUST 24, 2019

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____ ____, Director of the _____ Cooperative, on July 30 and August 17, 2019. On July 31, 2019, the investigator spoke by telephone with the parent.

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

- Email dated August 29, 2018 from the student's classroom teacher to the parents
- Email dated October 29, 2018 from the classroom teacher to the parent regarding the scheduling of a CARE Team meeting
- Report of screening by occupational therapist dated November 2018
- Email dated February 4, 2019 from the student's classroom teacher to the student's parents
- Email dated February 12, 2019 from the student's classroom teacher to the parent regarding a February 21, 2019 CARE Team meeting
- Email correspondence covering the period of February 18 - 21, 2019 regarding the parent's participation in a February 21, 2019 CARE Team meeting
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated February 21, 2019
- Email dated March 6, 2019 from the student's classroom teacher to the parents referencing an updated CARE Team Plan
- Staffing Report dated March 7, 2019
- Email correspondence covering the period of March 7 through March 26, 2019 between the student's classroom teacher and the parent
- Email correspondence covering the period of March 11 through March 19, 2019 between the parent and the building principal

- Email correspondence covering the period of March 21-22, 2019 between the student's classroom teacher and the parent
- Email dated March 25, 2019 from the classroom teacher to parents
- Email dated March 29, 2019 from the building principal to the parents
- Email correspondence covering the period of March 30 through April 5, 2019 between the building principal and both parents regarding the scheduling of a telephone conference
- Email meeting invitation dated April 11, 2019
- Staffing Report dated April 11, 2019
- Email meeting invitation dated April 16, 2019
- Eligibility Determination dated April 16, 2019
- Staffing Report dated April 16, 2019
- IEP Participants page dated April 30, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated April 30, 2019
- Online district calendar for the 2018-19 school year

## Background Information

This investigation involves a 9-year-old student who was enrolled in the 3rd grade during the 2018-19 school year. The parents are divorced and share joint custody of the student.

The student's classroom teacher first contacted the parents on August 29, 2018 to express her concerns regarding the student's ability to follow directions and complete work on time. The teacher asked both parents if the student had experienced similar problems in the past and if they had suggestions to help the student stay focused. Suggestions were offered by the student's father (always referred to in this report as "parent'), and the parent and the teacher agreed to meet to talk about the student when the parent came to the school to have lunch with the student.

Beginning in September of 2018, a daily chart was sent home with the student to provide parents with information regarding the student's assignment completion. One to three times a week, assignments that needed to be corrected or completed were also sent home. According to the classroom teacher, the student was more motivated to do well, and the quality of his work improved along with his focus.

The classroom teacher and the student's mother spoke in person about the student's progress during fall parent/teacher conferences held the third week of October 2018. The conversation specifically addressed the topic of the student's writing and spelling. At that time, the student's skills in these areas were below average. The classroom teacher believed it would be beneficial to refer the student for discussion by the building's CARE Team – a building-level team

which included, among others, the building special education teacher, school social worker, and school psychologist. According to the director of the special education cooperative, CARE Team is a ***general education function*** which problem solves on behalf of students who may be struggling with any area in the general education classroom. The purpose of the classroom teacher's CARE team referral was to seek out suggestions for additional interventions which could help the student be successful in the general education classroom setting and – in the words of the classroom teacher – "to problem-solve possible causes/solutions, and to determine if any other testing would be helpful [because the student has been] a bit of a puzzle to us all at school since his reading scores are at such a discrepancy with his writing and spelling."

On October 29, 2018, the student's classroom teacher sent an email to the student's parents regarding the scheduling of a CARE Team meeting for November 8, 2018. In that email, the classroom teacher indicated she was "sending home a permission form for you to sign so [the occupational therapist for the district] can complete [an observation and assessment of the student's writing and spelling skills]."

The occupational therapist completed her screening and reported her observations at the November 8th CARE Team meeting. Following that meeting, a number of interventions were put in place for the student including the following:

- visual exercises implemented 20 minutes each day by special education staff (special education teacher or paraeducator) beginning November 19, 2018 and ending February 21, 2019
- small group writing/spelling instruction for 25 minutes per day with the special education teacher outside the classroom beginning November 19, 2018
- preferential seating
- directions repeated individually for the student
- immediate feedback and reteaching with opportunity to correct work
- allowing the student to stand to complete work
- chunking work so that the student completed one portion of the assignment, then reviewed new directions and moved on to the next part of the assignment
- word banks for help with spelling
- checklists for writing expectations
- extra phonics/spelling pattern practice and instruction

In December of 2018, the student's mother took him to Midwest Neuroeducational Services for an outside evaluation and received a diagnosis of dyslexia. The agency also subsequently evaluated the student with regard to attentional issues.

At a CARE Team meeting on January 17, 2019 which neither parent attended, school staff reviewed the student's Measures of Academic Progress (MAP) testing results. Small group reading instruction in the general education classroom with a paraeducator was initiated for 30 minutes a day to provide more opportunities for the student to read aloud.

On February 5, 2019, the student's classroom teacher sent an email to the parent copying the student's mother. In her email, the teacher summarized the interventions that had been put in place beginning in September 2018. The classroom teacher also stated in her email that the interventions would be reviewed at a CARE Team meeting on February 7, 2019. The teacher included in her email a copy of notes from discussions she had with the school psychologist and special education teacher in January. She told the parents that the occupational therapist and special education teacher would be present at the February 7th meeting to talk about the effectiveness of the interventions with the team and would discuss the student's needs going forward. The classroom teacher attached to her email a copy of the occupational therapist's screening report and a report of the student's winter reading scores.

On February 12, 2019, the student's classroom teacher sent the parent an email regarding the ***rescheduling*** of the February 7th meeting to February 21, 2019 and offered the parent the option of participating in the meeting via conference call.

On February 18, 2019, the student's classroom teacher sent an email to both parents regarding an upcoming CARE Team meeting scheduled for February 21, 2019. The parent sent an email to the classroom teacher on February 20, 2019 stating that he would not be able to attend the meeting in person but would like to participate via conference call. Plans were put in place for that call.

At the February 21, 2019 CARE Team meeting, which the parent participated in via conference call, the student's progress was reviewed and interventions were discussed. The report of the outside evaluation of the student obtained by the student's mother was reviewed, and the diagnosis of dyslexia was noted. It was decided that an evaluation to determination whether the student was eligible for and in need of special education services was warranted. The student's mother provided written consent for that evaluation after the meeting on February 21, 2019.

On March 7, 2019, the CARE Team met to discuss the need for the district to collect new data and conduct additional testing in the areas of written language and behavior. The team also discussed how the student's needs might be met through either an IEP or a Section 504 Accommodation Plan. The student's mother was present at this meeting; the student's father was not in attendance. The prior written notice and request for consent to conduct a special education

evaluation originally signed by the student's mother on February 21, 2019 was modified, and the student's mother initialed those changes to reflect her consent.

On April 11, 2019, the school psychologist, building principal, and director of the special education cooperative spoke by telephone with both parents in an effort to address questions related to the student's assessments, interventions, and potential special education services.

A special education Eligibility Determination meeting for the student was held on April 16, 2019. In attendance were the building principal, a special education teacher, the director of the special education cooperative, the student's classroom teacher, the school psychologist, and both parents. Testing results were reviewed. All parties except the parent signed to indicate that they agreed with the determination that the student was eligible to receive special education services under the category of Specific Learning Disability.

An IEP team meeting was held on April 30, 2019 with both parents in attendance. Both parents provided signed written consent to allow the student to receive the special education services outlined in the proposed IEP.

## Issues

In his complaint, the parent outlined two issues.

**Issue One: The district failed to provide the parent with prior written notice and request for consent for an evaluation by the district's occupational therapist.**

For children age five through age 21, Kansas screening laws require that schools utilize age appropriate screening procedures, including observations, instruments, measures, and techniques that disclose any potential exceptionality and indicate a need for special education evaluation, including hearing and vision screening (K.A.R. 91-40-7(b)(2)).

In Kansas, this screening is conducted, in part, through the implementation of general education intervention (GEI). The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the support children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into initial evaluation for special education. Collaboration between special education and general education staff is an important part of the general education intervention process. School personnel must be involved in this building- level, school-wide activity (K.A.R. 91-40-7(c)).

As an agency, the Kansas State Department of Education (KSDE) encourages the use of a multi-tiered system of supports for all children, encompassing school-wide support for both academic and behavioral competency. This is further emphasized in Kansas special education regulations which, in most cases, require the use of general education interventions (GEI), prior to referring any child in kindergarten through grade 12 for an initial evaluation (K.A.R. 91-40-7(c)(2)). GEI requires schools to have data-based documentation of the interventions and strategies implemented for each child.

Some schools conduct GEI through a school-wide approach of providing multi-tiered levels of intervention to support children to achieve more successfully. In recent years, this kind of a systemic approach has been referred to as a multi-tiered system of supports (MTSS). The practices utilized in MTSS are based on providing high-quality instruction and intervention matched to child need; monitoring progress frequently to make decisions about change in instruction or goals; and applying child response data to important educational decisions. In Kansas, this set of principles and practices are encompassed within Kansas Multi-tiered System of Supports and Alignment (Kansas MTSS).

Other schools accomplish conducting GEI through an individual child problem solving approach, often referred to as student improvement teams with names such as Student Intervention Team (SIT), Student Assistance Team (SAT), Teacher Assistance Team (TAT), **CARE Team**, etc. or problem-solving teams. Either approach (school-wide or individual problem-solving) may be used as schools seek to provide early intervention for children in need of additional supports to be successful.

Questions often arise about who can work with a student to provide what type of support at what point in the general education intervention (GEI) process. Because child find is required by special education law and GEI is one of Kansas' methods for conducting child find for school age children, it is appropriate that special educators will, in part, support carrying out GEI. This may include special educators – including such specialists as speech/language pathologists or occupational or physical therapist – who assist in collecting student data, participating in the analyses of data to determine next steps, and the provision of interventions.

Federal regulations indicate that the screening of a student to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services (34 C.F.R. 300.302). Further explanation in comments to the federal regulations indicates that screening refers to a process that a teacher or specialist uses to determine appropriate instructional strategies. The comments go on to describe screening as typically being a relatively simple and quick process that is used to determine strategies to more effectively teach children (Federal Register, August 14, 2006, p. 46639). This would include examples of

such things as universal screening and progress monitoring tools (e.g. DIBELS, etc.) that yield information teachers may use to more appropriately select interventions tailored to a student's area of academic need, observations of children in various environments from which analyses of behavior patterns may occur in order to direct staff to appropriate intervention selection, and diagnostic tools which assist school personnel in a deeper understanding of the student's presenting concern so that more effective interventions may be selected.

It should be made very clear here that the latitude given by this regulation is NOT to be interpreted as a way to circumvent other regulations pertaining to evaluation. The difference between screening and evaluation is the ***intent*** of the activities. If the intent of the activities is to determine instructional strategies, that constitutes screening. It is clear in the regulation and subsequent comments that the ONLY activities that may be considered screening are those activities which result directly in information to be used solely for the purpose of designing instructional strategies. At any point that the intent changes to seek to determine if the student is a child with an exceptionality or if the student is in need of special education, that is evaluation and all due process protections come into play. At that point, parents must be contacted to provide prior written notice and to seek consent for initial evaluation.

## Parent's Position

The parent contends that in an email to the parent and the student's mother dated October 29, 2018, the student's classroom teacher referenced an observation and assessment which would be conducted by the occupational therapist for the district who would be looking "at some dysgraphia things (writing, spelling, size of letters…)." According to the parent, the classroom teacher indicated that she was sending home a permission form related to the occupational therapist's observation, noting that the results would be reviewed at a CARE team meeting proposed for November 8, 2018.

It is the position of the parent that the October 29th email was the only communication he received regarding the CARE team process for the student during 2018. The parent further asserts that he was not provided a copy of the permission form and did not give consent for the observation by the occupational therapist. The parent states that because he was not given appropriate prior written notice, he was not informed of his right to request mediation or to file for due process to object to the observation. Additionally, he was not notified whether the proposed meeting on November 8th was confirmed. The parent states that if that meeting was held, he was not given any information regarding what was discussed.

## District's Position

The district contends that because the student was not a child with a disability, nor was he a child under evaluation for a disability at the time that screening by the occupational therapist was proposed in November of 2018, the district was not under any obligation to provide the type of notice and consent described by the parent.

## Investigative Findings

Records supplied by the district show that the November 8, 2018 meeting referenced by the parent in his complaint was a building level CARE Team meeting – a *general* education team, **not** a *special* education team, as were all meetings held prior to the student's referral for special education evaluation on February 21, 2019.

The assessment/observation conducted by the occupational therapist in November of 2018 was an action designed to provide the CARE Team with information regarding the development of general education interventions to meet the needs of the student, not to determine his eligibility for special education.

Following the CARE Team meeting on February 21, 2019 wherein the decision was made by the CARE Team to move forward with a special education evaluation of the student, the district provided the student's mother with prior written notice of the evaluation and a request for consent, and the student's mother provided her written consent.

## Summary and Conclusions

Special education statutes and regulations require districts to put in place policies and procedures designed to disclose any potential exceptionality and indicate a need for special education evaluation, including hearing and vision screening, and age-appropriate assessments for school-aged children (K.A.R. 91-40-7(b)(2)). However, special education laws and regulations do not include specific requirements regarding how those "child find" policies and procedures are to be implemented.

The student was not referred for special education evaluation until February 21, 2019. All actions by the district specified under this issue prior to that February 21st date were executed as a part of the building CARE Team process which is a general education intervention process not governed by special education statutes and regulations. The assessment/observation conducted by the occupational therapist was completed as a part of the CARE Team process in an effort to help with the development of instructional interventions – not to determine the student's eligibility for special education. Because special education statutes and regulations do not apply to the CARE Team policies and

practices raised under this issue, a violation of special education law is not substantiated on this issue.

Additional Issue Related to Notice

During a telephone conversation with the investigator on July 31, 2019 and in subsequent email exchanges with the investigator, the parent contended that the district did not seek his written permission before conducting testing to determine the student's eligibility for special education services. The district has agreed to have this issue addressed as a part of the parent's original complaint.

Whenever a child has been referred for an evaluation, the school must provide Prior Written Notice to the parents that describe any evaluation procedures the school proposes to conduct (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.304(a)). In addition, there are standard components of content the notice must contain (34 C.F.R. 300.503(b)). The purpose of providing notice to the parents is so they understand what action the public agency is proposing (in this case, to conduct an initial evaluation) and the basis used for determining the action is necessary.

The school must obtain informed consent from the parent of the child before conducting the evaluation (K.A.R. 91-40- 27(a)(1); 34 C.F.R. 300.300(a)). In determining that informed consent is obtained, the following must be ensured (K.A.R. 91- 40-1(l); 34 C.F.R. 300.9):

1. 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.
2. 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 and lists the records (if any) that will be released and to whom.
3. The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
4. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

The Office of Special Education Programs (OSEP), the office in the U.S. Department of Education that oversees special education requirements, has provided guidance regarding notice and consent of divorced parents. OSEP has said, "In situations where the parents of a child are divorced, the parental rights established by the [IDEA] apply to both parents, unless a court order or state law specifies otherwise" (Federal Register, August 14, 2006, p.46568). OSEP has further clarified that in such cases when the parents are divorced there is no requirement in the IDEA that the public agency obtain consent from both parents. (Letter to Ward, OSEP, August 31, 2010, 111 LRP 13076). In summary, if parents are divorced, regardless of which parent has primary custody, the school

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

## Parent's Position

The parent contends that he never received a copy of any document from the district requesting consent to conduct a special education evaluation of the student and therefore has never granted permission for such an evaluation.

## District's Position

It is the position of the district that both parents participated in the CARE Team meeting of February 21, 2019 and were aware of the district's plan to conduct an evaluation to determine the student's eligibility for special education support. The district asserts that the student's mother gave her written consent for the evaluation on February 21, 2019 immediately following that CARE Team meeting at the school. That original consent form was subsequently modified to reflect additional new assessments proposed by the district, and the student's mother consented to those changes.

According to the district, the school psychologist mailed a copy of the original evaluation consent form to the student's father on February 21, 2019. The district asserts that a second copy of a prior written notice and request for evaluation form was mailed to the student's father on March 7, 2019. When the district did not receive any response to the notice from the parent, the district moved ahead to conduct the evaluation of the student because one of the student's divorced parents (the student's mother) had provided written consent for the evaluation.

## Investigative Findings

According to the director of the special education cooperative, the school psychologist for the district has a clear recollection of going to the office after the CARE Team meeting of February 21, 2019 to get the parent's address before mailing him a copy of the evaluation notice and request for consent form.

The district provided a copy of an evaluation notice and request for consent form signed by the student's mother on February 21, 2019. That form shows that the

document was “hand delivered” to the student’s mother but does not show a method of delivery to the student’s father.

This original evaluation notice and request for consent form was subsequently modified on March 7, 2019 to show that new data would be collected in the areas of “Social/Emotional Status/Behavioral Status” and “Academic Performance.” The student’s mother initialed those changes on March 7, 2019. There is no indication as to how or if a copy of the revised document was delivered to the student’s mother or the student’s father. The district asserts that because the student’s father did not provide any response to the district’s initial request for evaluation, the district did not provide him a copy of the modified notice and request for consent form.

The district provided the investigator with a second evaluation consent form for the student, this one dated March 6, 2019. The form has not been signed by either parent. The “Delivery” portion of this form shows that it was provided to the student’s mother on April 11, 2019. This form outlines a different explanation as to why the evaluation was proposed than was shown on the form signed by the student’s mother on February 21, 2019 and subsequently modified on March 7, 2019. The second evaluation notice and request for consent form also spells out a different evaluation plan than the one outlined in the February 21st document. While the district asserts that that a copy of this second evaluation notice and request for consent form was sent to the student’s father on March 7th, there is no indication on the form as to how or when the parent was actually provided a copy of the document, and it is not clear to the investigator why this notice and consent form was developed.

## Summary and Conclusions

The purpose of providing prior written notice is to ensure that a parent has been provided all required information relevant to the activity for which consent is being sought.

The district developed three evaluation notice and consent forms related to the student. As noted on the original notice and consent form, the district presented that form to the student’s mother on February 21, 2019. The district subsequently modified that original notice and consent form on March 7, 2019 and the student’s mother initialed all changes. The modified notice and consent form does not reflect when, how, or to whom the form was delivered. The district developed a third notice and consent form on March 7, 2019. That form contained different content than the other two forms and the district’s documentation shows it was delivered to the student’s mother on April 11, 2019. There is no evidence to support the district’s contention that the father was provided with copies of any of these evaluation notice and consent forms.

The district did not follow up with the student's father when he did not return a signed copy of the initial evaluation consent because the student's mother had already given her consent for the evaluation. Further, the district felt no obligation to provide a copy of the proposed revision to the initial notice and consent form to the student's father because the modification was made to a form signed by the student's mother, not his father.

Because the district cannot show that it provided prior written notice of special education evaluation to ***both*** of these divorced parents, a violation of special education statutes and regulations is substantiated.

Additional Comments

The district opted to provide both of the student's parents with notice of a number of special education actions using a single form. This approach may not prove problematic when both parents are present when a form is developed and signatures are obtained. However, when both parents are not present, the documentation of when and how a form is delivered to the two parties can be confusing unless that delivery model is clearly spelled out for each individual parent. In the opinion of the investigator, the delivery of forms when both parents are not present would be best accomplished by providing each party his or her own individual copy of the document so that delivery information is clearly documented for each.

**Issue Two: The district failed to provide the parent with written notice 10 calendar days prior to two team meetings in April of 2019.**

Federal regulations, at 34 C.F.R. 300.501(b)(1), require districts to ensure that one or both parents are present or are otherwise afforded the opportunity to participate in meetings regarding the evaluation, identification, educational placement of their child and the provision of a free appropriate public education (FAPE) to the student.

With regard to Individualized Education Program (IEP) team meetings, the meeting is to be scheduled at a mutually agreed upon time and place (34 C.F.R. 300.322(a)(2)). The school must provide notice of an IEP team meeting to the parents for the initial IEP team meeting and any subsequent IEP team meetings (34 C.F.R. 300.322(a)(1)). The notice must be provided in writing at least 10 calendar days prior to the meeting (K.A.R. 91-40-17(a)(2)). However, a parent may waive the right to 10-day prior written notice thereby allowing an IEP Team meeting to be convened in less than 10 days.

Special education statutes and regulations do not require ***10-day*** **prior written notice** for an eligibility determination meeting although prior notice of the meeting is required for any meeting regarding identification or evaluation. (See 34 C.F.R. 300.501(b)(1)(i) and 34 C.F.R. 300.501 (a)(2); 34 C.F.R. 300.322(a)(1) and

(b)(1); and K.A.R. 91-40-25 (a), (b), and (c).). If the eligibility determination meeting is held in conjunction with an IEP team meeting, 10-day prior written notice must be provided.

The written notice of an IEP team meeting must include the following information:

1. the purpose;
2. date;
3. time;
4. location of the meeting;
5. the titles or positions of the persons who will attend on behalf of the school (The school is to notify the parents about who will be in attendance at an IEP team meeting, but individuals may be indicated by position only. The school may elect to identify participants by name, but they have no obligation to do so.); and
6. the parents have a right to invite to the IEP meeting individuals whom the parents believe to have knowledge or special expertise about their child.

If parents are divorced, regardless of which parent has primary custody, the school must notify both parents unless a court order precludes this from happening. This applies to all special education notice requirements including notice of an IEP team meeting. If the school is only aware of one parent's address, the school must make reasonable efforts to locate the other parent in order to provide notice. The school is not required to conduct duplicate IEP team meetings for divorced parents that do not wish to attend the same meeting.

## Parent's Position

The parent asserts that written notice of a team meeting scheduled for April 16, 2019 was mailed to him on April 15, 2019 even though the notice was dated April 11, 2019. According to the parent, he did not receive the prior written notice form until after the meeting had been held.

Additionally, the parent contends that written notice of an IEP Team meeting on April 30, 2019 was dated April 17, 2019 but was not mailed to him until April 22, 2019. According to the parent, he received that notice less than one week before the meeting.

## District's Position

It is the contention of the district that while the written meeting notice for the meeting of April 16, 2019 was not provided to the parent 10-days prior to the meeting, the scheduling of the meeting met both the spirit and the letter of the requirements of K.A.R. 91-40-17. The district asserts that the parent suggested

the date for the meeting during a telephone conference on April 11, 2019 and subsequently attended and participated in the meeting on April 16th.

As to the meeting of April 30, 2019, the district contends that written notice was mailed to the parent 13 days prior to the meeting and should have reached him before the date alleged by the parent. The district asserts that the meeting was scheduled at a date and time that the parent indicated would fit his schedule, and the date and time for the meeting were agreed upon by the parent at a meeting on April 16, 2019. It is the position of the district that the parent attended and participated in the meeting on April 30, 2019.

The district contends that the parent signed notice of meeting forms for both the April 16 and April 30, 2019 meetings to indicate that he planned to attend the meetings but erred in not checking the box on either form to indicate that he waived his right to ten-days prior written notice of the meetings.

## Investigative Findings

### April 16, 2019 Meeting:

On April 11, 2019, the building principal sent to the parent an email invitation for a 35-minute "Eligibility Determination Meeting" to be held on April 16, 2019. The invitation contained the date, time, and location of the meeting as well as the email addresses of other invitees but did not specify their roles. A video call link was included in the invitation. The email did not provide the parent with notice that he had a right to invite to the IEP meeting individuals whom he believed to have knowledge or special expertise about the student.

A district form providing prior written notice of the April 16, 2019 meeting and containing all required information was mailed to the parent by the school psychologist. The form is dated April 11, 2019, 5 days before the scheduled meeting. However, the postmark on the envelope in which the notice was sent was April 15, 2019, one day before the scheduled meeting.

The district's prior written notice of meeting form stated that the school psychologist "hand delivered" the form to the parent on April 11, 2019. However, the parent was not in the district on April 11, 2019. On that date he participated in a telephone conference with the building principal, the student's mother, the school psychologist, and the director of special education for the cooperative.

The district provided the investigator with a copy of the prior written notice of the April 16th meeting. The form was signed by the parent on April 19, 2019, three days ***after*** the meeting. In the "Acknowledgement" section of the form, the parent indicated that he planned to "attend the meeting as scheduled." The box next to the statement "I consent to waive my right to a 10-day prior written notice of the meeting to develop, review, or revise the IEP for my child" is not checked.

According to the form, the purpose of the April 16, 2019 meeting was "to review the evaluation and determine eligibility." The form also noted that "if it is determined that your child is eligible, or continues to be eligible for special education and related services, the IEP team will develop an individualized education program (IEP) for your child and determine the appropriate placement."

April 30, 2019 Meeting:

On April 16, 2019, the building principal sent an email invitation to the parent for in "IEP Development" meeting on April 30, 2019. The invitation contained the email addresses of other invitees but again did not specify their roles. A video call link was included in the invitation. Again, the email did not provide the parent with notice that he had a right to invite to the IEP meeting individuals whom he believed to have knowledge or special expertise about the student.

The district provided a copy of prior written notice of the April 30th meeting containing all required information. According to the form, which is dated April 17, 2019, the special education teacher delivered the form to the parents by mailing a copy of the form on April 17, 2019 and sending another in the student's backpack that same date, 13 days before the proposed meeting. However, the parent received the meeting notice in an envelope with the return address of the elementary school and a postmark of April 22, 2019, 8 days before the scheduled meeting. The parent signed the form on the day of the meeting, April 30, 2019.

The prior notice of meeting form indicates that the purpose of the April 30th meeting was to review the evaluation results and determine eligibility and "IEP development." Under the "Acknowledgement" section of the form, the parent indicated that he planned to "attend the meeting as scheduled." The box next to the statement "I consent to waive my right to a 10-day prior written notice of the meeting to develop, review, or revise the IEP for my child" was not checked.

In a telephone conversation with the investigator on July 31, 2019, the parent confirmed that he attended the Eligibility Determination/IEP meeting on April 16, 2019. His signature on the Eligibility Determination form corroborated his statement. The parent also stated that he attended the IEP team meeting for the student on April 30, 2019. The "Participants" section of the student's April 30, 2019 IEP includes the parent's signature.

## Summary and Conclusions

Written notice of meeting is intended not simply to ensure that the parent knows when to come to a meeting and where, but also to ensure that the parent has been provided with all legally required information related to the special education meeting.

The district and the parent worked together to schedule both the student's Eligibility Determination/IEP meeting and his initial IEP team meeting at mutually agreeable times, and the parent attended both meetings. However, the district failed to provide the parent with 10-days prior written notice of either meeting, and the parent did not waive his right to 10-day's prior notice. The email invitations for these meetings sent to the parent by the building principal did not provide the parent with the titles or positions of the individuals who would be attending the meeting on behalf of the district and failed to notify the parent that he could invite to the meeting individuals whom the parents believe to have knowledge or special expertise about the student.

In its notice of meeting form, the district indicated that if the student was determined eligible for special education services then an IEP would be developed at the meeting. Therefore, 10-days prior written notice of the meeting was required.

Because the district did not provide the parent with a legally compliant written notice of the meetings of either April 16 or April 30, 2019 ten days prior to each of these meetings, a violation of special education statutes and regulations is substantiated.

Additional Comments

The delivery date shown on any prior written notice form should reflect the date the form was actually delivered, not the date the form was completed – unless, of course, the form is actually delivered on the date it is completed. In the case of the two notice of meeting forms that are the focus of this issue, the delivery dates shown on the forms vary from four to five days from the dates the forms were actually mailed. The intent of the 10-days prior written notice requirement is to allow parents ample time to prepare for a meeting and to have sufficient time to invite other participants to attend the meeting on behalf of the student. By delivering the notice of meeting several days after the form is actually completed, the time allotted for the parent to prepare is shortened.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Specifically, a violation has occurred with regard to

- K.A.R. 91-40-17(a)(2) which requires that parents be provided with 10-days prior written notice of an IEP team meeting, and

- K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.304(a) which require that parents be provided with prior written notice before conducting an evaluation to determine eligibility for special education services.

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

1) Submit, within 20 days of the date of this report, a written statement of assurance to Special Education and Title Services (SETS) stating that it will comply with

    a) K.A.R. 91-40-17(a)(2) by providing 10-days prior written notice to parents of an IEP team meeting for their child. In the case of parents who are divorced, this notice shall be provided to both parents unless a court order precludes this from happening, and

    b) K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.304(a) by providing both of a student's divorced parents with prior written notice a reasonable time before the district proposes to initiate an evaluation to determine eligibility for special education services, unless a court order precludes this from happening.

2) The director of special education for the cooperative addressed the issue of appropriate prior written notice of meetings at an all-employee in-service on August 8, 2019.

    a) Within 10 days of the date of this report, submit to SETS a copy of the agenda for that meeting containing a summary of the topics related to prior written notice which were addressed with staff on that date.

    b) If the training of August 8, 2019 did not include building principals, provide to SETS, within 10 days of the date of this report, a plan to provide training on the provision of written notice of meetings to principals.

3) The director of special education for the cooperative addressed the topic of the provision of prior written notice in an in-service with school psychologists on August 19, 2019.

    a) Within 10 days of the date of this report, submit to SETS a copy of the agenda for that meeting containing a summary of the topics related to prior written notice which were addressed with staff on that date.

4) If the training of August 8 and/or 19, 2019 did not specifically address the topics of a) how prior written notice is to be provided to divorced parents and b) how the delivery method and date of delivery should be documented, submit to SETS within 15 days of the date of this report a plan for additional training of ***all*** special education staff on these topics.

5) Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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 (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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), 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).

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

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON AUGUST 1, 2019

DATE OF REPORT: AUGUST 31, 2019

This report is in response to a complaint filed with our office by ____ and ____ _____, parents, on behalf of their son, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student," ____ _____ will be referred to as "the mother," and both ____ and ____ _____ will be referred to as "the parents."

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on August 1, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on August 30, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed both parties as part of the investigation process. The parent was interviewed by telephone on August 19, 2019. _____ _____, Director of _____ Cooperative, and ___ _____, Superintendent of USD #___, were interviewed by telephone on August 22, 2019.

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- Individualized Education Program (IEP) dated April 4, 2018
- IEP Goal Progress Report dated October 19, 2018
- Handouts from the IEP Boot Camp held on November 28, 2018

- Letter to all parents and guardians of students who were supposed to receive Adaptive Physical Education (APE) swimming services dated December 2018 written by _____ _____, APE Teacher
- Email dated January 4, 2019 written by ___ _____, Superintendent of USD #___ to _____ _____, Director of Special Education at _____ Cooperative
- Notes from _____ _____, School Psychologist
- Email dated February 5, 2019 written by the parents to ___ _____
- Email dated February 6, 2019 written by Mr. _____ to the parents
- Letter to Special Education and Title Services (SETS)at the Kansas Department of Education (KSDE) from Ms. _____ dated August 21, 2019
- 2018-19 Attendance Calendar for USD #___
- 2019-20 Attendance Calendar for USD #___
- Formal Complaint written by the parents dated July 26, 2019

## Background Information

This investigation involves a 14-year-old male who resides with his parents within the boundaries of USD #___. The student has received special education and related services since preschool due to an exceptionality of multiple disabilities including cerebral palsy, cortical vision impairment, and seizure disorder. During the 2018-19 school year, the student was enrolled in the 9th grade at _____ Senior High School in USD #___ through the _____ Cooperative. The student is currently attending _____ Senior High School for 10th grade during the 2019-20 school year.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

**ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP), specifically by not providing adaptive physical education services to the student during the 2018-19 school year.

## Parent Position

The parents allege USD #___ failed to provide the adaptive physical education (APE) services, specifically swimming, required by the student's IEP during the 2018-19 school year. The mother expressed that they were not only concerned that the student was not getting the APE services as required by the IEP, but also that they were not informed of the lack of services being provided in a timely manner.

The parents indicated the student has a gross motor skill goal on the current IEP that requires 50 minutes per week of APE involving swimming at the _____ Recreation Center Pool. The parents learned this IEP goal was not being addressed and the APE services at the swimming pool were not being provided at the end of October 2018 when they received the IEP Goal Progress Report. This document stated, "Swimming has not taken place this year in adapted PE. A new goal will be issued to the student."

However, the mother indicated that no one from the school district contacted the parents regarding scheduling an IEP team meeting or amending the student's IEP. In addition, the mother reported they never received any prior written notice of the change in APE services.

The parents met with the superintendent at the beginning of January 2019 to discuss their concerns regarding the gross motor skill goal not being addressed because the swimming services were not being provided. The mother reported being told that school staff told her the swimming services were discontinued was due to the remodeling of the locker room at the _____ Recreation Center Pool. Although the student's IEP team met in February and again in April, the mother reported the IEP was never reviewed and revised in regards to the swimming goal or service. The mother noted that school staff never contacted them regarding amending the student's IEP to change or remove the swimming goal and/or the APE services.

## School District Position

_____ _____, Director of the _____ Cooperative, acknowledged the district did not provide the 50 minutes per week of APE services at the _____ Recreation Center Pool required by the student's IEP during the 2018-19 school year. Ms. _____ also acknowledged that the parents have not been provided with appropriate prior written notice proposing this change to the APE services.

Ms. _____ reported the following timeline in regards to the allegation:

- A new APE teacher, _____ _____, was assigned to _____ High School for the 2018-19 school year. Ms. _____ took the student swimming at the beginning of the school year to the _____ Recreation Center Pool. Ms. _____ believed the remodeled locker room created health and safety issues due to tight spaces for changing students, limited staff to assist students, and difficult wheelchair access. She made the decision to discontinue the APE swimming activity and to provide the 50 minutes per week of APE services at the school. These 50 minutes per week were in addition to the existing 60 minutes two times per week of APE services addressing the other gross motor skill goal involving sitting on the student's IEP.

- On November 28, 2018, Ms. _____ and _____ _____, Special Education Teacher / Case Manager for the student, along with all of the special education staff at the _____ Cooperative, attended the IEP Boot Camp facilitated by the Kansas Technical Assistance System Network (TASN). This training focused on the IEP process.

- Sometime in December 2019, Ms. _____ sent a note home to parents and guardians students in the APE class that stated:

  > In considering a number of safety, health, and physical fitness factors, the decision has been made to discontinue the swimming portion of Adapted PE class. Your child's Adapted PE minutes each week will not be effected (sic).
  >
  > Please check one of the spaces below and return the slip to school. If you have questions or concerns, please email me or we can visit further at conferences in February.
  >
  > ___ I am okay waiting until my child's annual IEP meeting to change their APE goal.
  >
  > ___ I would like to schedule a new IEP as soon as possible

  Ms. _____ reported the parent did not return the slip to school indicating their choice.

- The parents met with Mr. _____, USD #___ Superintendent, on January 3, 2019 to discuss several concerns including the swimming issue. Mr. _____ then contacted Ms. _____ to discuss these concerns. Ms. _____

then met with Ms. _____ on January 24, 2019 to outline how to write an appropriate APE goal and how to proceed.

- On January 28, 2019, an IEP team meeting was held to review and revise the student's IEP. However, the parent requested the student be reevaluated prior to revising the current IEP.

- On April 11, 2019, the IEP team met and determined the student continued to be a student with an exceptionality and in need of special education and related services. An IEP team meeting was scheduled for May 6, 2019; however, that IEP team meeting was not held because the parents adjourned the meeting when the speech/language pathologist was unable to attend.

- On May 9, 2019, Mr. _____ and Ms. _____ toured the _____ Community Center Pool to determine if this site would be an option for providing the swimming portion of the APE class.

- On May 13, 2019, the parents requested an independent educational evaluation (IEE) and USD #___ is currently in the process of obtaining that evaluation.

**Finding of Facts**

The following facts are based upon interviews and documentation obtained during the course of this investigation.

One IEPs was in effect during the 2018-19 school year. The IEP dated April 4, 2018 required 50 minutes per week of APE services at the _____ Recreation Center Pool to address a gross motor skill goal involving swimming and 60 minutes of APE services two times per week at _____ High School to address a gross motor skill involving sitting. A total of 170 minutes per week of APE services was required to be provided to the student to address two gross motor skills goals.

In August 2018, the APE teacher unilaterally made the decision to cease providing the 50 minutes per week of APE services at the _____ Recreation Center Pool to address gross motor skill goals for all students in the APE class.

The 50 minutes per week of APE services at the _____ Recreation Center Pool were not provided during the entire 36 weeks of the 2018-19 school year. Instead, those services were provided at the _____ High School in addition to

the 60 minutes of APE services. While a total of 170 minutes per week of APE services continued to be provided to the student, only the student's gross motor skill goal involving sitting was addressed during the 2018-19 school year.

The parents of the student were first notified of this change of services through the IEP Goal Progress Report dated October 19, 2018.

Sometime in December 2018, the APE teacher provided parents and guardians of all students in the APE class with a written explanation of the reason for discontinuing the swimming portion of the APE class. All parents were offered the choice of changing their students' IEPs at the next scheduled annual IEP team meeting or meeting as soon as possible to change the APE swimming goal and delete the 50 minutes per week of APE services at the _____ Recreation Center Pool.

On January 4, 2019, the parents of the student met with Mr. _____, Superintendent of USD #___, and made him aware of the district's failure to implement the student's IEP in regards to the swimming goal and the required APE services.

On January 24, 2019, Ms. _____ met with Ms. _____, APE Teacher, to develop a plan to address the failure to implement the student's IEP in regards to the swimming goal and the APE services.

However, the student's IEP team never met during the 2018-19 school year to review and revise the IEP in regards to the swimming goal and the APE services required to address that goal. The parents of the student have not been provided with appropriate prior written notice proposing a change of services.

**Applicable Regulations and Findings**

Federal regulations, at 34 C.F.R. 300.101, require school districts to make a free appropriate public education available to all children residing within the district. Federal regulations at 34 C.F.R. 300.17 defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Federal regulations, at 300.324(a)(4) and 300.324(a)(6), allow for changes to be made to the current IEP by amending the IEP rather than by redrafting the entire document either with or without an IEP Team Meeting. The changes may be made by the entire IEP Team at an IEP Team Meeting. Alternatively, the changes may be made without a meeting if the parent of a child with a disability and the school district representative agree not to convene an IEP Team Meeting for the purposes of making the changes and instead develop a written document to amend or modify the child's current IEP.

Federal regulations at 34 C.F.R. 300.503(a)(1) require that prior written notice must be given to parents a reasonable time before the responsible public agency proposes to change the provision of a free appropriate public education (FAPE) of the student. . Such prior written notice must include all of the elements required by 34 C.F.R. 300.503(b).

The KSDE defines the term "reasonable time" in Chapter 1, Section D of the Kansas Special Education Process Handbook as 15 school days.

In addition, Kansas regulation, at K.A.R. 91-40-27(a)(3), requires parent consent before making a material change in services. K.S.A. 72-3404(bb) describes a material change in services as an increase or decrease of 25% or more of the duration or frequency of any special education service, related service, or supplementary aid or service.

In this case, the IEP in effect during the 2018-19 school year required a total of 170 minutes (duration) per week (frequency) of APE services. This was described in the IEP as 50 minutes per week of APE services at the _____ Recreation Center Pool to address a gross motor skill goal involving swimming and 60 minutes two times per week of APE services to address a gross motor skill goal involving sitting.

Documentation and interviews found the 50 minutes per week of APE services at the _____ Recreation Center Pool were discontinued because of the unilateral decision made by the APE teacher in August 2018. The student did not receive these APE services at the _____ Recreation Center Pool as required by the IEP during the entire 36 weeks of the 2018-19 school year and the gross motor skill goal involving swimming was not addressed.

However, when the 50 minutes per week of APE services at the _____ Recreation Center Pool were discontinued, an additional 50 minutes per week of APE services at the _____ High School were added. While there was not a

material change in the duration or frequency of the APE service being provided, only the gross motor skill involving sitting was addressed through these APE services and the provision of FAPE was changed.

The student's IEP team was never reconvened to review and revise the IEP goal and/or APE services in regards to the swimming nor was the IEP amended. The parents were not provided with appropriate prior written notice of the change to APE services at least 15 school days before the decision to discontinue the 50 minutes per week of APE services at the _____ Recreation Center Pool and to add 50 minutes per week of APE services at _____ High School.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to provide the special education services as required by the student's IEP is substantiated. In addition, USD #___ is found to have violated special education statutes and regulations in regards to making changes to the student's IEP after the annual IEP team meeting without an agreement from the parent to amend the IEP without a meeting. USD #___ is also found to have violated special education statutes and regulations for failing to provide parents with appropriate prior written notice before proposing to change the provision of FAPE to the student.

The investigation of this allegation also found systemic noncompliance as USD #___ failed to provide the APE services at the _____ Recreation Center Pool in accordance with the IEPs of multiple students in the district due to the unilateral decision of the APE teacher during the 2018-19 school year.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Violations have occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   In this case, the student's IEP required 50 minutes per week of APE services at the _____ Recreation Center Pool to address a gross motor skill goal involving swimming. Documentation and interviews

found these services were discontinued because of the unilateral decision made by the APE teacher in August 2018, and the student did not receive the APE services at the _____ Recreation Center Pool as required by the IEP during the entire 36 weeks of the 2018-19 school year.

The findings of this investigation also substantiate systemic noncompliance in USD #___ for failing to provide APE services at the _____ Recreation Center Pool in accordance with the IEPs of multiple students in the district due to the unilateral decision of the APE teacher during the 2018-19 school year.

B. Federal regulations at 300.324(a)(4) and 300.324(a)(6) require the public agency to make changes to a child's IEP after the annual IEP team meeting by either convening an IEP team meeting for the purpose of making changes or developing a written document to amend or modify the child's current IEP by mutual agreement with the parent.

In this case, the annual IEP dated April 4, 2018 was unilaterally changed by the APE teacher without reconvening the IEP team or amending the IEP with parent agreement.

C. Federal regulations at 34 C.F.R. 300.503(a)(1) and (b) require that prior written notice must be given to parents a reasonable time before the responsible public agency proposes to change the provision of a free appropriate public education (FAPE) of the student.

In this case, the IEP goal for gross motor skills related to swimming and the APE services being provided at the _____ Recreation Center Pool were changed at the beginning of the 2018-19 school year. The parent first learned of this change on October 19, 2019 which is much more than 15 school days from the date the services were discontinued.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

a) Comply with federal regulations at 34 C.F.R. 300.323(c)(2) requiring school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

b) Comply with federal regulation at 300.324(a)(4) and 300.324(a)(6) requiring school districts and parents to make changes to a child's IEP by either reconvening the IEP team or by amending the IEP without a meeting by mutual agreement.

c) Comply with federal regulation at 34 C.F.R. 300.503(a)(1) and (b) requiring public agencies to provide parents with appropriate prior written notice a reasonable time (15 school days) before proposing changes to the provision of FAPE.

2. No later than September 16, 2019, USD #___ shall make a written offer of compensatory services to the parent for providing not less than 1,800 minutes of compensatory APE services to address the IEP goal involving swimming. The offer must include a schedule that would accomplish the completion of all compensatory services by the end of the 2019-20 school year. USD #___ shall provide a copy of this written offer, including the schedule, to Special Education and Title Services (SETS) on the same day it is provided to the parents. The parents can accept all, part, or none of the compensatory services offered and has 15 school days from the date they receives the offer to notify the district of their decision. Within 15 school days of making this written offer to the parents, USD #___ shall notify SETS, in writing, of the parents' decision regarding the offer of compensatory services. If the parent accepts all or part of the compensatory services offered, USD #___ shall notify the parents and SETS when the compensatory services have been completed.

3. No later than September 30, 2019, USD #___ will identify all students in the district who did not receive the APE services at the _____ Recreation Center Pool required by their IEPs during the 2018-19 school year. USD #___ will then provide a written offer of compensatory APE services to each of those parents, which shall consist of no less than the amount of services that were not provided to each student during the 2018-19 school year. The offer must include a schedule that would accomplish the completion of all compensatory services by the end of the 2019-20 school year. USD #___ shall provide a copy of each of these written offers,

including the schedules, to Special Education and Title Services (SETS) on the same day they are provided to each parent. Each parent can accept all, part, or none of the compensatory services offered and has 15 school days from the date they receives the offer to notify the district of their decision. Within 15 school days of making these written offers to each parent, USD #___ shall notify SETS, in writing, of each parent's decision regarding the offer of compensatory services. USD #___ shall notify each parent who accepts all or part of the compensatory services and SETS when the compensatory services have been completed.

4. No later than September 30, 2019, USD #___ shall reconvene the student's IEP team to review and revise the IEP as necessary in regards to the motor skills goal involving swimming. USD #___ shall provide the parent with appropriate prior written notice of any changes in services and goals resulting from the decisions made at that IEP team meeting.

5. No later than October 21, 2019, USD #___ shall reconvene the IEP teams of each identified student who did not receive the APE services required by the IEP during the 2018-19 school year. Each IEP team shall review and revise the IEP as necessary in regards to the motor skills goal involving swimming. USD #___ shall provide each parent with appropriate prior written notice of any changes in services and goals resulting from the decisions made at that IEP team meeting.

6. No later than November 1, 2019, USD #___ will provide training to all special education staff working at _____ High School regarding their professional responsibilities as special education teachers and case managers. At a minimum, this training will address implementation of the IEP as written, the procedures for changing a student's IEP after the annual IEP is written, and the provision of appropriate prior written notice to parents in compliance with all requirements of the IDEA. No later than September 30, 2019, USD #___ will contact TASN to request a TASN provider to conduct the training, and USD #___ will provide documentation of this request to SETS. No later than November 2, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

7. USD #___ and the _____ Cooperative will create a written procedure that outlines the steps administration must take to monitor the implementation of the IEPs of students enrolled at _____ High School as well as monitoring compliance with the IEP process as

required by the IDEA. This procedure must include a plan for addressing noncompliance with the requirements of the IDEA through the evaluation of the special education staff. Once this procedure is created, USD #___ and the Cooperative will inform and train all administrative staff regarding their responsibilities in carrying out this procedure. USD #___ shall also inform all special education staff of this procedure. No later than November 15, 2019, USD #___ will provide SETS with documentation of the written procedure for ensuring implementation of the IEPs of students enrolled at _____ High School and compliance with the IEP process as required by the IDEA, evidence that administrative staff were informed and trained in regards to their responsibilities in carrying out the procedure, and evidence that special education staff were informed of this procedure.

8. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to 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 (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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
_____ COOPERATIVE AND
_____ PUBLIC SCHOOLS, USD #___
ON AUGUST 6, 2019

DATE OF REPORT: SEPTEMBER 5, 2019

This report is in response to a complaint filed with our office on behalf of _____ _____ by her 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 _____ _____-_____, Executive Director of Special Services for the _____ Cooperative (_____) on August 12 and 20, 2019. The investigator spoke by telephone with the parent on August 22 and September 4, 2019.

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

- IEP for this student dated December 11, 2017
- Notice of Meeting dated October 15, 2018
- IEP for this student dated November 7, 2018
- Team Meeting Record dated November 7, 2018
- Prior Written Notice for Identification, Initial Services, Educational Placement, Changes in Services, Change of Placement, and Request for Consent dated November 7, 2018
- IEP Amendment Between Annual IEP Meetings dated January 14, 2019
- Team Meeting Record dated January 14, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Changes in Services, Change of Placement, and Request for Consent dated January 14, 2019
- Notice of Meeting dated April 17, 2019
- Team Meeting Record dated May 9, 2019

## Background Information

This investigation involves a 12-year-old girl who is enrolled in the 6th grade at the district middle school for the 2019-20 school year. The student attended her neighborhood elementary school for kindergarten through second grade. The student was evaluated in first grade to determine whether she was eligible for and in need of special education services but was not determined to be eligible at that time. The student transferred to a parochial school where she repeated second grade. She was reevaluated with regard to special education eligibility when she was in third grade. At that point she was found eligible for and in need of special education services under the primary exceptionality of Learning Disability.

The delivery of special education services was provided by the district under a contract with an outside agency, the Cradle to Career Literacy Center (C2C). The C2C Literacy Center is located within the district and offers a variety of services including assessment, tutoring, professional development, and consultation. The services provided to the student were supervised by a "Qualified Instructor" who had previously taught special education and holds a Master's degree in Learning Disabilities as well as Reading Specialist Certification and training in the Orton-Gillingham approach to reading instruction. The day-to-day instruction of the student was provided by an individual with experience tutoring students both in English and Spanish.

During her third-grade year, special education reading instruction for the student was delivered using the Sonday System and Read Naturally for general reading instruction. At the fourth-grade level, services were again provided by staff from the Cradle to Career Literacy Center. The Semple Math series was utilized for her individualized mathematics instruction, and the Take Flight series was used for her individualized reading instruction.

The student was in a combined 4th/5th grade classroom for the 2018-19 school year. There were 17 students in the class. Ten of the students were 5th graders; 7 were 4th graders.

An IEP annual review meeting was held on November 7, 2018.

## Issues

In her complaint, the parent raises four issues:

**<u>Issue One:</u> Throughout the 2018-19 school year, the _____ has excluded the parent from the decision-making process regarding the student and has not actively considered the opinions of the parent.**

To address the requirement to strengthen the role of parents in the special education process, Congress mandated that schools afford parents the opportunity to be members of any decision-making team for their child, including

eligibility, initial evaluation and reevaluation, and development of an individualized education program (IEP) for the provision of a free appropriate public education (FAPE). Schools are to ensure that parents have the opportunity to be members of the IEP team that makes decisions on the educational placement of their child. Although logistically this increased involvement of parents may present challenges in arranging convenient meeting times, it should result in decisions that are individualized to meet the unique needs of students and in the development of a closer, more collaborative relationship with parents. Additionally, parents have a responsibility to participate and provide their input into their child's education. School teams recognize the contributions that parents can make to the process and how they can help ensure their child's educational progress (K.A.R. 91-40-25(a); K.A.R. 91-40-17(a); 34 C.F.R. 300.501(b), (c)).

Parents are to be provided notice of meetings related to eligibility, evaluation, reevaluation, IEP development, provision of a free appropriate public education (FAPE) for their child and educational placement decisions, to ensure that they have the opportunity to participate in the meetings (K.A.R. 91-40-17(a), (b)(1); K.A.R. 91-40- 21(c), (d); K.A.R. 91-40-24(e); 34 C.F.R. 300.501(b)(2); 34 C.F.R. 300.322(b), (c)).

One of the procedural safeguards afforded to parents is the required Prior Written Notice of certain proposed special education actions. 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
- provision of special education and related services (FAPE) to their child.

Additionally, Prior Written Notice is provided to the parent when the school proposes to make a change in services or placement that is not substantial or material. However, parent consent is not required for either of these changes.

## Parent's Position

The parent asserts that the district failed to consider her opinions regarding the needs of the student on two occasions:

- at a November 7, 2018 IEP annual review meeting when the decision was made to move the student into the classroom for core reading and math instruction, and
- during a May 9, 2019 transition meeting when the decision was made to terminate C2C as a contracted service provider for the student once she entered the middle school.

## District's Position

It is the position of the district that the parent was included in the decision-making process and excerpts from team meeting documents show that the parent's opinions were considered. Additionally, the district contends that the parent gave her written consent for the changes proposed by the district.

## Investigative Findings

The student's December 11, 2017 IEP stated that the student was to receive the following services beginning August 15, 2018:

- Indirect consultative services
- 90 minutes of pullout services (60 minutes for literacy and 30 minutes for math)

On October 16, 2018, a notice of meeting was provided for an IEP Team meeting scheduled for November 5, 2018. Because of a scheduling conflict for the parent, the meeting was rescheduled for November 7, 2018. The parent was given notice of the rescheduled meeting on October 26, 2018.

According to the "Team Meeting Record" of the 2-hour and 35-minute meeting, the team discussed the following topics:

- Parent(s) Input
- Goals
- Accommodations
- Assistive Tech
- Transition
- Progress Reports
- Assessments
- Placement
- Present levels
- Spec Ed/Related Service
- ESY

According to the meeting notes, the team discussed the parent's concerns regarding inconsistency in information provided by the teacher and information provided at parent teacher conferences. Core time for exposure to reading and math were discussed. The parent expressed her concerns over the student's engagement during science, social studies, and other classes. Math and Language Arts concerns/needs were discussed. The meeting notes show that there was discussion of the parent's concerns regarding communication between home and school.

The team discussed having the student remain in the classroom for core instruction in math. The student had not been receiving any core math instruction in the general education setting. The private parochial school principal had contacted the _____ to suggest that the student would benefit from more general education core math instruction to prepare her for integration into middle school math.

The parent opposed the district's contention that the student needed to be present in the classroom during core reading and math instruction because she felt that the student was too far behind in these areas to spend more time in the classroom. It was the parent's position that if the student was to spend more core time in the general education classroom, then the student should have more individual support ***in*** the classroom, especially for math. According to the parent, the C2C service provider supported the parent's concerns regarding placing the student in core math without any additional support particularly because the student had been receiving pull-out instruction for math in an alternative curriculum.

The team discussed the parent's position on these concerns. The district asserted that core math instruction in the general education setting represented the least restrictive environment (LRE) for the student and felt that before adding in-class services to the student, unsupported integration should first be attempted. The general education teacher appeared to have a manageable class load of 17 students. Because of the combination 4th/5th grade classroom structure, math instruction was delivered by grade level, and only 9 other students would be grouped with the student for core math instruction.

According to the meeting record, the team considered increasing math support but rejected the increase "because C2C is a contracted services [sic] and no one was here to make a finicial [sic] decision. We agreed on a collaborative plan in the PWN [prior written notice] and will have a follow-up mtg." The instructional coach for the district stated in an email to the Executive Director of the _____ dated August 23, 2019 that "C2C attendees insisted that this statement be added to the meeting record." According to the instructional coach, the IEP case manager added the statement, but the "reason the services were not added was because the LRE in math had not been attempted." The team agreed to add 10 minutes of consultative services between the C2C resource teacher/service supervisor, C2C service provider, and the general education teacher, an increase in the level of support provided by C2C. These 10 minutes per week of consultative services were intended to help the general education teacher understand the terminology being used with the student by C2C staff during pull-out math instruction in the Semple Math curriculum.

According to the IEP the team developed on November 7, 2018, services to the student for the remainder of the 2018-19 school year would be as follows:

- Indirect consultative services ("Resource teacher will consult with service provider and gen. ed. teachers")
- Special education services outside the regular education classroom ("90 minutes total of pullout services [60 minutes for literacy and 30 minutes for math]") 5 days per week for a total of 450 minutes

However, the IEP states that beginning August 15, 2019, the student's services would be changed as follows:

- Indirect consultative services ("Resource teacher will consult with service provider and gen. ed. teachers")
- Special education services outside the regular education classroom ("74 minutes of resource ELA/math 4x/week")
- Special education services outside the regular education classroom ("68 minutes of resource ELA/math 1x/week")

The total number of minutes the student would be receiving special education services outside the regular education classroom would be 364 minutes, a 19% reduction in services from what she received during the 2018-19 school year.

The meeting record also showed that the parent was "concerned if C2C will [be following the student] to Middle School and how time will be structured. This will be talked about at the transition meeting."

At the conclusion of the November 7, 2018 IEP meeting, the parent was given prior written notice that the district had updated the student's IEP goals and present levels of performance. The parent was also given prior written notice that the special education services to be provided to the student for the remainder of the 2018-19 school year would include the following:

- "90 min direct services (60 min ELA, 30 min math)
- 10 min consultation between resource & service providers/gen. ed. teachers")

The prior written notice form stated that for the 2019-20 school year, the services to the student would be as follows:

- "74 min 4 days/wk for ELA/math services
- 68 min 1day/wk for ELA/math services
- 10 min consultative services between resource"

The prior written notice form stated that:

> [A] request was made to increase math time…at this time we will continue services as they are w/ intention to collaborate between service provider and gen. ed. teacher. This will be monitored to

> determine effective collaboration from current service provider with gen. ed. environment. Mother and C2C asked for more math services but team will discuss this later based on data.

According to the prior written notice form, the team decision was based on the following:

- MAP data
- Classroom grades and performance
- Observations
- Teacher input
- IEP goal progress reports
- Parent input

The parent provided her written consent for the proposed services on the day of the meeting, November 7, 2018.

Following the November 7, 2018 meeting the student was to have received core math instruction in the general education classroom without special education support. According to the parent, the student became increasingly stressed about school after she began participating in core math instruction, and her skills began to regress.

After Christmas, the parent requested an IEP Team meeting. A team meeting was convened on January 14, 2019. The meeting record summarized a one-hour discussion of the parent's concerns and the student's needs. According to the record, the special education teacher began the meeting by asking the parent to "express her thoughts and concerns." The record indicates that the parent told the team that while the student had initially been excited about returning to her general education classroom for core math instruction, she began to lose confidence and to feel she was not doing things correctly once she started getting homework. The parent also told the group the student's skills were declining and asked for more math support.

Because the student was being provided with math instruction using an alternative curriculum, the instructional language being used by the C2C provider and the classroom teacher did not match. The team discussed this issue extensively, reviewed data, and talked about how the implementation of math instruction by the C2C instructor had changed since the November 2018 meeting.

During the discussion at the meeting, it was discovered that the C2C service provider had been pulling the student from core math instruction in the general education classroom contrary to what was decided at the November 7, 2018 meeting and was not following the student's November 2018 IEP. The C2C service provider was unaware that the student had not been provided any core

math instruction in the classroom during the 2018-19 school year prior to the November 2018 IEP Team meeting and did not know that, until that November change, she was the only person providing the student with math instruction.

According to the Team Meeting Record of January 14, 2019, “right now, during core math, [the student] works with [the C2C service provider] for 30 minutes and then works on a work book for 30 minutes. She is not getting any instruction with peers during math core, as of last week.”

The team agreed that the student needed push-in support in the general education classroom for math. The decision was made to amend the student’s November 2018 IEP. Thirty minutes of special education support in the general education classroom in the area of math was added to the student’s services. This added support constituted a 33% change in the student’s services and in placement. The additional services were to start on January 15, 2019 and end on May 22, 2019. According to a form entitled “IEP Amendment Between Annual IEP Meetings,” the additional services were put in place to “allow for transfer of terminology and skills to facilitate [the student’s] access to grade-level instruction and skills. This is in addition to the 30 minutes of pull-out math and 60 minutes of specially-designed instruction in literacy that is in the current IEP.”

The parent was provided with prior written notice of the proposed changes on January 14, 2019 and gave her written consent for the changes to be implemented. According to the prior written notice form, both the teacher and parent noted that, following the student’s move into the classroom for core math instruction, the student “was having difficulty with this change [and] the team determined that the in-class support will better allow [the student] to access the general education curriculum and generalize skills learned during math intervention.” According to the form, the parent expressed concerns regarding the student’s participation in the core math environment, noting that the student “was overwhelmed and was starting to show regression.” The addition of in-class support was based upon the “student’s response to intervention, classroom grades and performance, teacher input, and parent input.” The form notes that the team had concerns that “having in-class support may draw attention to [the student]” but determined that the positive effects of the change outweighed the potential harmful effects.

On May 9, 2019, the IEP Team met for the purpose of discussing the student’s transition to the district middle school. A notice of meeting was mailed to the parent on April 17, 2019 and a second notice was emailed to the parent on May 3, 2019. The parent attended the meeting.

District staff told the parent that the student would have special education resource support every day in addition to her core classes. The middle school team also offered the parent the option of having the student enroll in classes for math and reading which would be co-taught by a general education teacher and

a special education teacher. According to the team, the district could also offer adult support for the student in her science and social studies courses.

The parent asked when C2C staff members would be providing their services. When the director of special education for _____ told the parent that _____ staff would be providing the student's special education services, the parent objected to the change and there was extensive discussion by the team about how services would be delivered to the student at the middle school level.

The parent asked whether there was a way to "slowly transition" the student. The middle school special education teacher indicated that she could receive training on the alternative math curriculum with which the student was being instructed by C2C staff rather than dropping that curriculum completely. The C2C service provider expressed concern about having someone new instruct the student. The C2C service supervisor requested that the current C2C service provider for the student be allowed to continue for the first trimester. District staff spoke about the importance of the student being able to integrate into curriculum linked to core standards. There was discussion of using extended school year (ESY) time with the C2C service provider to begin the transition. The director of special services for _____ stated that _____ staff had the resources and skills to provide services to the student but said she would give thought to having the current C2C service provider involved in providing support "as a sort of mentor" for the middle school special education teacher in the fall. There was agreement that the C2C service provider and the middle school special education teacher would meet to discuss how the student takes notes.

No changes were made to the student's November 2018 IEP at the May 2019 meeting.

The option to amend the student's November 2018 IEP to add co-teaching services for the fall along with the provision of adult support in science and social studies was brought up again by district staff, but the parent indicated that she would think about that option.

## Summary and Conclusions

The district complied with all legal requirements regarding notice of meetings and prior written notice of proposed action. There is ample evidence to show that the parent had an opportunity to share her concerns regarding services for the student identified in her complaint. Documentation shows that when making decisions, the district listened to and considered the input of the parent. The fact that the district's decisions regarding services for the student did not align with the parent's opinion does not mean that the input of the parent was not considered.

The changes to services and placement for the student made by the district at the November 7, 2018 IEP meeting did not exceed the 25% threshold established by special education law. The parent was provided with prior written notice of the proposed changes and, though it was not required, did provide written consent for the changes to occur.

Neither the student's December 2017 IEP nor her November 2018 IEP specify that the student must be educated using a specific curriculum or service provider. The district has the authority to make decisions regarding the instructional curriculum to be used with a student and the provider who will deliver instruction. Under these circumstances, a violation of special education laws and regulations is not substantiated on this issue.

## Additional Issue

In the course of this investigation, the investigator identified an issue related to the legally required composition of an IEP team.

The members of the IEP team are specifically identified and described in federal regulations and state statutes at 34 C.F.R. 300.321 and K.S.A. 72-3404(u).

- *The student* must be invited to attend the student's own IEP meeting beginning at age 14, or younger, if a purpose of the meeting is consideration of the student's postsecondary goals and the transition services needed to assist the student in reaching those goals. The school may invite the student to attend their own IEP team meeting at any age if appropriate.

- *The parents* must be members of the IEP team.

- *The special education teacher(s)* or provider(s): not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child. The school may determine the particular individual(s) to be members of the IEP team.

- *The general education teacher(s):* not less than one general education teacher of the child, if the child is, or may be, participating in the general education environment (K.S.A. 72-3404(u)(2)). This must be a teacher who is or may be working with the child to ensure success in the general education curriculum and implement portions of the IEP.

- ***The school representative*** or designee must be a member of the IEP team. There are three requirements of the school representative or designee. The school representative or designee:

- ✓ is qualified to provide or supervise provision of special education services;
- ✓ has knowledge of the general education curriculum; and
- ✓ is knowledgeable about the availability of the school's resources (K.S.A. 72-3404(u)(4)).

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

- *A person who can interpret instructional implications* of evaluation results must also be a member of the IEP team.

- *Others* include individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, and those who are invited by the parents or the school to attend the IEP meeting.

The student was under age 14 and did not attend the IEP annual review on November 7, 2018. The parent was present as were both a special education teacher of the student from the district and a general education teacher of the student from the private parochial school. Three employees of C2C were present including the student's service provider and her supervisor/resource teacher as well as the C2C director. The principal of the private school was present as was an Academic Adaptive Special Education Instructional Coach from the cooperative.

A school representative from the district was not present, and no one in attendance at the meeting signed in as the individual assuming that role. According to the district, district staff who were present at the meeting incorrectly believed that the principal of the private parochial school was acting as the designated school representative.

As stated in the Team Meeting Record of the November 7, 2018 meeting, "increasing math time was discussed but was rejected because C2C is a contracted services [sic] and no one was here to make a finicial [sic] decision."

Because there was no school representative present at the meeting of November 7, 2018, the IEP Team was not properly constituted. A violation of special education statutes and regulations is identified.

**Issue Two: The _____ discontinued interventions from the student's IEP without any team discussion.**

Parent's Position

It is the position of the parent that the district made changes to the student's IEP on November 7, 2018 and on May 9, 2019 with no data-driven discussion regarding the effectiveness of interventions that had been put in place. The parent contends that the district was unwilling to listen to her reasons for objecting to the discontinuation of C2C services at the middle school level.

In a telephone conversation on August 22, 2019, the parent told the investigator that prior to the May 9, 2019 meeting, she had anticipated that the delivery of services would look somewhat different at the middle school level than in the private parochial school, but she anticipated that the transition to the new setting would occur over a period of time with C2C staff providing services in the initial stages of the transition. The parent stated that the district was unwilling to discuss anything other than a complete change-over to district delivery of services.

Additionally, the parent asserts that the reading and math curriculum used by C2C have proven effective when other approaches have not. The parent opposed a sudden discontinuation of the use of these alternative curricula and favored a gradual transition away from these curricula at the middle school level.

The parent asserts that the district was unwilling to listen to her concerns and unwilling to consider any transitional approach to the change in curriculum and services.

District's Position

The district contends that at meetings on November 7, 2018 as well as January 14 and May 9, 2019 there were lengthy discussions regarding the provision of special education services to the student. Further, the district asserts that the student's identified middle school service provider expressed a willingness to train in the curriculum being used with the student at the private parochial school in order to ease the student's transition.

Investigative Findings and Conclusions

As outlined above under Issue One, records indicate that the parent was present for and actively participated in both the November 7, 2018 IEP annual review and the May 9, 2019 transition meeting.

C2C service provision is not required by the student's November 7, 2018 IEP. C2C was contracted by the district to deliver the special education services

outline in the IEP, specifically the provision of 90 minutes of direct special education services to the student.

While special education instruction has been delivered to the student using curricular materials that are different from the curriculum with which general education students at the school are being taught, the student's November 7, 2018 IEP does not mandate instruction to the student using the alternative curricular programs. The district asserts that they have fully qualified staff capable of providing the specialized instruction to the student called for in her IEP.

As noted above, under Issue One, there is ample evidence to show that the district considered the parent's concerns. However, the district has the authority to assign staff and to establish curriculum. The student's November 2018 IEP, amended on January 14, 2019, does not specify that services had to be provided by C2C staff and does not mandate instruction using any specific curriculum. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Three: The _____ predetermined changes to the student's IEP regarding the services to be provide to the student as well as the service provider.**

Parent's Position

The parent asserts that at a transition meeting on May 9, 2019 she was handed a new, completed IEP reflecting a termination of the services outlined in the student's November 7, 2018 IEP. According to the parent, she was told that the services outlined in what she believed to be a revised IEP were what was "available" at the middle school. The parent contends that the district was unwilling to consider the input she and others provided to argue for the continued use of C2C staff for the provision of special education services to the student.

District's Position

The district asserts that the May 9, 2019 meeting was held for the purpose of discussing the student's transition to the middle school and no changes to the student's November 2018 IEP were made. The director of the cooperative who was present at the meeting has no recollection of the parent being given any IEP, but contends that, if the parent was provided an IEP, the document would have been a copy of the student's November 2018 IEP.

The district contends that it has the right to select the service provider for the student. It is the position of the district that the special education teacher assigned to provide services to the student is fully qualified. Additionally, at the time of the May 9, 2019 meeting, the middle school special education teacher

expressed willingness to be trained in the curricular approach being used by the student for math instruction.

## Investigative Findings and Conclusions

The student's November 7, 2018 IEP does not specify who would be providing services to the student at either the elementary or the middle school level. Decisions regarding assignment of staff are the purview of the district.

The only changes made to the student's IEP between November 7, 2018 and the end of the 2018-19 school year were made at a meeting on January 14, 2019 when the November 2018 IEP was amended to add 30 minutes of support to the student during core math instruction. With the written consent of the parent, the additional support was initiated on January 15, 2019 and extended through the end of the 2018-19 school year on May 22, 2019.

Services to the student for the beginning of the 2019-20 school year were outlined in the student's November 7, 2018 IEP. The student was to continue to receive special education services in a special education setting for both language/literacy and math as she had at the parochial school. As shown on the student's November 2018 IEP, the student would receive fewer direct service minutes at the middle school level than she received in the parochial school (364 minutes rather than 450 minutes). At the November 7th meeting, the parent was provided with prior written notice of the reduction in services. Because the reduction fell below the 25% level and thus not a material change in services, parental consent for the change was not required, but the parent did sign the consent form indicating she gave written consent for the district's proposed action.

The reduction in service minutes was a result of a change in the structure of the middle school day. At the middle school level, class periods are 74 minutes long on Mondays, Tuesdays, Thursdays, and Fridays. Classes range from 65 to 69 minutes in length on Wednesdays.

At the middle school level, the district provides special education pull-out support through "resource" classrooms where specialized instruction is provided to students by a special education teacher and a paraeducator. Resource classes are offered in place of an elective option so that students can remain in the general education setting for core instruction.

Most special education students are also enrolled in co-taught core classes where instruction is provided through the combined efforts of a general education content area instructor and a special education teacher. The co-teaching model is designed to allow special education teachers to offer push-in support to ensure that students have access to core curriculum through accommodations and modifications. This option was offered to the parent at the May 9, 2019 meeting,

but the parent did not agree to adding this support to the student's IEP at that time.

At the November 7, 2018 IEP team meeting, the parent was given prior written notice of the change in service minutes that would occur when the student moved to the middle school level. While the amount of that reduction fell below the 25% level and did not constitute a material change in service whereby parent consent is required for the change, the parent nonetheless gave her written consent. The changes to the student's November 7, 2018 IEP made at the January 14, 2019 meeting were implemented during the period of January 15 through May 22, 2019 and were intended to provide additional support to the student during core instruction in math at the elementary level. The parent gave her written consent for this time-limited change in services. An option to provide the student with push-in support at the middle school level was discussed at the May 9, 2019 meeting but was declined by the parent. No additional revisions to the student's IEP were made at the May 9, 2019 team meeting. The student's November 2018 IEP did not specify that C2C staff would provide special education services to the student, and any decision regarding who would be assigned to provide special education services to the student at the middle school level was up to the district. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

**Issue Four: The _____ threatened to discontinue agreed upon extended school year (ESY) services to the student unless the parent agreed to changes to the student's IEP.**

Parent's Position

The parent asserts that at a transition meeting for the student on May 9, 2019, the district threatened to discontinue contracted services to the student from C2C for the Extended School Year (ESY) period and to instead force the student to participate in the district's regular summer school program.

District's Position

It is the position of the district that the continuation of C2C services to the student during the summer of 2019 for ESY support was never in question and ESY services were never used as leverage to force the parent to agree to service or staff changes.

Investigative Findings and Conclusions

The Team Meeting Record dated May 9, 2019 does show that the team discussed ESY services. However, there is no indication in the record that the district threatened to discontinue C2C involvement in those services or that the district suggested in any way that if the parent did not agree to the district's plan

for services, the student would be placed in the district's general summer school program. The references to ESY in the meeting record relate to the possibility of using the ESY period to begin the transition process for the student with C2C providing the instruction.

According to the Executive Director of Special Services for the _____, who was present at the meeting, she told the parent that C2C staff could provide ESY services and the time could be used to support the student's transition to the middle school. The principal of the middle school, who was also present for the May 9th meeting, states that:

> "[D]uring the Team meeting…it was noted that ESY services would continue to be provided to the student in order to help the student cover material to be better prepared for the start of the school year. This was a service already written in the IEP and it was already agreed upon who would provide services for ESY. There was no threat of removing these services during the meeting I attended."

There is no evidence to support the parent's contention that the district threatened to discontinue C2C support to the student during the ESY period. A violation of special education statutes and regulations is not substantiated on this issue.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. Specifically, a violation was identified with regard to 34 C.F.R. 300.321 and K.S.A. 72-3404(u) which require that an LEA representative or designee be present at every properly constituted IEP team meeting.

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

1) Submit, within 10 school days of the date of this report, a written statement of assurance to Special Education and Title Services (SETS) stating that it will comply with 34 C.F.R. 300.321 and K.S.A. 72-3404(u) by ensuring that a school representative or designee is present at all IEP meetings unless excused in writing by both the parent and public agency. This written statement shall include an affirmative statement that USD #___ staff understand that staff from a private/parochial school cannot serve in the role of LEA representative or designee, as this responsibility rests with USD #___.

2) Within 15 school days of the receipt of this report, develop a plan for the training of all district staff assigned to private/parochial schools regarding this requirement, and provide a copy of that plan to SETS. USD #___ shall deliver this training to targeted staff no later than December 1, 2019. USD

#___ shall provide SETS with documentation of the training including a list of everyone who attended no later than December 2, 2019.

3) Further, USD #___ shall, within 10 calendar days of the date of this report, submit to SETS one of the following:

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

   b) a written request for an extension of time within which to complete one or more of the corrective actions specified in the report together with justification for the request; or

   c) a written notice of appeal. Any such appeal shall be in accordance with K.A.R. 91-40-51 (f).

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), 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).

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Public Schools: 20FC___-001

DECISION OF THE APPEAL COMMITTEE

BACKGROUND

This matter commenced with the filing of a complaint on August 6, 2019, by _____ _____, on behalf of her daughter, _____ _____. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education, and Title Services team at the Kansas State Department of Education. Following the investigation, an Initial Report, addressing the allegations, was issued on September 5, 2019. That Initial Report concluded that there was a violation of special education statutes and regulations

Thereafter, the parent filed an appeal of the Initial Report. Upon receipt of the appeal, an appeal committee was appointed and it reviewed the original complaint, the Initial Report, the parent's notice of appeal, and the district's written response. The appeal committee has reviewed the information provided in connection with this matter and now issues this final report.

PRELIMINARY MATTERS

I

Scope of Inquiry: The Appeal Committee limits its inquiry to the issues presented in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Initial Report. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function will be to determine whether sufficient evidence exists to support the findings and conclusions in the Initial Report.

II

Standing to File Appeal: The envelope delivered to the Kansas State Department of Education (KSDE) containing the appeal documents included a document titled "Cradle to Career Literacy Center's Appeal Response to _____ _____'s Complaint." That document stated in part, "This portion of the appeal is being written by the [sic] Angie Schreiber, the Executive Director of Cradle to Career Literacy Center (C2C). I am writing a response to provide information and exhibits in response to the issues raised both by the parent, _____ _____ and from the Complaint Investigator, Diana Durkin." A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Initial Report. That regulation states, in part, that: "An ***agency or complainant*** [emphasis added] may appeal any of the findings or conclusions of a compliance report…." An agency is defined as the "board of education of any school district, or state agency" [K.A.R. 91-40-1(b) and (h)]. A complainant is the person or organization that filed the original written, signed complaint [K.A.R. 91-40-51(a)]. The complaint at issue here was filed by complainant _____ _____, whose name is listed under "person filing the formal complaint" on the Formal Complaint Request Form, which also contains the signature of _____ _____. This complaint was filed against USD #___ _____

Public Schools, which is the agency. The Appeal Committee finds that Cradle to Career (C2C) and Angie Schreiber are neither the complainant nor the agency; thus, neither C2C nor Angie Schreiber have standing to file an appeal of the Initial Report. The Appeal Committee will limit this Appeal Decision to address the statements in the complainant _____ _____'s letter of appeal and the submitted documentation relevant to those statements.

III

Scope of Appeal – Findings and Conclusions: A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Initial Report. That regulation states, in part, that: "An agency or complainant may appeal any of the ***findings or conclusions*** [emphasis added] of a compliance report…." In her letter of appeal, the parent includes twenty itemized statements, each appealing certain sections of the Initial Report. Some of these twenty statements are appealing parts of the Initial Report which are not findings or conclusions. The above quoted regulation allows for appeal of the findings and conclusions of the investigator. That regulation makes no provision for the appeal of any other part of the Initial Report. The Appeal Committee will only address the statements in the parent's letter that appeal findings and conclusions of the Initial Report. The Appeal Committee finds that the parent's statements numbered 1., 2., 3., 4., 5., 17., and 18. appeal parts of the Initial Report that are not findings or conclusions and those statements will not be addressed in this Appeal Decision. Findings and conclusions can be identified in the Initial Report by referring to the underlined subheadings contained therein (Investigative Findings, Investigative Findings and Conclusions, Summary and Conclusions).

Throughout the parent's letter of appeal, the parent appears to argue that the investigator did not correctly frame the four issues investigated in the Initial Report. While K.A.R. 91-40-51(f) does not permit an appeal of issue statements, the Appeal Committee did compare the four issue statements in the Initial Report with the parent's four stated concerns in her filed Formal Complaint Request Form. The Appeal Committee finds the four issue statements in the Initial Report to be materially the same as the four stated concerns in the parent's Formal Complaint Request Form.

IV

Scope of Appeal – No New Issues: A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Initial Report. That regulation states, in part, that: "An agency or complainant may appeal any of the findings or conclusions of a compliance report…." The above quoted regulation allows for appeal of the findings and conclusions of the investigator. That regulation makes no provision for raising new issues on appeal. The Appeal Committee will only address the statements in the parent's letter that appeal findings and conclusions of the Initial Report. The Appeal Committee finds that the parent's statement numbered 14 from her appeal letter is raising a new issue that was not investigated in the Initial Report. Since this issue was not investigated in the Initial Report, there is no finding or conclusion that can be appealed. Thus, parent's statement numbered 14. will not be addressed in this Appeal Decision. If the parent desires to raise the new issue of whether the student's current IEP is reasonably calculated to enable the student to make appropriate progress in light of the student's circumstances, the parent may file a new complaint making a new allegation with supporting facts. However, Special Education and Title Services will not investigate any allegations or facts that have already been investigated and a report issued.

## DISCUSSION OF ISSUES ON APPEAL

**ISSUE 1:** Throughout the 2018-19 school year, the _____ Cooperative (_____) has excluded the parent from the decision-making process regarding the student and has not actively considered the opinions of the parent.

The Appeal Committee finds that the numbered statements in the parent's appeal letter that address findings and conclusions contained in Issue 1 of the Initial Report include statements 6., 7., 8., 9., 10., 11., 12., 13., and 15.

The Appeal Committee will first address the parent's appeal statements numbered 6., 8., 9., 12., and 13. Each of these statements address findings of fact based on documentation reviewed by the investigator and summarized or quoted in Issue 1 of the Initial Report. However, the Appeal Committee finds that none of these facts had any material effect on the outcome of the conclusion of Issue 1. An analysis of each is included below:

In statement 6. of the appeal, the parent refers to page 5, paragraph 3, of the Initial Report where the investigator summarizes the November 7, 2018 Team Meeting Record stating, "The general education teacher appeared to have a manageable class load of 17 students." The parent, on appeal, argues that this fact does not apply to "this" and alleges the teacher was not able to support the student or deliver the core curriculum to her. The Appeal Committee finds that the statement in the Initial Report regarding the teacher's class load is a finding of fact, which merely describes the contents of the discussion documented in the November 7, 2018 Team Meeting Record. The Appeal Committee also finds that this statement of fact did not factor into the legal conclusion made by the investigator on Issue 1 in the Initial Report. The parent argues a new issue not investigated in the Initial Report when stating "It does not matter how many students she [the teacher] had, she was not able to support [the student] or deliver the core curriculum to her so she could learn it." As stated in Preliminary Matter IV above, the regulation K.A.R. 91-40-51(f) does not permit the Appeal Committee to consider new issues on appeal.

In statements 8. and 9. of the appeal, the parent refers to page 7 of the Initial Report where the investigator quotes the November 7, 2018 prior written notice (PWN). Again, this quote comes directly from the contents of the PWN document reviewed by the investigator, and the Appeal Committee finds that the investigator had sufficient evidence, namely the PWN, to support this statement of fact. The parent argues a new issue not investigated in the Initial Report when stating that the student was failing and the IEP goal progress reports showed no evidence that a change was needed. As stated in Preliminary Matter IV, if the parent desires to raise the new issue of whether the student's current IEP is reasonably calculated to enable the student to make appropriate progress in light of the student's circumstances, the parent may file a new complaint making a new allegation with supporting facts.

In statements 12. and 13. of the appeal, the parent refers to page 9 of the Initial Report where the investigator summarizes the May 9, 2019 Team Meeting Record stating, "The director of special services for _____ stated that _____ staff had the resources and skills to provide services to the student but said she would give thought to having the current C2C service provider involved in

providing support ‘as a sort of mentor’ for the middle school special education teacher in the fall…. The option to amend the student’s November 2018 IEP to add co-teaching services for the fall along with the provision of adult support in science and social studies was brought up again by district staff, but the parent indicated that she would think about that option.” The parent, on appeal, argues that the student is not currently using the C2C curriculum this fall and that the parent made no indication that she would think about the option of adding co-teaching services and adult support in science and social studies. The Appeal Committee finds that the above quoted statement in the Initial Report is a finding of fact which merely describes the contents of the discussion documented in the May 9, 2019 Team Meeting Record. The investigator had sufficient evidence, namely the May 9, 2019 Team Meeting Record, to support this statement of fact. Whether the student is currently using the C2C curriculum or another curriculum is not relevant to the findings and conclusions in Issue 1 of the Initial Report.

The Appeal Committee will next address the remaining appeal statements that it finds address findings and conclusions contained in Issue 1 of the Initial Report, which are numbered statements 7., 10., 11., and 15.

In statement 7. of the appeal, the parent refers to page 5 of the Initial Report where the investigator quotes the November 7, 2018 Team Meeting Record stating, “[a]ccording to the meeting record, the team considered increasing math support but rejected the increase ‘because C2C is a contracted services [sic] and no one was here to make a finicial [sic] decision. We agreed on a collaborative plan in the PWN [prior written notice] and will have a follow-up mtg.’” The investigator again quoted the meeting record on page 6 of the Initial Report stating, “[t]he meeting record also showed that the parent was ‘concerned if C2C will [be following the student] to Middle School and how time will be structured. This will be talked about at the transition meeting.’” In her appeal statement 7, the parent claims the team never had such conversation and “[w]e went from saying we would discuss it to then them telling me there will be no transition with Cradle to Career.” The Appeal Committee finds that there is sufficient evidence to support the investigator’s findings of fact that the team planned to discuss C2C at the May transition meeting, and that the team actually had a discussion about C2C at the May meeting. The November 7, 2018 Team Meeting Record, quoted on pages 5 and 6 of the Initial Report, states that a discussion about C2C would take place at the transition meeting. Further, on page 9 of the Initial Report the investigator summarizes from the May 9, 2019 Team Meeting Record the discussion that took place regarding C2C services.

In statement 10. of the appeal, the parent refers to page 8, paragraph 4, of the Initial Report where the investigator states, “The parent was provided with prior written notice of the proposed changes on January 14, 2019 and gave her written consent for the changes to be implemented.” The parent argues on appeal that she “would never have signed for such a change, that was not what my signature was for, if it was used for this purpose then it was presented falsely.” It is unclear from parent’s appeal statement 10 what is meant by “such a change” or to which change she did not intend to consent. On page 8 of the Initial Report, the investigator summarizes (from the January 14, 2019 Team Meeting Record, the January 14, 2019 PWN, and the January 14, 2019 IEP Amendment Between Annual IEP Meetings form) that the change made to the IEP during that meeting included an addition of thirty minutes of special education math support in the general education classroom. The Appeal Committee finds sufficient evidence to support the

investigator's finding that the parent signed the PWN giving her consent to add thirty minutes of special education math support in the general education classroom. The Appeal Committee will assume that when the parent claims she did not consent to "such a change" in her appeal statement 10. that this refers to the allegation made in Issue 3 on page 13 of the Initial Report that at the May 2019 transition meeting the parent was handed a new completed IEP (with IEP Initiation date of 1/15/2019) with the C2C service provider line removed. The Appeal Committee will address this IEP and this portion of the parent's appeal in the discussion of Issue 3 below.

In statement 11. of the appeal, the parent refers to page 9 of the Initial Report where the investigator, referring to the May 9, 2019 transition meeting, states, "there was extensive discussion by the team about how services would be delivered to the student at the middle school level." The parent argues on appeal that the team never discussed how the student would be taken off the curriculum she was on or what new program would be used. The Appeal Committee finds that there is sufficient evidence to support the investigator's finding of fact that the team had an extensive discussion about the delivery of services at the middle school level during the May meeting. On page 9 of the Initial Report, the investigator summarizes from the May 9, 2019 Team Meeting Record the discussion that took place regarding services at the middle school. The team discussed ways to transition the student into the core curriculum including the possibility of training for the middle school special education teacher, ESY time, mentor support from C2C, and consultation between C2C and the middle school special education teacher.

In statement 15. of the appeal, the parent refers to page 10 of the Initial Report where the investigator states, "Neither the student's December 2017 IEP nor her November 2018 IEP specify that the student must be educated using a specific curriculum or service provider." The parent argues on appeal that this statement is not true and that the service provider is stated as Cradle to Career in the goals and benchmarks section. The Appeal Committee examined the December 2017 IEP, November 2018 IEP, and the IEP with an Amendment Date of January 14, 2019. In the goals and benchmarks section of both the December 2017 and November 2018 IEP, the "staff responsible" is listed as "Cradle to Career." The Appeal Committee finds that, while the parent is correct that the service provider is stated as Cradle to Career, the investigator is also correct that the IEPs do not state that the student must be educated using a specific curriculum or service provider. The investigator could have been clearer in explaining this distinction.

Further, the Appeal Committee also finds that the investigator is correct in the conclusion on page 10 of the Initial Report that "The district has authority to make decisions regarding the instructional curriculum to be used with a student and the provider who will deliver instruction." In Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), the Supreme Court held that the primary responsibility for choosing instructional methodology is left with the local school district (also see Johnson by Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 316 F. Supp. 2d 960, D. Kan. 2003, 41 IDELR 64 stating that "So long as the court determines that a child's IEP is reasonably developed to provide the child a FAPE, then the court must leave questions of methodology to the school district."). Regarding the selection of provider, see Slama by Slama v. Independent Sch. Dist. No. 258, 259 F. Supp. 2d 880, D. Minn. 2003, 39 IDELR 3 holding that "school districts have the sole discretion to assign staff" and "[a]lthough the Supreme Court [in Rowley] has recognized the importance of parental

consultation, and participation in the IEP decision-making process, nothing in the Court's opinions suggest that parents usurp the District's role in selecting its staff to carry out IEP's provisions."

The Appeal Committee did notice that the IEP with an Amendment Date of January 14, 2019 does not contain the "staff responsible: Cradle to Career" language, a fact that is relevant to Issue 3, which the Appeal Committee will address below.

In summary, regarding Issue 1, the issue presented in the complaint was whether the district failed to consider her concerns at a November 7, 2018 IEP annual review meeting (when the IEP was changed to move the student into core reading and math instruction) and a May 9, 2019 transition meeting (when C2C was terminated as the service provider for the upcoming 2019-20 school year). The applicable regulation is 34 C.F.R. 300.501(b)(1). That regulation says, "the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and the educational placement of the child; and the provision of FAPE to the child." The Appeal Committee finds sufficient evidence to uphold the investigator's conclusion that the parent had an opportunity to participate in meetings and share her concerns regarding core reading and math instruction and the provision of services by C2C. **The Appeal Committee concludes that the Initial Report should be, and is, sustained on Issue 1.**

**ADDITIONAL ISSUE:** In the course of this investigation, the investigator identified an issue related to the legally required composition of an IEP team.

In the statement numbered 16. within the parent's appeal letter, the parent refers to page 11 of the Initial Report where the investigator found that the school district violated 34 C.F.R. 300.321 when a school representative from the district was not present at the November 7, 2018 IEP annual review meeting. The investigator noted that the school district incorrectly believed that the private school principal, who was in attendance, was filling that role. The Appeal Committee finds sufficient evidence to uphold the investigator's conclusion that a school representative from the district was not present, and no one at the meeting (including the private school principal) was acting in that role. The parent argues on appeal that the group at the meeting should know procedures. The investigator ordered corrective action (Corrective Action 2) to ensure that the relevant district staff are informed of this requirement moving forward. **The Appeal Committee concludes that the Initial Report should be, and is, sustained on the Additional Issue.**

**ISSUE TWO:** The _____ discontinued interventions from the student's IEP without any team discussion.

The parent's appeal letter did not address any of the findings or conclusions in the Initial Report for Issue Two. The appeal statements numbered 17. and 18. address the sections of Issue 2 that describe the parent's position and the district's position and are titled as such. As stated in Preliminary Matter III, K.A.R. 91-40-51(f) allows for appeal of the ***findings and conclusions*** of

the investigator. That regulation makes no provision for the appeal of any other part of the Initial Report. Thus, **the Appeal Committee will not address Issue 2.**

**ISSUE THREE:** The _____ predetermined changes to the student's IEP regarding the services to be provided to the student as well as the service provider.

The Appeal Committee finds the parent's appeal statements numbered 10. and 15. to be relevant to the findings and conclusions in Issue 3 and will address those appeal statements further in that context here.

In the parent's appeal statement 10., she argues that when she signed the PWN to give consent for changes at the January 14, 2019 IEP meeting, her signature was not meant to consent to "such a change." While it is not clear what is meant by "such a change" the Appeal Committee assumes that the parent is referring to the allegation made in Issue 3 on page 13 of the Initial Report that at the May 2019 transition meeting the parent was handed a new completed IEP (with IEP Initiation date of 1/15/2019) with the C2C service provider line removed. In the parent's appeal statement 15., she points out that the December 2017 and November 2018 IEPs list C2C as the staff responsible in the goals and benchmarks section.

On page 14 of the Initial Report for Issue 3, the investigator makes the following finding of fact:

> The only changes made to the student's IEP between November 7, 2018 and the end of the 2018-19 school year were made at a meeting on January 14, 2019 when the November 2018 IEP was amended to add 30 minutes of support to the student during core math instruction. With written consent of the parent, the additional support was initiated on January 15, 2019 and extended through the end of the 2018-19 school year on May 22, 2019.

The Appeal Committee reviewed three IEPs provided in the parent's appeal with the following "IEP Initiation" dates: December 11, 2017; November 8, 2018; and January 15, 2019. When examining the list of documents that the investigator was able to review for her investigation (listed on page 1 of the Initial Report), the Appeal Committee notes that the investigator was provided the document titled "IEP Amendment Between Annual IEP Meetings," but did not see the IEP with the January 15 initiation date. Upon comparing the three IEPs to one another, the Appeal Committee finds that the phrase "Staff Responsible: Cradle to Career" was present in the Goals and Benchmarks section of the December 2017 and November 2018 IEPs; this phrase is not present in the January 2019 IEP. Thus, the Appeal Committee finds that in addition to the changes made in January that the investigator lists on page 14 of the Initial Report (quoted above), an additional change was made to remove the phrase "Staff Responsible: Cradle to Career." The Appeal Committee examined the document titled "IEP Amendment Between Annual IEP Meetings" and finds that this phrase removal was not included in the description of proposed IEP changes and effective dates. Further, the Appeal Committee finds no evidence that the district notified the parent of this IEP change in a prior written notice.

The parent alleges in Issue 3 that the district had already determined before the May 9, 2019 IEP meeting, that C2C would not provide services for the 2019-20 school year. She supports that allegation by stating when she arrived at the May 9, 2019 IEP meeting, she was given an IEP with the service provider already changed. The district asserted in the Initial Report that no changes to the November 2018 IEP were made and there was no recollection of the parent being given any IEP at the May meeting, but if the parent was provided an IEP, it would have been a copy of the student's November 2018 IEP.

The Appeal Committee finds sufficient evidence to support the allegation that the district removed the phrase "Staff Responsible: Cradle to Career" from the November 2018 IEP without notifying the parent with prior written notice and before discussing C2C services in the May 9, 2019 transition meeting. Accordingly, in regard to Issue 3, the Appeal Committee finds a violation of the following federal regulations: 34 C.F.R. 300.503(a) and 34 C.F.R. 300.501(b). The Appeal Committee, however, agrees with the investigator's conclusion on page 14 in the Initial Report that decisions regarding assignment of staff are the purview of the district. So, while the parent has the right to participate in discussions regarding changes to the student's IEP and provision of services, the district has the final authority to designate staff, service providers, and instructional methodology. See the discussion of case law history on these principles above on pages 5 and 6 of this Appeal Decision. Further, removing specific staff or service providers from an IEP does not require parent consent. Parent consent is required for changes to an IEP that are a material change in service or a substantial change in placement [K.S.A. 72-3430(b)(6)]. A material change in service is "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" [K.A.R. 91-40-1(mm)]. A substantial change in placement is "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.A.R. 91-40-1 (sss)]. The district did not change the duration or frequency of services or placement of the student when it removed "Staff Responsible: Cradle to Career" from the Goals section of the IEP.

34 C.F.R. 300.503(a) requires a school district to provide written notice to the parents of a child with a disability a reasonable time before the district proposes to change the identification, evaluation, educational placement, or provision of FAPE to the child. There is a rich history of case law regarding the provision of FAPE stretching back over thirty-six years to Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), where the Supreme Court said a FAPE is an IEP reasonably calculated to provide educational benefit. More recently, in Endrew F. v. Douglas County School District, 117 LRP 9767 (S.C. 2017), the Supreme Court added some clarity, stating that a FAPE is an IEP reasonably calculated to enable a child with a disability to make appropriate progress in light of the child's unique circumstances. From this lengthy history of case law, it is evident that the provision of a FAPE involves all parts of the IEP. Thus, when the federal regulation, at 34 C.F.R. 300.503, requires a Prior Written Notice whenever an agency proposes to initiate or change, or refuses to initiate or change, the provision of a free appropriate public education to the child, it is requiring a Prior Written Notice for any change to an IEP. Here the district removed the phrase "Staff Responsible: Cradle to Career" from the November 2018 IEP without providing notice to the

parent. Any change to an IEP concerns the provision of FAPE to the child and requires prior written notice.

34 C.F.R. 300.501(b) states that the parent must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and provision of FAPE to the child. In this case, the purpose of the May transition meeting was to discuss the student's transition from elementary school to middle school and to discuss whether C2C would continue to deliver services. However, evidence shows, based on the IEP with Initiation Date January, 15, 2019, that the district had already removed "Staff Responsible: Cradle to Career" from the IEP before the May 9, 2019 transition meeting, effectively making that decision before the parent had an opportunity to participate in a discussion. **The Appeal Committee concludes that the Initial Report should be, and is, overturned on Issue 3. A new Corrective Action is ordered and is detailed below.**

**ISSUE 4:** The _____ threatened to discontinue agreed upon extended school year (ESY) services to the student unless the parent agreed to changes to the student's IEP.

The Appeal Committee finds that the numbered statements in the parent's appeal letter that address findings and conclusions contained in Issue 4 of the Initial Report include statements 19. and 20.

In statement 19 of the appeal, the parent refers to page 15 of the Initial Report where the investigator finds there is no indication in the May 9, 2019 IEP Team Meeting Record to substantiate the claim that the district threatened to discontinue C2C involvement in ESY. The parent, on appeal, argues that "there was [sic] a lot of things said on [sic] that two hour and 35-minute long meeting, that are not on record." The Appeal Committee agrees with the investigator and can find no documentation to support this allegation.

In statement 20 of the appeal, the parent refers to page 16 of the Initial Report where the investigator states that the principal of the middle school was present for the May 9 meeting. The parent argues on appeal that the principal was not in attendance, but the assistant principal was in attendance. The Appeal Committee notes that the school representative in attendance at the May 9, 2019 meeting was the assistant principal and hereby amends the Initial Report to reflect that fact. However, the Appeal Committee finds that this fact has no bearing on the investigator's conclusion that there is no evidence to substantiate the claim made in Issue 4 that the district threatened to discontinue C2C involvement in ESY.

**The Appeal Committee concludes that the Initial Report should be, and is, sustained on Issue 4.**

## CONCLUSION

The complaint report is sustained on Issue 1, Additional Issue, and Issue 4. However, the complaint report is overturned on Issue 3.

## CORRECTIVE ACTION

Because the Appeal Committee has overturned the investigator's conclusion in Issue 3 and has found violations of special education statutes and regulations, the Appeal Committee requires the following corrective action:

USD #___ is directed to take the following actions:

> No later than November 15, 2019, USD #___ shall reconvene the student's IEP Team to allow the parent to participate in a discussion about whether Cradle to Career will provide services in the student's IEP. At the conclusion of the IEP meeting, USD #___ shall provide a PWN to the parent for any district proposal or refusal of the parent's proposal to change any portion of the student's IEP. No later than November 16, 2019, USD #___ shall provide to Special Education and Title Services (SETS) a copy of the notice of meeting and a copy of the PWN provided to the parent.

This is the final decision on this matter. There is no further appeal. This Final Report is issued this 2nd day of October, 2019.

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Melissa Valenza

_____
Stacie Martin

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

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON SEPTEMBER 3, 2019

DATE OF REPORT: OCTOBER 3, 2019

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

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, the terms "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on September 3, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on October 3, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed both parties as part of the investigation process. The parent was interviewed on September 19, 2019 by telephone using an interpreter provided by the Kansas Department of Education. The parent did not request that any other party be interviewed during the investigation.

Staff from the _____ Cooperative were interviewed on September 20, 2019. The _____ Cooperative made the following persons available for this interview:
_____ _____, Executive Director of Special Services
____ ____, Principal of _____ _____ _____ Elementary School
____ _____, School Psychologist for _____ Catholic School (__CS)
_____ ____, Special Education Instructional Coach for __CS

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- Individualized Education Program (IEP) dated March 8, 2019
- IEP Goal Progress Report for the March 8, 2019 IEP
- IEP dated March 9, 2018
- IEP Goal Progress Report for the March 9, 2018 IEP
- IEP dated March 13, 2017
- IEP Goal Progress Report for the March 13, 2017 IEP
- IEP Goal Progress Report for the March 30, 2016 IEP
- Notification of Meeting (NOM) dated September 10, 2018 scheduling an IEP meeting for September 25, 2018
- Team Meeting Record dated September 25, 2018
- Emails dated October 4, October 11, October 18, and October 19, 2018 between _____ _____ and _____ _____, Assistant Executive Director Legal Services for the Kansas Association of School Boards
- Email dated December 19, 2018 written by ____ _____ to _____ _____, Interpreter at USD #___
- Email dated December 19, 2018 written by ____ _____ to _____ _____, Principal at _____Catholic School
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent (PWN) dated December 20, 2018
- Email dated February 4, 2019 written by _____ _____, Special Education Teacher, to Mr. ____, Ms. _____, and Ms. ____
- NOM dated February 15, 2019 scheduling an IEP team meeting for March 4, 2019
- Team Meeting Record dated March 4, 2019
- Request for Transportation dated March 4, 2019
- NOM dated March 7, 2019 scheduling IEP team meetings on March 4, March 5, and March 6, 2019
- Evaluation / Eligibility Report dated March 7, 2019
- Team Meeting Record dated March 7, 2019
- PWN dated March 7, 2019
- Team Meeting Record dated March 8, 2019
- PWN dated March 8, 2019
- Affirmation of Consultation with Private School / Special Education Services for Parentally Placed Private School Students dated August 14, 2018

- Affirmation of Consultation with Private School / Special Education Services for Parentally Placed Private School Students dated September 9, 2019
- Summary of affirmation consultations written by Dr. _____ and confirmed by Mr. _____ via an email dated September 20, 2019
- Letter of Allegations dated September 3, 2019 written by the parent
- Response to the Allegations dated September 18, 2019 written by Dr. _____
- Summaries of the Alphabetic Phonics and Barton Reading & Spelling System from the What Works Clearinghouse at the US Department of Education

## Background Information

This investigation involves a 7-year-old male who resides with his parent within the boundaries of USD #___. Spanish is spoken in the home and Spanish is the student's first language. For this reason, USD #___ provides a translator at all IEP team meetings to ensure the parent is able to participate and is fully informed of all information relevant to any action proposed or refused as a result of that IEP team meeting. The student was initially evaluated at age three and received special education and speech therapy at the _____ Early Childhood Center in USD #___. The student was parentally placed at _____ Catholic School beginning in kindergarten and continuing through his current third grade placement. USD #___ has continued to provide special education services and speech therapy to the student during this entire timeframe. The most recent reevaluation determined the student is a student with an exceptionality under the categories of Specific Learning Disabilities in the areas of reading fluency, reading comprehension, and basic reading skills as well as Speech Language Impairment.

## Issues

Based upon the written complaint, the complainant raised four issues that were investigated.

**ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), conducted an evaluation of the student without consulting with the parent during the 2018-19 school year.

### Parent Position

The parent alleges USD #___ conducted an evaluation of the student without making her aware and including her in the process. The parent indicated she was at her son's school and learned from the principal of _____ Catholic School that an IEP meeting that was to be held the next day. She attended the meeting on December 20, 2018 and met with two staff from USD #___ who told her that she had to sign the papers for a new evaluation. The parent reported the staff did not consult with her or ask her if she agreed or not. The parent believes USD #___ made decisions about the evaluation of her son without taking into account her opinions or concerns about her son's education.

The parent acknowledged that the papers she was asked to sign were provided in Spanish and that an eligibility determination meeting to review the evaluation results for her son was conducted on March 7, 2019.

**School District Position**

____ ____, Principal at _____ _____ _____ Elementary School (___), reported the IEP team meet on September 25, 2018, to discuss the student's progress over the summer and to familiarize the new special education staff with the student's needs and services. Mr. ____ reported that the parent was informed of the upcoming required three-year reevaluation of the student at this meeting.

USD #___ staff acknowledged that ____ _____, School Psychologist, and _____ _____, Interpreter at USD #___, met with the parent at _____ Catholic School on December 20, 2018. This meeting was not an IEP team meeting but was only scheduled to review the Prior Written Notice (PWN) form and to obtain consent to conduct the required three-year reevaluation.

Ms. _____ reported that Mr. _____ had attempted to contact the parent on December 17, 2018 and had left a voice message about the meeting. Ms. _____ had also asked _____ _____, Principal at _____Catholic School, to remind the parent about the meeting. The PWN was provided to the parent in Spanish and Mr. _____ interpreted the conversation about the contents of the PWN. Ms. _____ noted the parent signed consent for the reevaluation on December 20, 2018.

Mr. ____ indicated that the parent's input was solicited throughout the evaluation process and was included in the evaluation report summarizing the assessment results. All of this information was considered when making the continued eligibility determination on March 7, 2019.

## Finding of Facts

The following facts are based upon interviews and documentation obtained during the course of this investigation.

- USD #___ provided the parent with a Notification of Meeting (NOM) on September 10, 2018. The NOM was to schedule an IEP team meeting for September 25, 2018 with the purpose of the meeting shown as "Other: The school team will convene to discuss the student's progress over the summer and better familiarize the new special education staff with the student's needs and services."

- The IEP team met on September 25, 2018. The IEP team meeting notes record a lengthy discussion about reading and math progress as well as parent concerns for educational programming; however, these notes do not reflect a discussion of the reevaluation process.

- Email communication dated December 19, 2018 written by Ms. _____ to Mr. _____ states, "Two phone calls have been made to the student's parents and voicemails were left both times. We asked that she come into school tomorrow morning when she drops off the student so that she can sign the paperwork. We have not received a phone call back to confirm that she will be there or not. Just in case _____ [district translator] and (sic) will be at _____ tomorrow at 7:45 a.m. . . . We told ____ ____ it's not necessary for him to be in the building since we're just getting consent signed."

- The parent signed the Spanish version of the PWN proposing a reevaluation of the student on December 20, 2018. The PWN proposes to conduct assessments to gather new data in the areas of general intelligence, academic performance, and communication.

- The IEP team met on March 4, 2019 to review the results of the testing conducted as part of the reevaluation. The parent requested additional testing be conducted in the area of basic reading skills.

- The additional assessment was conducted and the IEP team met again on March 7, 2019 and determined that the student continued to be a student with an exceptionality in the categories of Specific Learning Disabilities in the areas of reading fluency, reading comprehension, and basic reading skills as well as Speech Language Impairment.

## Applicable Regulations and Findings

Federal regulations, at 34 C.F.R. 300.305(a) require the IEP Team and other qualified professionals (as appropriate) to review existing data as part of any reevaluation including evaluations and information provided by the parents of the child. Based on that review, and input from the child's parents, the IEP team and other professionals (as appropriate) are required to identify what additional data, if any, are needed to determine whether the child continues to have a disability and to need special education and related services.

Federal regulations at 34 C.F.R. 300.300(d)(1)(i) and 34 C.F.R. 300.305(b) allow this review of existing data to be conducted without parent consent and without a meeting. However, 34 C.F.R. 300.305(a) requires this review to be conducted by the IEP Team, which includes the parent. In addition, while a meeting is not required to conduct this review (as previously stated), 34 C.F.R. 300.322(b)(1)(i) requires that, if a meeting is held, the parent must be provided with a notification of the meeting which includes the purpose of the IEP team meeting.

Chapter 7, Section C of the Kansas Special Education Process Handbook states, "The first activity [of] the reevaluation team is to conduct is a review of existing data. The reevaluation team needs to consider all data that is currently available including evaluations and information provided by the parents, current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related service providers; and the child's response to scientifically, research-based interventions, if implemented. The review of existing data, as part of the evaluation, may be conducted without a meeting and without consent from the parents . . . After the team has reviewed the existing data, there must be a determination of what data, if any, will be collected during the reevaluation, with the Prior Written Notice completed to reflect that determination."

Chapter 7, Section D of the Kansas Special Education Process Handbook specifies that the membership of the reevaluation team must include the parent in conducting the reevaluation and determining eligibility.

In this case, it appears that staff at USD #___ did discuss the student's current academic skills and needs at the September 25, 2018 IEP team meeting and the USD #___ staff believe this discussion provided the parent with the opportunity to provide input into the reevaluation process. However, the NOM provided to the parent did not indicate that a review of existing data for the purpose of reevaluation was one of the purposes of September 25, 2018 IEP team meeting.

In fact, the NOM stated and the parent interview reflects that she understood that this sharing of data was for the purpose of discussing the student's progress over the summer and familiarizing the new special education staff with the student's needs and services.

While there is no requirement that the review of existing data be conducted at a meeting or with parent consent, there is nothing to document that the parent's input was sought or obtained in choosing the areas needing to be assessed to gather new data prior to the PWN being provided to the parent on December 20, 2018. Documentation shows the December 20, 2018 PWN already included the areas to be assessed when it was shared with the parent. Emails reflect that the December 20, 2018 meeting was held solely for the purpose of "just getting consent signed."

It is noted that USD #___ staff did consider the parent's input and her request for additional assessment in the area of basic reading skills following the March 4, 2019 eligibility determination meeting. Documentation and interviews found this additional assessment was completed, was used in the eligibility determination process, and was described in the March 7, 2019 Evaluation Report.

Based on the foregoing, the allegation of a violation of special education statutes and regulations requiring USD #___ to obtain input from the student's parent when identifying what additional data were needed to determine if the student continued to be a student with an exceptionality and to need special education and related services is substantiated.

> **ISSUE TWO:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), inappropriately changed the location where the student receives his special education services during the past 12 months.

## Parent Position

The parent also alleges that USD #___ changed the location of her son's special education services during the 2018-19 school year without her consent. She reported the IEP team originally discussed changing his special education services from being provided at _____ Catholic School to being provided at ___ during the March IEP team meeting even though the student would continue to receive his speech therapy services at _____ Catholic School. She reported that she disagreed with the change in the location of the special education services but was told that USD #___ was making this change for all

the students receiving special education services at the parochial school. Once the change took place, her son became stressed and reported that he did not like moving between the two schools. The parent is concerned that her son loses instructional minutes each day during the journey from one school to the other.

**School District Position**

Dr. _____ reported that the location for providing special education services was discussed with the principal of _____ Catholic School, Mr. _____, at the annual private school consultation meeting on August 14, 2018 and September 9, 2019. At that meeting, it was agreed that USD #___ would begin moving toward the location of special education services being provided at each student's neighborhood public school. The intent of this change was to provide services with the licensed special education service provider rather than primarily through para educator support. Speech therapy services, when appropriate, would continue to be provided at _____ Catholic School. Transportation between the private school and the neighborhood public school would be provided by USD #___.

USD #___ staff reported that the student's IEP team met on March 8, 2019 to conduct the annual review and revision of the IEP. As a result of this meeting, USD #___ proposed increasing the amount of special education services for reading and maintaining the amount of math instruction. The location of these services would change to the neighborhood public school with transportation being provided between the two schools. In addition, USD #___ proposed increasing the amount of speech services to the student. The location of these services would remain at _____ Catholic School.

The parent agreed with these changes to the special education and related services being provided to the student; however, the parent disagreed with the location of the special education services that were to be provided at the neighborhood public school, ___. She wanted all of these services to be provided at _____ Catholic School.

Mr. ____ explained the difference between a change of placement and a change of location of where the actual services were being provided. He indicated that the change being proposed was not a change in placement but only a change in the amount of services to be provided. He stated that the parent would need to provide written consent for the material change in the amount of services but that her consent was not required for the change in the location of the services.

The parent was provided with PWN describing these proposed changes in services and she signed consent for material change of services on March 8, 2019 with a disclaimer that she agreed with the changes in services but did not agree with where those services would be provided.

**Finding of Facts**

The following facts are based upon interviews and documentation obtained during the course of this investigation.

- The student lives within the boundaries of USD #___ and the parent has requested USD #___ provide the student with special education and related services per an IEP.

- Dr. _____ met with Mr. _____, Principal at _____ Catholic School, on August 14, 2018 for the annual consultation meeting for school year 2018-19 and again on September 9, 2019 for the annual consultation meeting for school year 2019-20. The purpose of these annual consultations was to discuss the provision of special education and related services to its parentally placed private school students. At those meetings, it was agreed that USD #___ would move toward providing special education services at each student's neighborhood public school. Speech therapy services, when appropriate, would continue to be provided at _____ Catholic School. Transportation between the private school and the neighborhood public school would be provided by USD #___.

- An IEP team meeting was held on March 8, 2019 to review and revise the student's IEP. New IEP goals were developed based upon the most recent reevaluation of the student and material changes in the amounts of special education and related services were proposed. Specifically, USD #___ proposed providing 60 minutes per day of special education services for reading which was an increase of 30 minutes per day. It was also proposed to continue the 30 minutes per day of math instruction. The location of these services would be at the neighborhood public school with transportation being provided between the two schools and the IEP proposed adding 15 minutes per day of transportation services. In addition, USD #___ proposed providing 15 minutes of speech therapy twice a week, which was an increase of 15 minutes per week of speech services to the student. The location of these services would remain at _____ Catholic School.

- USD #___ provided the parent with PWN proposing a material change of services following the March 8, 2019 IEP team meeting. The parent signed consent for these material changes in special education services on March 8, 2019 but noted, “I sign with reservations, I give consent but I do not agree with the place where my son is going to receive the services.”

**Applicable Regulations and Findings**

Federal regulations at 34 C.F.R. 300.116(c) require the child be educated in the school that he or she would attend if nondisabled unless the IEP of a child with a disability requires some other arrangement.

In Letter to Trigg, (2007) 50 IDELR 48, the United States Department of Education Office of Special Education Programs ("OSEP") determined that when two or more equally appropriate locations are available, a district may assign a child with disabilities to the school or classroom of its choosing. In this letter, OSEP describes the difference between the terms “placement” and “location” as follows:

> 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.

Kansas statutes at K.S.A. 72-3462 allows special education and related services to be provided at either the public or private school. The decisions regarding the location of special education and related services must be made in consultation between the pubic and the private school representatives.

Federal regulations at 34 C.F.R. 300.503 require that written notice must be given to parents a reasonable time before the responsible public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The written notice provided to parents by the responsible public agency must contain a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action.

In addition, Kansas regulation at K.A.R. 91-40-27(a)(3) requires parent consent before making a material change in services and/or a substantial change in placement. K.S.A. 72-3430 describes a material change in services as an increase or decrease of 25% or more of any one service and describes a substantial change of placement as movement to a less or a more restrictive environment for more than 25% of student's day.

In this case, the student was parentally placed at _____ Catholic School and had an IEP developed by USD #___. The consultation between the pubic and the private school representatives had determined that special education services for all students would move to being provided at the neighborhood public school. The student's IEP team met on March 8, 2019, and USD #___ appropriately provided the parent with PWN for the proposed material change of services and the parent provided written consent for this material change of services on that same date.

Based on the foregoing, the allegation of a violation of special education statutes and regulations requiring USD #___ to obtain prior written consent to change the location where the student receives special education services is not substantiated.

> **ISSUE THREE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), refused to allow the parent to decline some of the special education services being offered during the past 12 months.

## Parent Position

During the September 25, 2018 IEP team meeting, the parent shared concerns with the reading intervention program being used by the school during the student's special education reading instruction. She also told the IEP team that she believed the student was not making adequate academic progress in the area of reading. For these reasons, the parent requested that the student only receive the specialized instruction in math and the speech therapy services. The parent indicated that she had started the student in tutoring through the Cradle to Career Literacy Center during the summer of 2018 and she wanted to continue these services for the student's reading instruction. The USD #___ staff did not agree with this request but did agree to check to see if this was a possibility. Ultimately, she was told by USD #___ staff that she must accept all the services offered in the IEP or revoke her consent for special education, which would mean that the student would receive no special education or related services.

## School District Position

USD #___ staff reported that the parent shared concerns about the type of reading intervention program that was being used with her son and his overall lack of progress in the area of reading at the September 25, 2018, IEP team meeting. Because of these concerns, the parent requested that the student no longer receive the special education services for reading but continue to receive the special education services for math and the speech therapy services. The parent indicated she would privately provide the reading services needed by the student. The USD #___ staff were not in agreement with the request to discontinue the special education services for reading and did not believe the IEP would still be able to provide a free appropriate public education (FAPE) to the student; however, they agreed to seek legal guidance in an effort to honor the parent request.

On October 4, 2018, Dr. _____ consulted with _____ _____, Assistant Executive Director Legal Services for the Kansas Association of School Boards, regarding this request. Dr. _____ and Ms. _____ spoke over the phone during the week of October 15, 2018 and Ms. _____ provided written guidance on October 18, 2018. The guidance provided stated:

> As a general rule, school districts typically don't allow parents to use the Smorgasbord approach to special education services. However, when the parents are insistent and refuse to sign the IEP relating to dyslexia services, then the district develops the IEP that in their opinion provides FAPE and if the parents refuse consent for a particular service then have that reflected in the IEP on the signature line and then send them a yearly notice that you are ready, willing and able to provide the service to them.

Based upon the guidance, USD #___ refused to allow the parent to accept only the special education services for math and the speech therapy services. On November 30, 2018, Ms. _____ shared this decision with the parent via a phone conversation translated by Mr. _____.

## Finding of Facts

The following facts are based upon interviews and documentation obtained during the course of this investigation.

- The IEP in effect at the beginning of the 2018-19 school year was developed on March 9, 2018. That IEP included goals to address math

calculation skills, basic reading skills, speech articulation skills, and grammatical language skills. The IEP required 60 minutes per day of specialized instruction in reading and math along with 15 minutes per day for one day per week of speech therapy.

- An IEP team meeting was held on September 25, 2018 to review progress made during the summer in a new tutoring program and to familiarize new special education staff with the student. At this meeting, the parent shared concerns about the type of reading intervention program being used with her son and his overall lack of progress in the area of reading. Because of these concerns, the parent requested that the student no longer receive the special education services for reading but continue to receive the special education services for math and the speech.

- USD #___ staff were not in agreement with the request to discontinue the special education services for reading and did not believe the IEP would still be able to provide a free appropriate public education (FAPE) to the student; however, they agreed to seek legal guidance in an effort to honor the parent request. During October 2018, USD #___ sought and received legal guidance regarding this parent request from _____ _____, Assistant Executive Director Legal Services for the Kansas Association of School Boards.

- Based on this guidance, USD #___ determined they would refuse the parent's request to discontinue the special education services for reading made at the September 25, 2018 IEP team meeting. This decision was shared verbally with the parent on November 30, 2018 through a translated phone call made by Ms. _____.

**Applicable Regulations and Findings**

Federal regulations at 34 C.F.R. 300.101 require school districts to make a free appropriate public education available to all children residing within the district. Federal regulations at 34 C.F.R. 300.320(a)(4)(i) require the IEP include a statement of the special education and related service to be provided to the student that will enable the student to advance appropriately toward attaining the annual goals. Federal regulations at 34 C.F.R. 300.17 defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Kansas regulations at K.A.R. 91-40-1(l)(3)(C) and 91-40-27(k) allow the parent to revoke consent for some special education and related services but only if the

IEP Team certifies in writing that those identified services are not needed in order to provide FAPE to the student. If the IEP Team does not certify this determination, the parent consent cannot be revoked for those identified services.

Federal regulations at 34 C.F.R. 300.503 require that written notice must be given to parents a reasonable time before the responsible public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The written notice provided to parents by the responsible public agency must contain a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action.

In this case, the parent requested to revoke consent for the special education services for reading at the September 25, 2018 IEP team meeting. USD #253 staff were not in agreement with the request to discontinue the special education services for reading and did not believe the IEP would still be able to provide a free appropriate public education (FAPE) to the student; however, they sought legal guidance in an effort to honor the parent request. Once this guidance was obtained, USD #___ determined to refuse the parent's request to revoke consent for only the special education services for reading. This decision was shared verbally with the parent via a phone call on November 30, 2018; however, the parent was never provided with prior written notice of this decision.

Based on the foregoing, the allegation of a violation of special education statutes and regulations by USD #___ is substantiated because the parent was not provided appropriate prior written notice of the decision to deny the parent request to revoke consent for one of the special education services required by the student's IEP.

> **ISSUE FOUR:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide appropriate special education instruction to allow the student to receive educational benefit during the past 12 months.

## Parent Position

During the September 25, 2018 IEP team meeting, the parent shared concerns about the reading intervention program being used by the school during the student's special education reading instruction. She also told the IEP team that

she believed the student was not making adequate academic progress in the area of reading.

Specifically, the parent was concerned that USD #___ changed the instructional interventions for reading from a program called Alphabetic Phonics (AP) to the Barton program for the 2018-19 school year and refused to go back to AP. She stated that the student has become very nervous, stressed, and does not want to read. She believes this change in reading programs has caused the student to regress in his reading skills.

In addition, the parent reported the IEP reading goal in the 2018-2019 year and the IEP reading goal in the 2017-2018 year are the same. The parent stated the goal is essentially for her son to read first grade material with 90% accuracy. The parent believes her son has not progressed despite receiving special education services in reading for the last three years as he cannot read with fluency. He makes the sound of the letters before reading the whole word and, yet most of the time, he does not read the word correctly.

## School District Position

USD #___ staff reported that the parent shared concerns about the type of reading intervention program being used with her son at the September 25, 2018, IEP team meeting. The district staff acknowledged that the special education teacher had previously used Alphabetic Phonics but the current special education teacher was using the Barton program to provide the specialized instruction to enable the student to achieve his IEP reading goal. School staff explained to the parent that both of these programs are based on the research based Orton-Gillingham instructional method for teaching reading.

USD #___ staff reported that the all of the reading goals on each of the student's last three IEPs have addressed basic reading skills. However, each school year the goal becomes progressively more difficult and reflects the IEP goal progress on the previous reading goal. USD #___ acknowledged that the student is still reading below his current grade level but report that he is making progress in improving his basic reading skills as outlined in each IEP.

## Finding of Facts

The following facts are based upon interviews and documentation obtained during the course of this investigation.

- The IEP dated March 13, 2017 included the following basic reading goal: In one IEP year, the student will be able to identify and produce all 26 letter sounds/names with 90% accuracy. The IEP Goal Progress Report shows the student was able to identify 26/26 lower case letters and 25/26 upper case letters. In addition, the student was able to identify and produce all letter sounds with the exception of the letters E and Q.

- The IEP dated March 9, 2018 included the following basic reading goal: By the end the IEP year, the student will decode and read words in first grade level reading materials with 90% accuracy. The IEP Goal Progress Report shows this goal was broken into three benchmarks for 1) reading vowel/consonant (VC) and consonant/vowel/consonant (CVC) words; 2) reading words with common beginning and ending consonant diagraphs and reading high frequency sight words; and 3) reading words with silent e and words with short vowel sounds. The data reported indicates he reading VC and CVC words with 90% accuracy; reading beginning consonant diagraphs with 80% accuracy and ending consonant diagraphs with 70% accuracy; reading 61/100 sight words on the first grade list; and reading silent e words with 90% accuracy.

- The IEP dated March 8, 2019 includes the following basic reading goal: By the end of the IEP year, given a passage at the 2nd grade level, the student will apply phonic rules including r-controlled vowels, vowel diagraphs, and vowel diphthongs to decode words with 80% accuracy. The IEP goal progress shows this goal is broken into three benchmarks with the benchmark addressed to date focusing on decoding words with r-controlled vowels with 80% accuracy (e.g. ar, er, ir, or, ur, hard, herd sir, sort, hurt, etc.). The data reported indicated he has an accuracy of 80% on r-controlled vowels.

- At the September 25, 2018 IEP team meeting, the parent shared concerns with the changes in the reading intervention program being used with her son and parent requested the Alphabetic Phonics be used as the methodology to address the reading goal on the student's IEP.

- Both the Alphabetic Phonics and the Barton Reading & Spelling System are structured literacy programs based on the Orton-Gillingham method of teaching reading.

**Applicable Regulations and Findings**

Federal regulations at 34 C.F.R. 300.101 require school districts to make a free appropriate public education available to all children residing within the district. Federal regulations at 34 C.F.R. 300.17 defines the term "free appropriate public education," in part, as providing special education.

Federal regulations at 34 C.F.R. 300.320(a)(4)(i) requires the IEP to include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child to enable the child to advance appropriately toward attaining the annual goals.

Federal regulations at 34 C.F.R. 300.39 defines the term “special education” as specially designed instruction designed to meet the unique needs of a child with a disability.

The Analysis of Comments and Changes to the Regulations Implementing the Individuals with Disabilities Education Act (IDEA) in the Federal Register, Vol. 71, No. 156, Page 46665, provides guidance in regards to the inclusion of instructional methodologies in the IEP by stating:

> There is nothing in the Act that requires an IEP to include specific instructional methodologies . . . The Department’s longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

Federal regulations at 34 C.F.R. 300.503 require that written notice must be given to parents a reasonable time before the responsible public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. The written notice provided to parents by the responsible public agency must contain a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action.

In this case, the specially designed instruction for reading included in the student’s IEPs for the past three school years was required to address basic reading skills goals and none of the IEPs included a specific reading program or

methodology that must be used to provide the specially designed instruction. Documentation shows the student's IEPs over the past three school years have all included IEP goals that have progressively increased in difficulty level and all of the IEP Goal Progress Reports reflect that the student has made progress towards achieving each of these IEP goals. While none of the IEPs required a specific reading program or methodology, it is noted that the parent made a specific request the use of the Alphabetic Phonics program to address the reading goal at the September 25, 2018; however, the parent was never provided with appropriate prior written notice refusing this request.

Based on the foregoing, the allegation of a violation of special education statutes and regulations that USD #253 failed to provide appropriate special education instruction to allow the student to receive educational benefit during the past 12 months is not substantiated. However, as a result of this investigation, noncompliance was identified for failing to provide the parent with appropriate prior written notice for refusing the parent's request for the inclusion of a specific methodology to address the student's reading goal at the September 25, 2018 IEP team meeting.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.305(a) require the IEP Team and other qualified professionals (as appropriate) to review existing data as part of any reevaluation including evaluations and information provided by the parents of the child. On the basis of that review, and input from the child's parents, the IEP team and other professionals (as appropriate) are required to identify what additional data, if any, are needed to determine whether the child continues to have a disability and to need special education and related services.

   In this case, USD #___ provided the parent with a PWN proposing to conduct a reevaluation with additional assessment of the student on December 20, 2018. However, USD #___ failed to attempt to obtain input from the parent as part of the review of existing data and then failed to include the parent in the process of identifying what additional data was needed to determine whether the student continued to be a student with a disability and to need special education and related services.

B. Federal regulations, at 34 C.F.R. 300.503, require that written notice must be given to parents a reasonable time before the responsible public agency propose or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student.

   The findings of this investigation show USD #___ did not provide appropriate PWN to the parent following two requests that would affect the provision of FAPE to the student made at the September 25, 2018 IEP team meeting. First, the parent requested that the Alphabetic Phonics reading program be used as the methodology to provide the specialized instruction to address the IEP goal for reading. Second, the parent made a request to decline the special education services for reading. USD #___ responded to both requests verbally but then failed to provide the appropriate prior written notice to the parent.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

   a. Comply with federal regulations at 34 C.F.R. 300.305(a) requiring IEP Teams and other qualified professionals (as appropriate) to review existing data as part of any reevaluation including evaluations and information provided by the parents of the child and, on the basis of that review and input from the child's parents, the IEP team and other professionals (as appropriate) are required to identify what additional data, if any, are needed to determine whether the child continues to have a disability and be in need of special education and related services.

   b. Comply with 34 C.F.R. 300.503 by appropriately responding, with a PWN, to parent requests for changes to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student when a request is made.

2. No later than November 30, 2019, USD #___ will provide training to all special education staff and building administrators working at _____ _____ _____ Elementary School regarding the reevaluation process. This training will focus on the review of existing data and include information

and strategies for soliciting and obtaining parental input into the process. In addition, this training will address the specific requirements related to providing special education and related services to students who are parentally placed in a private school. No later than December 4, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

3. No later than November 30, 2019, USD #___ will also provide training to all special education staff and building administrators working at _____ _____ _____ Elementary School regarding when to provide PWN. This training will also emphasize when to provide appropriate PWN and how to identify when the parent is making a request during an IEP team meeting that would affect the initiation of or changes to the identification, evaluation, educational placement or the provision of a free appropriate public education of the student. No later than December 4, 2019, USD #253 will provide documentation of the date and content of the training as well as who attended the training to SETS.

4. No later than October 30, 2019, USD #___ will provide the parent with appropriate PWN refusing the parent's request that the Alphabetic Phonics reading program be used as the methodology to provide the specialized instruction to address the IEP goal for reading and refusing the parent's request to decline the special education services for reading. No later than November 7, 2019, USD #253 will provide SETS with documentation of the PWN being provided to the parent.

5. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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(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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON SEPTEMBER 23, 2019

DATE OF REPORT: OCTOBER 23, 2019

This report is in response to a complaint filed with our office by ____ and ____ _____, parents, on behalf of their son, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student," ____ _____ will be referred to as "the mother," and both ____ and ____ _____ will be referred to as "the parents."

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on September 23, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on October 23, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on October 11, 2019. USD #___ did not respond to either phone calls or emails offering the opportunity to be interviewed and/or to provide documentation regarding the allegations.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Email calendar invitation dated November 28, 2018 for an IEP meeting on December 7, 2018 written by _____ _____, Special Education Teacher
- Six emails dated December 6, 2018 (1:25 p.m. through 1:51 p.m.) between the persons invited to the IEP meeting regarding changing the time for the IEP team meeting

- Email dated December 6, 2018 (2:05 p.m.) written by the mother
- Email dated December 6, 2018 (4:11 p.m.) written by _____ _____, Physical Therapist
- Email dated December 6, 2018 (4:23 p.m.) written by ____ _____, Principal of _____ High School
- IEP Team Meeting notes dated December 7, 2018 written by _____ _____, Case Manager from Lifespan Care Management Services LLC
- Formal Complaint written by the parents dated September 18, 2019
- Complaint Report 20FC___-002 dated August 31, 2019

## Background Information

This investigation involves a 14-year-old male who resides with his parents within the boundaries of USD #___. The student has received special education and related services since preschool due to an exceptionality of multiple disabilities including cerebral palsy, cortical vision impairment, and seizure disorder. During the 2018-19 school year, the student was enrolled in the 9th grade at _____ Senior High School located in USD #___ through the _____ Cooperative. The student is currently attending _____ Senior High School for 10th grade during the 2019-20 school year.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

> **ISSUE ONE:** The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to appropriately schedule IEP team meetings for the student during the 2018-19 school year.

## Finding of Facts

The parents reported and documentation shows that the student had a gross motor skill goal on the IEP in place at the beginning of the 2018-19 school year that required 50 minutes per week of Adaptive Physical Education (APE) involving swimming at the _____ Recreation Center Pool.

A previous IDEA complaint investigation described in 20FC___-002 found the 50 minutes per week of APE services at the _____ Recreation Center Pool were

discontinued and the gross motor skills goal involving swimming was not addressed because of the unilateral decision made by the APE teacher in August 2018.

The parents indicated they first learned the services and the IEP goal involving swimming was not being addressed at the end of October 2018 when they received the IEP Goal Progress Report. This document stated, “Swimming has not taken place this year in adapted PE. A new goal will be issued to the student.” However, the parents reported that no one from USD #___ contacted them to schedule an IEP team meeting or to discuss this “new IEP goal.”

In mid-November, approximately one month from the date of the IEP Goal Progress Report, the parents reported they let the student’s special education teacher, _____ _____, know that they wanted to have an IEP team meeting to discuss the gross motor skill goal involving swimming and the APE services that were not being provided.

Ms. _____ sent an email meeting invitation on November 28, 2018 to the following persons:

- _____ _____, Adaptive PE Teacher
- _____ _____, Assistant Principal at _____ High School
- _____ _____, School Counselor
- _____ _____, Case Manager from Lifespan Care Management Services LLC
- _____ _____, Assistant to the Adaptive PE Teacher
- _____ _____, Physical Therapist
- ____ _____, Principal at _____ High School
- The mother

The email states Ms. _____ is inviting the participants to an IEP meeting for the student in room 1-176 on December 7, 2018 at 1:00 p.m.

When the investigator asked the parents why a regular education teacher was not invited to the meeting, the parents stated that the student’s IEP team does not include a regular education teacher because the student is placed 100% of the time in the special education setting.

Documentation showed that Ms. _____ and Ms. _____ along with all of the special education staff at the _____ Cooperative attended the IEP Boot Camp facilitated by the Kansas Technical Assistance System Network (TASN) on November 28, 2018. This training focused on the IEP process.

Several emails were sent between the participants on December 6, 2018 arranging to change the time of the meeting to 1:30 p.m.

At 2:05 p.m., the mother sent the meeting participants an email indicating that she particularly wanted the physical therapist at the meeting because "I think the main point of discussion involves a PT goal . . ." In this email, the mother also questioned why the meeting was only scheduled for 30 minutes instead of the typical 60 minutes as in previous IEP team meetings.

At 4:11 p.m., Ms. _____, sent an email to the meeting participants asking "If we are doing a full IEP meeting or just a meeting to talk about some things?"

At 4:23 p.m., Ms. _____ sent an email to the meeting participants stating, "The understanding I had from the initial email was to talk about the student's swim time. This is not an official IEP meeting as it is not time yet for his annual IEP meeting. There is no set time for length of an IEP team meeting. The amount of time request in the initial email was 30 minutes."

The parents reported that the following persons attended the meeting held on December 7, 2018: Ms. _____, Ms. _____, Ms. _____, Ms. _____, Ms. _____, Ms. _____, Ms. _____, and the mother.

At the meeting, the mother reported that Ms. _____ stated that since the entire team was not present, this could not actually be an IEP meeting. Ms. _____ then told her that an IEP team meeting would need to be scheduled to write a new goal to replace the goal that was not being implemented. The mother indicated Ms. _____ refused to write a new goal or to amend the existing one the district could not implement at the December 7, 2018 meeting.

The meeting notes written by Ms. _____ state, "Holding full IEP after holidays to establish a solid goal." The meeting notes written by Ms. _____ reflect discussion regarding the IEP goals with Ms. _____ asking the mother how she felt about the goals and "What else should she do?"

An annual IEP team meeting for the student was scheduled for May 6, 2019; however, that IEP team meeting was not held because the parents adjourned the meeting when the speech/language pathologist was unable to attend.

## Applicable Regulations and Findings

Federal regulations at 34 C.F.R. 300.324(b)(1(ii) require school districts to ensure the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals; the results of any reevaluation;

information about the student provided to, or by, the parents; the student's anticipated needs; or other matters.

Federal regulations, at 34 C.F.R. 300.324(a)(4) and 300.324(a)(6), allow for changes to be made to the current IEP by amending the IEP rather than by redrafting the entire document either with or without an IEP Team Meeting. The changes may be made by the entire IEP Team at an IEP Team Meeting. Alternatively, the changes may be made without a meeting if the parent of a child with a disability and the school district representative agree not to convene an IEP Team Meeting for the purposes of making the changes and instead develop a written document to amend or modify the child's current IEP.

Federal regulations at 34 C.F.R. 300.321(a) describes the required participants at an IEP team meeting as 1) the parents of the child, 2) at least one regular education teacher (if the child is or may be participating in the regular education environment), 3) at least one special education teacher or at least one special education provider of the student, 4) a representative of the public agency, 5) an individual who can interpret the instructional implications of evaluation results, 6) at the discretion of the parent or public agency, other persons the parent of school district have knowledge or special expertise, and 7) the student, if appropriate. Federal regulations at 34 C.F.R. 300.321(e) allow any of these required IEP team members be excused with written parent consent.

In this case, the student's IEP in effect at the beginning of the 2018-19 school year included a gross motor skill goal that required 50 minutes per week of Adaptive PE involving swimming at the _____ Recreation Center Pool and these services were discontinued because of the unilateral decision made by the APE teacher in August 2018.

Approximately two months later, an IEP Goal Progress Report was provided to the parent in October 2018 stating, "Swimming has not taken place this year in adapted PE. A new goal will be issued to the student." However, at that time, no one from the school district contacted the parents to amend the IEP or to schedule an IEP team meeting to discuss this "new IEP goal."

In mid-November, approximately one month from the date of the IEP Goal Progress Report, the parents requested an IEP team meeting to discuss the gross motor skill goal involving swimming and the APE services that were not being provided.

A meeting was scheduled and held on December 7, 2018. However, USD #___ staff incorrectly told the parent that this meeting was not an "official" IEP team

meeting because “it is not yet time for his annual IEP meeting.” The physical therapist also asked if the meeting was a “full IEP meeting or just a meeting to talk about some things” which is an inaccurate portrayal of the IEP process.

At the IEP team meeting, USD #___ staff told the parent an IEP meeting could not take place because “the entire IEP team” was not in attendance. However, documentation shows that all of the required IEP team members were present at the December 7, 2018 meeting as noted below:

1) the parents of the child (the mother)
2) at least one regular education teacher, if the child is or may be participating in the regular education environment (not applicable because the student was in special education 100% of the time)
3) at least one special education teacher or at least one special education provider of the student (Ms. _____, Ms. _____, Ms. _____)
4) a representative of the public agency (Ms. _____)
5) an individual who can interpret the instructional implications of evaluation results (Ms. _____, Ms. _____)
6) other persons the parent of school district have knowledge or special expertise (Ms. _____, Ms. _____)
7) the student, if appropriate (not appropriate)

During the 2018-19 school year, the student’s IEP team was not reconvened until May 6, 2019 for the annual IEP review.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to review and revise the student’s IEP during the 2018-19 school year is substantiated.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education laws and regulations. Violations have occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.324(b)(1(ii) require school districts to ensure the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, information about the student provided to, or by, the parents, the student’s anticipated needs, or other matters.

In this case, the student's IEP required 50 minutes per week of APE services at the _____ Recreation Center Pool to address a gross motor skill goal involving swimming. Documentation and interviews found these services were discontinued and the IEP goal involving swimming was not addressed because of the unilateral decision made by the APE teacher in August 2018.

The parents were informed of this discontinuation through the IEP Goal Progress Report approximately two months later. In November 2018, the parent requested an IEP team meeting to discuss this issue and an IEP meeting was scheduled on December 7, 2018. The USD #___ staff provided the parent with inaccurate and incorrect information about the IEP meeting process and did not discuss the issues related to the swimming IEP goal and services at the December 7, 2018 meeting.

Documentation shows that an IEP meeting would be held after the holidays; however, the student's annual IEP team meeting was not scheduled until May 6, 2019. This scheduled meeting was almost five months from the December meeting date and eight months from the unilateral decision to change the student's Adaptive PE services that resulted in the gross motor skill involving swimming not being addressed.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a) Comply with federal regulations at 34 C.F.R. 300.324(b)(1(ii) requiring school districts to ensure the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, information about the student provided to, or by, the parents, the student's anticipated needs, or other matters.

2. No later than December 15, 2019, USD #___ will provide training conducted by TASN to all administrative staff who could serve as the public agency representative at any IEP team meeting held at _____ High School regarding their professional responsibilities as the LEA representative; this shall include at a minimum all principals and assistant principals at _____ High School. This training will address the procedures for changing a student's IEP after the annual IEP is written in compliance with all requirements of the IDEA. In addition, the training will

address the requirement that the IEP Team revise the IEP to address any lack of expected progress toward annual goals. No later than November 25, 2019, USD #___ will contact TASN to request a TASN provider to conduct the training, and USD #___ will provide documentation of this request to SETS. No later December 16, 2019, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

3. No later than December 1, 2019, USD #___ will contact TASN to arrange for a mentor/consultant for the administrators who serve as LEA representatives at _____ High School in regards to the IEP meeting process, this shall include at a minimum all principals and assistant principals at _____ High School. This mentoring and consultation will last through the end of the 2019-20 school year and will include, at a minimum the following:
    a) Each administrator shall serve as an LEA representative in at least one IEP meeting in which the TASN mentor/consultant models/demonstrates the proper facilitation of an IEP team meeting; and
    b) After each administrator completes 3.a. above, each administrator shall serve as an LEA representative in at least one IEP meeting in which the TASN mentor/consultant observes and provides feedback to the administrator.

    The _____ High School administrators shall complete all components of this mentoring/consultation no later than May 14, 2020. No later than May 18, 2020, USD #___ shall provide to SETS documentation that each _____ High School administrator completed the mentoring/consultation, which shall be signed by each administrator and by the TASN mentor/consultant.

4. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to 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 (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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES**

REPORT OF COMPLAINT
FILED AGAINST
_____ UNIFIED SCHOOL DISTRICT #___
ON OCTOBER 10, 2019

DATE OF REPORT: NOVEMBER 9, 2019

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. Ms. ____ will be referred to as "the parent."

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with ____ _____, Executive Director of the _____ Cooperative (_____), on October 21, 2019. On October 22, 2019, the investigator spoke via conference call with Dr. _____ _____, Assistant Director of _____, and _____ _____, General Counsel for _____. The investigator spoke again with the General Counsel for _____ on October 24, 2019.

The investigator spoke by telephone with the student's mother on October 23 and 24, 2019.

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

- IEP for the student dated May 8, 2018
- Report of Psychoeducational Evaluation dated July 24, 2018
- IEP for the student dated May 7, 2019
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated May 7, 2019
- Email dated May 20, 2019 from the parent to the student's case manager
- Audio recording of the May 7, 2019 IEP team meeting
- Student Progress Monitoring Graph (DIBELS and Daze) for the 2018-19 school year
- Audio recording of the May 17, 2019 IEP team meeting
- Notice of Meeting Acknowledgment dated August 23, 2019
- IEP Meeting Notes from August 28, 2019 IEP team meeting
- Amended IEP dated August 28, 2019
- Audio recording of August 28, 2019 IEP team meeting

- Email dated September 3, 2019 from the building principal to the parent
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated September 3, 2019
- Email dated September 4, 2019 from the parent to the building principal
- Email dated September 5, 2019 from the Assistant Director of _____ to the parent
- Revocation of Consent for Particular Special Education and Related Service(s) and/or Placements dated September 5, 2019
- Letter dated September 6, 2019 to the parents from the school psychologist
- Notice of Meeting Acknowledgment dated September 12, 2019
- IEP for the student dated September 13, 2019
- IEP Meeting Notes for the September 13, 2019 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 September 13, 2019
- Audio recording of the September 13, 2019 IEP team meeting
- Prior Written Notice for Termination of Particular Special Education Services, Related Services, Supplementary Aids and Services and/or Placement Due to Parent's/Legal Education Decision Maker's Revocation of Consent dated September 13, 2019
- Email dated October 1, 2019 from the parent to the student's IEP case manager
- Email dated October 3, 2019 from the student's IEP Case Manager to the parent
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated October 3, 2019
- Email dated October 8, 2019 from the parent to the building principal
- Email dated October 10, 2019 from the building principal to the parent
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated October 10, 2019
- Progress Report dated October 23, 2019
- Email dated October 24, 2019 from the parent to the case manager
- Email dated October 29, 2019 from the case manager to the parent
- Email dated October 31, 2019 from the reading consultant to the assistant director and case manager

## Background Information

This investigation involves a 10-year-old girl who is enrolled in the 5th grade in her neighborhood elementary school, the same school she has attended since Kindergarten.

Following an evaluation by the district during the 2016-17 school year, the determination was made that the student was not eligible for or in need of special education services. Beginning August 28, 2017, the parents arranged for the student to receive tutoring from a "Certified Dyslexia specialist" in the private sector. The student has from that point forward been provided with 240 minutes per week of support from a private tutor in a small group setting.

The district conducted a reevaluation of the student in September of 2017, and in November of 2017 proposed an IEP for the delivery of special education services to the student. The parents agreed to the provision of paraeducator support for the student in the general education classroom but declined all other direct or consultative support in the area of reading/language arts outside of the general education setting. The parents based their decision at that time on their assertion that the special education teacher who would be assigned to provided special education services to the student was not adequately qualified.

On May 8, 2018, another IEP team meeting was conducted. The parents again declined consent for the delivery of direct pull-out special education services to the student to address her reading/language arts needs but continued to consent to the provision of paraeducator support in the general education setting. The parents also consented to monthly consultative occupational therapy (OT) services and assistive technology support.

In June of 2018, a private licensed psychologist conducted a psychoeducational evaluation of the student at the request of the parents. According to a report of the evaluation dated July 24, 2018, the student was diagnosed as having a "Specific Learning Disorder with impairment in Reading: word reading, comprehension, and reading fluency, Moderate" as well as a "Specific Learning Disorder with impairment in Written Expression: spelling accuracy, clarity & organization of written expression, writing fluency, Moderate."

On May 7, 2019, the student's IEP team met to conduct an annual review of the student's IEP, and the student's May 2018 IEP was revised. The IEP team revised the student's present levels of performance and annual goals and included parent comments in the IEP in a section designated for parent input. The district proposed that the student's use of a keyboarding program be increased from 15 minutes per week to 30 minutes per week. The district also proposed that direct assistive technology services be removed from the student's IEP and that the amount of consultative assistive technology support be reduced from 20 minutes per week to 5 minutes per week. The use of both graph paper and a multiplication chart were added to the list of supplementary aids and

services to be provided to the student.

In addition to the above changes, the district proposed that the student receive the following services:

- 45 minutes of special education services 5 days per week in a special education setting;
- consultation by a reading specialist with special education staff for 60 minutes per day, 5 days per week for the first 3 weeks of direct pull-out service; and
- consultation by a reading specialist with special education staff for 60 minutes once a week after the first 3 weeks of direct pull-out service.

The IEP team met for a second time on May 17, 2019 to continue discussion, and on May 20, 2019, the parent gave her signed written consent for all the IEP changes proposed by the district including the provision of direct special education services in a special education setting in the area of reading.

The IEP team met again on August 28, 2019 to discuss, among other topics, the district's plan for the delivery of reading services to the student for the 2019-20 school year.

## Issues

In her complaint, the parent identifies two issues:

**Issue One: The district and _____ have refused to provide reading instruction to the student using an evidence-based curriculum taught by a teacher who can deliver the program with fidelity.**

### Parent's Position

The parent states that the "Supplementary Aids and Services" portion of the student's May 7, 2019 IEP and subsequent August 28, 2019 amendment require that "an explicit, systematic, and cumulative, structured multi-sensory approach" be used with the student for the reading instruction. It is the position of the parent that the district has been unwilling to specify any particular curriculum or list of materials which it plans to use to deliver instruction to the student, but rather has only identified Orton-Gillingham as the instructional ***approach*** that will be utilized for instruction. The parent contends that it is imperative that the student's reading instruction be delivered using a specific, research-based, peer-reviewed ***curriculum*** such as Alphabet Phonics, the curriculum being implemented by the student's private tutor. In the opinion of the parent, the district's use of an "eclectic" collection of instructional materials chosen by the teacher fails to recognize the importance of explicit, systematic instruction based on an established curriculum.

The parent maintains that the Orton-Gillingham ***approach*** is not research-based and therefore fails to meet the standard established in Section 1414(d)(1)(A)(i)(IV) of the U.S. Code which states that the child's IEP must include a "statement of the special education and related services and supplementary aids and services, ***based on peer-reviewed research*** [emphasis added] to the extent practicable, to be provided to the child." Further, the parent asserts that since the district is not implementing the Orton-Gillingham (OG) approach with fidelity, the district is failing to comply with special education law.

The parent contends that the instructional approach being delivered by the district/cooperative differs from what is being utilized by the private tutor who has been working with the student since 2017. She asserts that the differences in instruction have been confusing to the student and have caused the student to be anxious, sad, and resistant to participation in after-school tutoring.

The parent states that she is open to allowing the use of any specific curriculum for the student's instruction so long as the curriculum is delivered in a systematic manner by a teacher who can implement it with fidelity. It is the contention of the parent that the teacher designated to provided special education services to the student is not adequately trained to deliver that service. The parent states that the teacher has only had two days of training on the Orton-Gillingham approach and is therefore not able to adapt curricular materials to meet the needs of the student. According to the parent, there is a teacher in the district who has the training necessary to provide appropriate services to the student, but the district is unwilling to designate that individual as the student's special education teacher.

It is the position of the parent that the needs of the student can only be met if her special education instruction is provided by a teacher who has been appropriately trained to implement a specific, clearly identified, peer-reviewed curriculum, preferably a curriculum that has the approval of the International Dyslexia Association.

## Position of the District/Cooperative

The district contends that the Orton-Gillingham approach meets the criteria established in the student's May 2019 IEP and subsequent amendments for "an explicit, systematic, and cumulative, structured multi-sensory approach" to be used with the student for the reading instruction. It is the contention of the district that "a variety of curriculum and/or programs may serve as the necessary resources and materials to effectively meet the instructional needs of a student."

The district also asserts that the staff member assigned to provide special education services to the student is appropriately and adequately trained, is appropriately licensed and certified, and is experienced in classroom instruction.

The district believes that the teacher is capable of providing direct, small group, and individual instruction through a variety of curriculums based upon the Orton-Gillingham approach.

The district further asserts that the parent was given the option of having the student transported to an adjacent school so that a different teacher could deliver special education services to the student, but the parent did not agree to that proposed option.

It is the position of the district that the law does not give the parent the right to dictate instructional methodology or curriculum nor does it allow the parent to determine who will implement the IEP or the training a service provider must have.

## Applicable Laws and Regulations

Regarding instructional methodology, the Federal Register at 64 FR 12552, March 12, 1999, states that "the courts have indicated (that a school district) is not required to substitute a parentally preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability."

Further, in Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), the Supreme Court held that the primary responsibility for choosing instructional methodology is left with the local school district (also see Johnson by Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 316 F. Supp. 2d 960, D. Kan. 2003, 41 IDELR 64 stating that "So long as the court determines that a child's IEP is reasonably developed to provide the child a FAPE, then the court must leave questions of methodology to the school district."). Regarding the selection of provider, see Slama by Slama v. Independent Sch. Dist. No. 258, 259 F. Supp. 2d 880, D. Minn. 2003, 39 IDELR 3 holding that "school districts have the sole discretion to assign staff" and "[a]lthough the Supreme Court [in Rowley] has recognized the importance of parental consultation, and participation in the IEP decision-making process, nothing in the Court's opinions suggest that parents usurp the District's role in selecting its staff to carry out IEP's provisions."

Each school district must ensure that all personnel necessary to carry out the requirements of IDEA are appropriately and adequately prepared and trained. All special education personnel, as appropriate, shall have the content knowledge and skills to serve children with exceptionalities. This includes special education teachers, related services personnel and paraeducators. School districts must take steps to actively recruit, hire, train, and retain qualified personnel to provide special education and related services to children with disabilities (34 C.F.R. 300.156; 34 C.F.R. 300.207).

Kansas statutes, at K.S.A. 72-3404(i), define a "Special Teacher" as a "person, employed by or under contract with a school district or a state institution to provide special education or related services, who is: (1) Qualified to provide special education or related services to exceptional children as determined pursuant to standards established by the state board…"

Under Part B regulations, "qualified personnel" are defined as those individuals who have met State Education Agency (SEA) approved or SEA recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services (see 34 C.F.R. 300.156).

## Investigative Findings

The "Supplementary Aids and Services" section of the student's May 7, 2019 IEP states that "an explicit, systematic, and cumulative, structured multisensory approach will be used when [the student] is given direct instruction in the special education classroom in the general education building for the length of the instructional period." The district has opted to use the Orton-Gillingham approach to provide this instruction.

The student's IEP does not specify that any specific curriculum or materials must be used for the instruction of the student.

### The Orton-Gillingham Approach:

In 2000, the _____ put together a team to discuss reading programs that could be purchased for special education students. That team researched at least 10 different programs and determined that no one program seemed to fit the needs of all students. The team determined that the Orton-Gillingham (OG) *approach* – the methodology of instruction from Academy of Orton-Gillingham Practitioners and Educators (AOGPE) – would be adopted.

The district determined that several different instructional programs could be made available that would allow for differentiated approaches to instruction for students using the OG approach. The OG approach serves as the foundation when delivering multi-sensory instruction supported through the use of teacher-selected curricular programs such as SPIRE, Saxon Phonics, Lindamood-Bell, and Wilson Reading. These curricular programs are the vehicle through which multi-sensory approach to instruction is delivered to support the unique needs of individual students. It was determined that a minimum of two days of training in the OG methodology would be required for all appropriate service providers.

In an email to the parent dated September 3, 2019, the building principal stated that “OG is a systematic approach that incorporates a structure of core instructional elements no matter the curricular resource selected…[and] a variety of curriculum and/or programs may serve as the necessary resources and materials to effectively meet the instructional needs of a student.”

The phrase “Orton-Gillingham approach” refers to the structured, sequential, multisensory techniques established by Dr. Orton, Ms. Gillingham, and their colleagues. Many programs today incorporate methods and principles first described in this foundational work, as well as other practices supported by research.

While the investigator found no specific research to show that OG is the best or only way to teach students with dyslexia, one of the reasons for the lack of research is the fact that OG is an *approach*, and not a specific program of instruction. Generally speaking, a school can use an “instructional program” when teaching students with dyslexia or “an instructional approach.” With a “program,” teachers follow a “scripted” manual that lays out a defined sequence of skills to be taught in a specific order. Teachers must be trained in the program by the publisher. Programs may be *based* on an instructional approach.

A number of reading programs are influenced by OG. These types of scripted programs can potentially be researched. The instruction is uniform and used the same way for all students. A well-designed study may be able to show positive results for kids who are best suited to the program.

An approach, such as OG, is just the opposite. It is an intervention that is individualized to each child. It is flexible, rather than prescribed, because it is based on a problem-solving process. That process starts with identifying the child’s learning difficulty. The next step is to develop a plan to address that difficulty.

An approach can offer more flexibility to meet complex needs than a program. Because it is not scripted and uniform, however, it cannot be studied carefully in the same way a program can. That does not mean an approach like OG is not highly effective. Some programs that are based on OG principles have been studied and have been shown to have good results.

Despite that lack of research, the principles and methods of OG have been peer reviewed. The Orton-Gillingham approach is well-regarded in the field of dyslexia. On its website, the International Dyslexia Association states that “parents who have children diagnosed with dyslexia should seek out reading instruction that is based on a systematic and explicit understanding of language structure, including phonics. This reading instruction goes by many names,

Structured Literacy, ***Orton-Gillingham*** [emphasis added], Simultaneous Multisensory, Explicit Phonics, and others." (See dyslexia.org homepage.)

Proposed Optional Services:

The building principal sent an email to the parent on September 3, 2019 stating the district's intention to begin providing services to the student at the adjacent elementary school on September 9, 2019. According to the email, if the parent did not consent to having the student transported by bus to the school, then staff would walk her "across the parking lot." If the weather was inclement, then arrangements would be made to have the student connected to her instruction "using a virtual alternative." A copy of a prior written notice and consent form was attached to the building principal's email.

According to that prior written notice and consent form dated September 3, 2019, "the teachers administratively assigned to provide the services specified in the IEP meet state and district requirements with regard to licensure, certification, preparation, and training. The assigned personnel are fully capable of delivering the explicit, systematic, cumulative, and structured multi-sensory approach called for in [the student's] IEP." The prior written notice and consent form also notes that "special education services for direct reading intervention provided at the home school was considered, and could be implemented. However, given her unique circumstances, the administration determined the best qualified personnel to deliver the reading services…were located at a nearby school location, and thus special transportation will be offered."

The parent declined consent for the student to be transported to the adjacent school to receive services at that location.

Teacher Qualifications:

Currently, two individuals are providing reading services to the student. The individual who is providing consultative support to the student has retired from the district but has agreed to contract with the district to provide services for the student. The consulting teacher holds certification in the area of Learning Disabilities and Elementary education and is a certified Reading Specialist. She has received extensive training in the area of reading/language arts. The consulting teacher was previously identified by the parent as an individual she felt was qualified to provide services to the student.

The consulting teacher is preparing lesson plans for the student and working with the case manager who is delivering direct instruction. The consulting teacher and the student's private tutor have also communicated regarding the instruction the student is receiving in both settings.

Beyond the formal education and training required to meet state licensure requirements and the knowledge and experience gained from delivering instruction to students in a classroom setting, the case manager has had specific training focused on research-based reading methodology and instruction. That training included an 80-hour course on Literacy Intervention as well as a 2-day, district-sponsored training on the Orton-Gillingham approach and training on the Alphabet Phonics curriculum. The case manager has participated in one-on-one independent study on OG with the consulting teacher as well as other on-going staff development related to her field.

The district/cooperative offered the option of having instruction provided to the student by a teacher at an adjacent building who has had additional OG training, but the parent declined that option.

Summary and Conclusions

The student's May 7, 2019 IEP and subsequent August 23, 2019 amendment call for the student to receive direct reading instruction in a special education classroom using an "explicit, systematic, cumulative, multi-sensory approach." The Orton-Gillingham approach being used by the district/cooperative complies with that requirement. The IEP does not require the use of any specific curriculum or materials in the instruction of the student.

This investigation has determined that the teachers assigned by the district to provide the services specified in the student's IEP meet state and district requirements with regard to licensure, certification, preparation and training.

Special education statutes and regulations do not grant parents the right as a part of the IEP process to dictate either the personnel designated to deliver services to a student or the methodology or materials that will be used in the instruction of the student. If the parent does not agree with the district's plan for the delivery of services, she can choose to revoke consent for ***all*** special education services. However, because the parent has consented to the district's provision of reading services, that particular service cannot be terminated unless the IEP team certifies that the particular services is not needed in order for the child to receive a FAPE.

The district is not obligated to pay for services secured by the parent as a matter of personal preference.

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

**Issue Two: The cooperative has refused to convene an IEP team meeting for the purpose of revoking special education services for the student.**

Parent's Position

The parent provided her written consent for the provision of direct, pull-out special education services to the student in the area of reading on May 20, 2019. The student's parent contends that, after those services were initiated on September 9, 2019, she made numerous requests for the district to stop providing reading support, but the district/cooperative has refused to discontinue services. Additionally, the parent asserts that the district/cooperative has refused to convene IEP team meetings to discuss the discontinuation of services.

## Position of the District/Cooperative

The district asserts that the parent's request for discontinuation of reading services was discussed at an IEP team meeting on September 13, 2019. According to the district/cooperative, the parent was subsequently provided with prior written notice of refusal to discontinue services. It is the position of the district/cooperative that termination of reading-related services would result in a denial of a free appropriate public education (FAPE) to the student.

## Applicable Statutes and Regulations

### Revocation of consent for all special education and related services:

Parent consent for the provision of special education services is voluntary, and may be revoked by the parents at any time. Revocation of consent must be in writing (K.A.R. 91-40-27(i); 91-40-1(l)(3)(C)). Federal regulations, at 34 C.F.R. 300.300(b)(4), state that if at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

- May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with 34 C.F.R. 300.503 before ceasing the provision of special education and related services;
- May not use the mediation procedures under 34 C.F.R. 300.506 or the due process procedures under 34 C.F.R. 300.507 through 300.516 in order to obtain agreement or a ruling that the services may be provided to the child;
- Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and
- Is not required to convene an IEP Team meeting or develop an IEP under 34 C.F.R. 300.320 and 300.324 for the child for further provision of special education and related services.

When parents revoke their consent for a special education action, the revocation is not retroactive but becomes effective either on the date that it was revoked or, if a future effective date is specified in the written revocation document, on that date (K.A.R. 91-40-1(l)(3); 34 C.F.R. 300.9). Therefore, the revoking of consent does not negate any action that has occurred after the previous consent was given and before the previous consent was revoked.

When a parent revokes consent for all existing special education and related services, the district may meet with the parent to attempt to resolve the difficulty. If the parent cannot be convinced to continue the services, the district must honor the parent's revocation; however, the district must provide prior written notice a reasonable time before ceasing provision of the services. Further, the district is not required to amend the child's education records to remove any reference to the child's receipt of special education and related services because of the revocation of consent (K.A.R. 91- 40-27(j)). If a parent who revoked consent for all special education and related services later wishes his or her child to be reenrolled in special education, the agency must first conduct an initial evaluation to determine whether the child qualifies for special education (K.A.R. 91-40-27(l)).

Revocation of consent for a particular service or placement:

The Office of Special Education Programs (OSEP)_in the United States Department of Education has stated “Section 300.300(b)(4) allows a parent at any time after the initial provision of special education and related services to revoke consent for the continued provision of special education and related services to their child **in their entirety** [emphasis added]. Under § 300.300(b)(1), parental consent is for the initial provision of special education and related services **generally, not for a particular service or services** [emphasis added]” OSEP further stated, “under the regulations in § 300.300(d)(2), States are free to create additional parental consent rights, such as requiring parental consent for particular services, or allowing parents to revoke consent for particular services, but in those cases, **the State must ensure that each public agency in the State has effective procedures to ensure that the parents’ exercise of these rights does not result in a failure to provide FAPE** [emphasis added] to the child” (see Federal Register, Volume 73, No. 321, December 1, 2008, p. 73011). To ensure that each school district in Kansas has effective procedures to ensure that a parents’ exercise of state consent rights does not result in a failure to provide FAPE, Kansas law conditions a parent's right to revoke consent for a particular service or placement upon written certification by the IEP team that the particular service or placement is not needed to provide a FAPE (K.A.R. 91-40-1(l)(3)(C)). If the IEP team so certifies, the district must provide prior written notice a reasonable time prior to ceasing provision of that service or placement for which parent consent was revoked. The district will not be considered in violation of FAPE for the failure to further provide the special education services or placement for which parental consent was revoked (K.A.R. 91-40-27(k)). If the

IEP team refuses to certify that discontinuation of the particular service or placement will not deny the child a free appropriate public education, the parents may pursue due process or mediation to attempt to end the services or placement at issue.

Parental request for an IEP meeting:

The IEP for a student must be reviewed periodically, but not less than annually to determine whether the annual goals for the child are being achieved (K.S.A. 72-3429(f)). The parents of a child with an exceptionality have the right to **request** an IEP meeting at any time. A district is not, however, required to agree to every parental request for an IEP meeting so long as the parent is provided with prior written notice of the district's refusal. OSEP has 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. Under § 300.507(a), the parents or agency may initiate a due process hearing at any time regarding any proposal or refusal regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and the public agency must inform parents about the availability of mediation" (see Federal Register, Volume 64, No.48, March 12, 1999, p. 12476 and 12477).

Investigative Findings

On May 20, 2019, the parent sent an email to the student's case manager stating that the parent "would like to schedule an IEP for early next year to discuss [the implementation of the student's reading instruction]."

That meeting was held on August 28, 2019. IEP Meeting Notes show that the parent asked the team to discuss the student's reading instruction. The notes indicate that the parent shared her "thoughts that KS teachers do not have training to teach dyslexia." According to the minutes, the parent stated that she had researched the Wilson reading program and Lindamood Bell and presented material regarding effective instruction using those programs. She also reported that she had looked into the training of the staff members who would be providing services to her daughter and believed those individuals to have inadequate training to be able to implement either Wilson or Lindamood Bell programs effectively.

The meeting notes also show that the team discussed the district's proposal to transport the student to the adjacent elementary school for her special education services in the area of reading. The parent indicated that she would be willing to have the student transported to another school for service ***only*** if the assigned

teacher has been trained appropriately. Since she did not believe the assigned teacher had been appropriately trained, she indicated she would not give consent for the student to be transported to another building.

On September 3, 2019, the building principal sent an email to the parent stating that the district/cooperative stood "ready, willing, and able to deliver the reading services, outlined in the IEP, with personnel currently designated…IRIS Teacher at [another school] will partner with our [building] team, and will be assigned to provide the direct reading instruction outlined in your child's IEP…Should you determine you are not comfortable consenting to the recent offer of transportation, we will make arrangements for staff to walk her across the parking lot, and on inclement weather days, will make the necessary arrangements to connect her with her instruction utilizing a virtual alternative."

As an attachment to the building principal's September 3, 2019 email, the district provided the parent with prior written notice of its proposal to provide transportation for the student to an elementary school located next to her assigned building for the purpose of receiving special education reading instruction.

The parent responded to the principal via email on September 4, 2019 stating that she wished "to withdraw consent for reading services [as] listed on [the student's] IEP…and I do not consent to busing or walking [the student] to another location for services." The parent also signed the September 3, 2019 prior written notice form to indicate she did not "give consent for transportation and withdraw consent for [the student] to receive special education services during language arts intervention time 5 days a week for 45 minutes due to lack of teacher training in the proposed curriculum."

On September 5, 2019, the Assistant Director of _____ sent an email to the parent asking that the parent complete and sign a "Revocation of Consent for Particular Special Education and Related Services and/or Placement" form and return the form to the building principal. In her email, the Assistant Director stated that an IEP Team meeting would be scheduled to consider her request. The Assistant Director also noted that in the interim the district was required to provide the special education reading services specified in the student's IEP but would provide those services in the student's assigned school.

The parent returned a signed revocation of consent form to the school on September 5, 2019, noting that she revoked consent for the student to receive "special education services during language arts intervention time 5 days a week for 45 minutes each day." On September 6, 2019, the school psychologist sent a letter to the student's parents stating that transportation to a nearby school for special education services would not be implemented because the parents did not give written consent for transportation services. The letter stated that _____ stood "ready, willing, and able to provide transportation as outlined in

the IEP and Prior Written Notice dated 9/3/2019 should you elect to provide your written consent to do so."

An IEP Team meeting was held on September 13, 2019, and the student's IEP was amended to remove transportation services. IEP Meeting Notes reflect that the team reviewed recent reading testing results for the student and again discussed the parent's concerns regarding the training of staff assigned to provide special education instruction to the student as well as questions the parent asked regarding curriculum. The parent specifically identified a teacher whom she wanted to have assigned to provide special education services to the student. Additionally, the parent asked the district to provide data regarding the effectiveness of reading instruction for other students receiving special education at the building. According to the notes, the parent agreed to having the student instructed by the special education staff assigned to the student's neighborhood school and did "not choose to revoke services at this time."

On September 13, 2019, the parent was provided with prior written notice that the student's IEP had been updated to include her present levels of performance. The parent was also given prior written notice of the district's refusal to provide the parent with data regarding the performance of other special education students beyond what was routinely made available to "parents and/or the public through the school district and/or the Kansas Department of Education." The district also refused to grant the parent's request that a particular teacher be assigned to provide special education instruction to the student.

A form entitled "Prior Written Notice for Termination of Particular Special Education Services, Related Services, Supplementary Aids and Services and/or Placements Due to Parent's/Legal Education Decision Maker's Revocation of Consent" was provided to the parent on September 13, 2019. The form provided the parent with written notice of the district's refusal to terminate the 45 minutes of special education services in a special education setting being provided daily to the student during language arts intervention time. According to the form, "the team…reviewed all school records and information provided by the parent. The IEP team has determined that the student will not receive a free appropriate public education without the services…" On September 13, 2019, the building principal also signed off on the "Revocation of Consent" form previously submitted by the parent on September 5, 2019 and indicated that "the team determined that the student does…need the special education and related service(s) and/or placement [outlined above] in order to receive a free appropriate public education (FAPE)."

On October 1, 2019, the parent sent an email to the student's IEP case manager asking her to provide weekly progress reports in both reading and typing. The parent also asked for prior written notice as to why the _____ would not offer to assign a staff member who has International Dyslexia Association recommended training to instruct the student and prior written notice of why the

_____ would not offer to assign someone with "the training the manufacturer of the curriculum the co-op has chosen" as well as prior written notice as to why the _____ would "not offer a curriculum that is evidenced based to remediate a student with dyslexia since the [eclectic] approach you offered is not evidence based."

The student's IEP case manager responded to the parent via email on October 3, 2019 indicating she would provide the parent with reading fluency progress reports on the student "every couple of weeks" and suggested the parent contact other service providers directly to request progress reports. The case manager attached a prior written notice form addressing the parent's other requests.

According to the prior written notice form, the district refused "to honor the parent's preference for a specific licensed provider and/or specific training(s) from an educational publisher(s)" because "the teachers administratively assigned to provide the services specified in the IEP meet state and district requirements with regard to licensure, certification, preparation, and training. The assigned school personnel are fully capable of delivering the explicit, systematic, cumulative, and structured multi-sensory approach called for in her IEP."

The prior written notice also stated that the district refused the parent's request to "restrict reading instruction to a particular product and/or instructional materials." According to the written notice form dated October 3, 2019, "the Orton Gillingham approach serves as the research-based approach and foundation of providers' instructional practice when delivering multi-sensory reading instruction supported through the use of teacher selected curricular programs and materials." The form notes that "while considered, restricting professional discretion and use of curriculum and instructional materials was rejected. Curriculum and/or materials are not the approach, rather serve as the vehicle through which a multi-sensory approach to reading instruction is delivered to support the unique needs of individual students. School personnel must maintain the professional discretion to select the materials necessary to support the development of instruction in response to the performance of the student…Special education laws and regulations do not grant the parent the right to dictate the curriculum or materials that will be used in the instruction of the student."

On October 8, 2019, the parent sent an email to the building principal and the student's case manager stating "I need you to immediately stop providing the 45 minutes per day of special education services that [the student] is receiving. She is confused, her attitude is declining and her enthusiasm is crashing. We need an immediate IEP meeting this week to address the fact that she is receiving services that are not evidence based and is becoming overwhelmed. She needs an evidence based dyslexia remediation and not an eclectic approach."

In an email to the case manager dated October 8, 2019, the assistant director of the _____ wrote, "[The building principal] has addressed this with the parent. Please proceed as scheduled, as we are compelled to deliver the services as outlined in the IEP."

In emails to the case manager dated October 8, 2019, the parent wrote, "[The student] has been saying that she is getting confused because the things you are teaching her conflict with the information she is getting from her other tutor. Could we compare what you each are doing so that we don't confuse her? I have [the tutor] [sic] if she could meet with you so you can compare what you are teaching her and align on best practices…I know [the tutor] would be happy to talk to you to share what she is using with [the student]."

The building principal sent an email to the parent on October 10, 2019 responding to the parent's October 8, 2019 phone call and email. In the email, the building principal wrote the following:

> Because the IEP team determined on 9/13/19 [the student] needs special education and related service(s) described in her IEP,
> (a) the service(s) and/or placement(s) called for in her IEP will continue;
> (b) You retain all of the procedural safeguards specified in federal and state special education laws and regulations; and
> (c) You may request mediation or initiate a due process hearing to challenge the IEP team's decision that the special education service(s) needed [sic] in order for the student to receive a FAPE. While the mediation and/or due process request is pending, all services would continue as outlined in [the student's] IEP due to stay-put.
>
> You also maintain the right to revoke consent for <u>all</u> special education and related services. If you choose to do so, the school district will no longer be legally required to convene an IEP meeting to develop an IEP, or to provide your child with the special education and related services outlined in the IEP. Furthermore, should you elect to exercise this option, the school district may not use mediation or a due process hearing to challenge your revocation of consent.
>
> Although your child would no longer be served under IDEA, you would have the right to request an evaluation under Section 504. If [the student] was then found eligible under Section 504, the team would develop an appropriate Section 504 plan.
>
> Let me know if you wish to exercise one of the above options.

Attached to the October 10, 2019 email was a prior written notice form which stated that the district "refuses the parent request to again convene an IEP meeting to discuss ceasing direct reading services in the special education

classroom as outlined in the IEP" because "on 9/13/19, the school convened the IEP team at the parent's request to consider revocation of reading services. All team members indicated the reading services specified in the IEP are necessary in order to confer a FAPE. Prior Written Notice indicating the LEA's refusal to terminate the special education services was issued to the parent on 9/13/19."

The October 10, 2019 prior written notice form also indicated that "the LEA refuses the parent's request to restrict reading instruction to a particular curricular product and/or instructional materials" noting that "the Orton Gillingham approach serves as the research-based approach and foundation of providers' instructional practice when delivering multi-sensory reading instruction supported through the use of teacher selected curricular programs and materials…While considered, restricting professional discretion and use of curriculum and instructional materials was rejected. Curriculum and/or materials are not the approach, rather serve as the vehicle through which a multi-sensory approach to reading instruction is delivered to support the unique needs of individual students. School personnel must maintain the professional discretion to select the materials necessary to support the development of instruction in response to the performance of the student."

The October 10, 2019 prior written notice form stated that the "LEA remains open to collaboration with outside providers with the necessary parent consent to communicate."

The district provided the parent with a report of the student's progress toward attainment of IEP goals on October 24, 2019. The form shows that Annual Goal 2 for the student is "By the next annual IEP, when given grade level curriculum based reading passage, [the student] will read 87 words per minute with 96% accuracy. According to the report, "when given a grade level curriculum based reading passage, [the student] read: 9/6/19: 79 words per minute with 98% accuracy 9/12/19: 54 words per minute with 95% accuracy 9/25/19: 58 words per minute with 91% accuracy 10/7/19: 54 words per minute with 95% accuracy 10/23/19: 82 words per minute with 98% accuracy."

The parent sent an email to the case manager on October 24, 2019 that "it looks like [the student] has met her fluency goal and no longer needs that service. We should meet as a team and discuss." On October 29, 2019, the case manager sent an email to the parent stating that the district "will not be honoring your request for a meeting." A prior written notice form was attached to the case manager's email stating "the LEA refuses the parent request [sent via email on 10/24/19] to again convene the IEP team to discuss ceasing reading services in the special education classroom as outlined in the IEP…Services were first implemented in September of 2019. The October 2019 progress report details a pattern of inconsistent performance with reading fluency, which was, in part, the basis for continuing need for the direct reading services as outlined in the IEP, as discussed in previous IEP meetings…While considered, convening the IEP to

consider ceasing the reading services was rejected. [The student] has only been receiving services since September 2019, and when the IEP team met on 9/13/19, it was determined she still required the services. While making progress, she is not yet displaying the consistent performance levels to support the fluency goal has yet been achieved."

Summary and Conclusions

The district has convened two IEP meetings to discuss the parent's concerns. At the August 23, 2019 IEP meeting, the team addressed the parent's assertion that the staff members assigned to deliver services to the student were inadequately trained and that no single curriculum or set of materials had been identified for use in instructing the student. An option of transporting the student to a neighboring school for service was discussed.

After being provided with prior written notice of the district's proposal to transport the student for service on September 3, 2019, the parent sent an email to the district on September 4, 2019 indicating that she wished to revoke consent for the district to deliver direct special education services in the area of reading.

The parent requested that the district discontinue a particular special education service – 45 minutes 5 days a week of pull-out special education support during language arts intervention time. As she confirmed in telephone conversations with the investigator on October 23 and 24, 2019, the parent did not want to discontinue all other special education and related services including classroom paraeducator support and assistive technology services.

Had the parent revoked consent for all special education and related services, the district would have been required to cease provision of services. However, because the parent has indicated she wanted to revoke consent for a particular service, the district was obligated by law to consider whether the cessation of services would result in a loss of FAPE for the student.

The district convened an IEP meeting on September 13, 2019, five days after reading services had been initiated for the student. Discussion again centered on the parent's concerns regarding the qualifications of the special education service providers. The team also looked at the student's current performance in the area of reading. The parent was given prior written notice that the district determined that the student would not receive a FAPE if the reading-related services outlined in her IEP were not delivered.

On October 8, 2019, the parent sent an email to the principal stating that she wanted the district to "stop providing the 45 minutes per day of special education services that [the student] is receiving." The parent also stated that she wanted to hold an "immediate IEP meeting this week to address the fact that she is receiving services that are not evidence based and is becoming overwhelmed.

She needs an evidence-based dyslexia remediation and not an eclectic approach."

Two days later, on October 10, 2019, the building principal sent an email to the parent outlining the district's obligations as they related to a parental request for revocation of services as well as the options available to the parent should she disagree with the district's decision. Another prior written notice was attached to the principal's email detailing the district's refusal to convene another IEP meeting to discuss the parent's request for revocation of services and her request to restrict the use of curriculum and/or materials in the instruction of the student. In the prior written notice form, the district listed reasons for their refusal, noting that the parent had previously been given prior written notice of the district's position after a previous IEP team meeting on September 23, 2019.

After being sent a report of the student's progress toward attainment of her IEP goals on October 24, 2019, the parent again asked for an IEP team meeting since the student had met her reading fluency goal and no longer needed services in that area. The district again provided prior written notice to the parent of refusal to convene an IEP meeting noting that the student had only been in service since September 2019 and, while she was making progress, she was not demonstrating a consistent level of performance to show that her goal had been achieved.

The district has complied with legal requirements with regard to a parental request for a partial revocation of consent for services. Two IEP meetings have been held prior to the filing of this complaint on October 10, 2019. At both of those meetings, the team addressed the parent's concerns regarding the qualifications of the student's special education service providers and the curriculum and materials being used in her instruction. At the second meeting, the team considered the student's progress and determined that continued provision of services was required to ensure that the student was provided a FAPE. The parent was provided with prior written notice of the district's refusal to cease the provision of services as requested by the parent as well as the district's refusals related to service providers, curriculum and materials.

While parents have a right to request an IEP meeting at any time, the district has the right to refuse the parent's request if the district believes conducting a meeting is not necessary to ensure the provision of FAPE and if the district provides the parent with prior written notice of refusal. In this case, the district convened two IEP meetings – one in August of 2019 and one in September of 2019 – and discussed the parent's ongoing concern regarding the district's provision of special education services to address the student's reading needs. In the September meeting, the district specifically addressed the parent's request for revocation of a particular service. The parent was given prior written notice of the district's refusal to discontinue service. There have been no significant changes to either the child's circumstance or the parent's requests. Therefore, it

is reasonable for the district to refuse the parent's request to convene yet another IEP meeting to discuss the same issues.

Under the circumstances described above, a violation of special education statutes and regulations is not substantiated on this issue.

## Corrective Action

Information gathered in the course of this investigation has not substantiated a violation of special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are warranted.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), 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).

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Unified School District: 20FC___-001

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on October 10, 2019, by _____ ____, on behalf of her daughter, _____ ____. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on November 9, 2019. That Complaint Report concluded that there was no substantiation of a violation of special education statutes or regulations.

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the Complaint Report, and the parent's notice of appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Final Report.

## PRELIMINARY MATTER

Scope of Inquiry: The Appeal Committee limits its inquiry to the issues presented in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

## DISCUSSION OF ISSUE ON APPEAL

The parent's notice of appeal addresses the findings and conclusions contained in Issue 1 of the Complaint Report. Therefore, the Appeal Committee will limit its inquiry to Issue 1, as the notice of appeal did not contest any of the findings and conclusions in Issue 2 of the Complaint Report.

ISSUE 1: The district and _____ [_____ Cooperative] have refused to provide reading instruction to the student using an evidence-based curriculum taught by a teacher who can deliver the program with fidelity.

The Appeal Committee identified three arguments within Issue 1 that the parent makes in her notice of appeal, and the Appeal Committee will address each of these arguments separately below:

A. Curriculum: The parent's notice of appeal states, "It is my position that the district has been unwilling to specify any curriculum or list of materials which it plans to use to deliver instruction to the student, but rather has only identified Orton-Gillingham (OG) as the instructional *approach* [emphasis in original] that will be utilized for instruction."

As the parent noted in her original complaint, and as the investigator found on page 7 of the Complaint Report, the Supplementary Aids and Services section of the May 7, 2019 Individualized Education Program (IEP) states (on page 20), "An explicit, systematic, and cumulative, structured multisensory approach will be used when [the student] is given direct reading instruction in the special education classroom in the general education building for the length of each instructional period."

On page 7 of the Complaint Report, the investigator finds, and the Appeal Committee agrees, that "the student's IEP does not specify that any specific curriculum or materials must be used for the instruction of the student."

The Appeal Committee finds that nothing in the IDEA or its implementing regulations require an IEP to include a specific curriculum, methodology or list of materials. The IDEA regulations at 34 C.F.R. 300.320(d)(1) state: "Nothing in this section shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act [IDEA]." Further, the Office of Special Education Programs (OSEP), which is the office within the United States Department of Education that writes and enforces the IDEA regulations, stated: "There is nothing in the Act [IDEA] that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP." See Federal Register at 71 Fed. Reg. 46,665 (August 14, 2006).

B. Peer-Reviewed Research to the Extent Practicable: The notice of appeal further states, "As stated in the in [sic] Diana Durkin's report [the Complaint Report], 'Despite that lack of research, the principles and methods of OG have been peer reviewed.' This lack of research does not meet the requirements of: Section 1414(d)(1)(A)(i)(IV) of the U.S. Code which states that the child's IEP must include a 'statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research* [emphasis in original] to the extent practicable, to be provided to the child.', nor her unique requirements as a student with dyslexia."

Here the parent's position, as also stated in the Complaint Report on page 5 and 6 and in the parent's original complaint, is that the "eclectic" curriculum and OG approach that the district has chosen is not based on peer-reviewed research, and as such, does not meet the IDEA requirement for special education services to be based on peer-reviewed research to the extent practicable.

The Complaint Report states on page 8, as the parent points out on appeal, "Despite that lack of research, the principles and methods of OG have been peer reviewed." However, the phrase "despite that lack of research" in that sentence refers to a preceding statement on page 8 of the Complaint Report: "While the investigator found no specific research to show that OG is the best or only way to teach students with dyslexia, one of the reasons for the lack of research is the fact that OG is an *approach* [emphasis in original], and not a specific program of instruction." The Appeal Committee finds that the investigator did not conclude that the OG approach is not based on research; in fact, the investigator stated on page 8 of the Complaint Report "Some programs that are based on OG principles have been studied and have been shown to have good results." Rather, the investigator found no research to show that OG is the best or only way to teach students with dyslexia.

The IDEA does not require special education services that are based on the greatest body of research or that are shown to be the best or only method to address the particular needs of a child. The IDEA regulations at 34 C.F.R. 300.320(a)(4) state that the IEP must include a statement of "special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable [emphasis added]…." When interpreting this regulation, OSEP stated:

> The phrase "to the extent practicable," as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-

> reviewed research [emphasis added]…. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE [emphasis added]. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs…. Special education and related services, and supplementary aids and services based on peer-reviewed research are only required "to the extent practicable." If no such research exists, the service may still be provided, if the IEP Team determines that such services are appropriate [emphasis added]…. While the Act clearly places an emphasis on practices that are based on scientific research, there is nothing in the Act that requires all programs provided to children with disabilities to be research-based with demonstrated effectiveness in addressing the particular needs of a child where not practicable…. [U]ltimately, it is the child's IEP Team that determines the special education and related services that are needed by the child in order for the child to receive FAPE [emphasis added]. See Federal Register at 71 Fed. Reg. 46,665 (August 14, 2006).

Courts have interpreted this provision in a similar manner. In Ridley Sch. Dist. v. M.R. and J.R., 58 IDELR 271 (3d Cir. 2012), *cert. denied*, 115 LRP 21644, 135 S. Ct. 2809 (2015), the parents of a child with specific learning disabilities argued that there were flaws in the research regarding the OG based reading program the school used. They also argued that none of the studies regarding the program demonstrated that it was effective for students with their child's specific disabilities. The court, relying on the OSEP guidance quoted above, held that "the IDEA does not require a school district to choose the program supported by the optimal level of peer-reviewed research." See also, Brandywine Heights Area Sch. Dist. V. B.M., 69 IDELR 212 (E.D. Pa. 2017).

Additionally, many courts have rejected the notion that an IEP is invalid because it provides an eclectic approach. See Joshua A. by Jorge A. v. Rocklin Uni. Sch. Dist., 52 IDELR 64 (9th Cir. 2009), ruling that the eclectic program proposed for a student with autism was appropriate. The court stated, "This eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable.' 20 U.S.C. §

1414(d)(1)(A)(i)(IV)." See also, K.S. v. Fremont Uni. Sch. Dist., 56 IDELR 190 (9th Cir. 2011); Deal v. Hamilton County Dep't of Educ., 46 IDELR 45 (E.D. Tenn. 2006); A.G. v. Board of Educ. of the Arlington Cent. Sch. Dist., 69 IDELR 210 (S.D.N.Y. 2017).

C. Teacher Qualifications: Finally, the notice of appeal states, "The district is not delivering Orton-Gillingham with fidelity because the requirements of Orton-Gillingham according to their website, [URL removed] to independently remediate a dyslexic student are 100 hours of coursework and 200 hours of supervised practicum. The teacher said to be using this approach has 16 hours of coursework and no supervised practicum so is not delivering Orton-Gillingham with fidelity and not experienced enough to shape any curriculum of the districts [sic] choice to meet the unique and specific needs of a dyslexic student.... What [the investigator] does not mention [in the Complaint Report] is that the International Dyslexia Association (IDA) emphasizes and is even more important is the teacher training required and receiving passing scores on a supervised practicum. [URL removed] The teacher assigned to be the main tutor for _____ has not had a supervised practicum, nor does she meet the requirements listed."

As cited on pages 6 and 7 of the Complaint Report, the IDEA and its implementing regulations at 34 C.F.R. 300.156(a) require that "The SEA [State Education Agency] must establish and maintain qualifications [emphasis added] to ensure that personnel necessary to carry out the purposes of [the IDEA] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." Therefore, the authority and responsibility for setting forth requirements for teacher qualifications and training in Kansas lies with the Kansas State Department of Education, not an outside organization such as the Academy of Orton-Gillingham Practitioners and Educators or the International Dyslexia Association. The regulations further specify at 34 C.F.R. 300.156(c) that the SEA established qualifications described in 300.156(a) must ensure that each public school special education teacher in the state meets three requirements: "(i) Has obtained full State certification as a special education teacher, or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher; (ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) Holds a bachelor's degree."

The Appeal Committee finds that the investigator properly concluded that the personnel providing reading services to the student meet the IDEA and Kansas special education teacher qualification requirements. On page 10 of the Complaint Report, the

investigator found, “This investigation has determined that the teachers assigned by the district to provide the services specified in the student’s IEP meet state and district requirements with regard to licensure, certification, preparation and training.”

## CONCLUSION

The Appeal Committee concludes that the Complaint Report is sustained on Issue 1.

This is the final decision on this matter. There is no further appeal. This Final Report is issued this 6th day of December, 2019.

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Melissa Valenza

_____
Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON OCTOBER 28, 2019

DATE OF REPORT: NOVEMBER 27, 2019

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

The complaint is against USD #___ (_____ Public Schools) who contracts with the _____ Cooperative in Education (____) to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on October 28, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on November 27, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on November 18, 2019 as part of the investigation process. USD #___ made the following school district staff available for an interview on November 20, 2019:

___ ____, Director of ____
_____ _____, School Psychologist
_____ _____, School Psychologist Paraprofessional
_____ _____, Behavior Specialist
_____ _____, Building Principal

_____ _____, Assistant Building Principal
_____ _____, Speech/Language Pathologist
_____ _____, Special Education Resource Teacher
_____ _____, Occupational Therapist (OT)
____ _____, Assistant Building Principal
_____ _____, Special Education Life Skills Teacher

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- Individualized Education Program (IEP) dated April 26, 2019
- Prior Written Notice (PWN) for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated April 26, 2019
- 2019-2020 Daily Attendance Sheet for OT
- Agenda/Discussion Notes of OT Consultation with school staff dated August 30, September 13, September 19, and October 10, 2019
- Copies of five different versions of a daily point sheet
- Four completed copies of daily point sheets
- Photo of student's folder with point sheet in folder pocket
- Photo of the student's daily visual schedule on a clipboard
- Photo of the classroom schedule posted on the wall
- Photo of the student's schedule during the reading block posted on the Promethean board
- Photo of the student's schedule during the math block posted on the Promethean board
- Written Response to the Allegations compiled by ___ ____, Director of the _____ Cooperative in Education
- Letter written by the student's sister dated October 29, 2019
- Journal entries written by the parent dated September 19, October 19, October 21, October 23, October 28, November 4, and November 5, 2019
- Letter to the parent written by _____ _____, Special Education Resource Teacher dated November 15, 2019

## Background Information

This investigation involves an 11-year-old male who is currently enrolled in the fifth grade at _____ Elementary School in USD #___. The parent reports the student has a medical diagnosis of Autism Spectrum Disorder - Level II with accompanying Intellectual Disability and Attention Deficit Hyperactivity Disorder. The student was initially evaluated at the end of first grade and found eligible for special education and related services due to an exceptionality of Developmental Delay on May 12, 2016. At the end of second grade, the student was reevaluated and met the eligibility criteria to be identified with a primary exceptionality of Intellectual Disability and a secondary exceptionality of Emotional Disturbance on May 1, 2017. The student has continuously received special education and related services through USD #___ from his initial eligibility through his current grade placement.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) during the 2019-20 school year, specifically by:

1) Not using visual aids
2) Not using decreased verbalization and maintaining 1:1 adult:student engagement
3) Not using a reward system or daily point system
4) Not providing choices
5) Not contacting the parent on a daily basis and
6) Not providing occupational therapy (OT) services.

Parent Position

The parent alleges USD #___ failed to implement the student's IEP and believes that this lack of implementation has denied the student the necessary supports to be successful in school. According to the parent, the student was successful in the third and fourth grades because he was receiving his special education and related services. The parent reported the student is now experiencing an increased level of frustration and emotional distress at school resulting in an escalation of inappropriate behavior in the school setting. She indicated that the student tells her, "They are so mean to me at school, I just want to hang myself at school." The student's sister shared that she believes that the problems the student is experiencing in school "have less to do with the student and more to do with the environment and the people he is around while he is at school."

The parent shared six specific allegations of USD #___'s failure to implement the IEP:

1) Not using visual aids

The parent stated that the school staff did not even attempt to use visual aids until she mentioned it following the student's meltdown on September 18, 2019. The parent believed this meltdown was a result of the student having a hard time with classroom transitions.

2) Not using decreased verbalization and maintaining 1:1 adult:student engagement

The parent reported the student's teacher and paraprofessionals get up and walk away from the student resulting in increased frustration. In addition, she stated the paraprofessionals and teachers who work with the student switch frequently during the school day. The parent believes the student needs the consistency of a paraprofessional or special education teacher present at all times who is willing to help engage the student. The parent also believes the student's inappropriate behavior is triggered by too many verbalizations, by how loud staff talk to the student, and by the noise level in the classroom which cause a sensory overload.

3) Not using a reward system or daily point system

The parent reported there was no reward system or daily point system until mid-October. The parent reported the first time she saw a point sheet was on October 19, 2019.

4) Not providing choices

The parent reports the student is not given choices and, that when he does want choices, he is disciplined for them. She indicated that according to the student, he is only allowed to play on the computers during a break.

5) Not contacting the parent on a daily basis

The parent stated that the IEP requires that she be contacted about the student's day; however, she has only been contacted about the student's inappropriate behavior at school this school year.

6) Not providing occupational therapy (OT) services

The parent stated that the student receives OT services outside of the school setting and she believes that student needs to see the school OT as well. She indicated that according to the student, he does not see the OT in school this school year.

## School District Position

USD #___ reported the student's current IEP was developed on April 26, 2019. School staff dispute the parent's allegations and believe the student's IEP is being implemented as written during the 2019-20 school year.

School staff acknowledged that the IEP includes the use of visual aids. Staff reported multiple types of visual schedules are provided on a daily basis for the student in the classroom as a visual means for the student to predict his routine. The student has a daily visual schedule on a clipboard that he marks off with a marker throughout the school day, a visual schedule posted on the wall showing the classroom schedule as well as specific daily schedules for both the reading and math instructional blocks showing the specific stations each student in the class is assigned to complete.

USD #___ also acknowledged that the IEP includes the use of a daily point system. The daily point sheet that was used during the 2018-19 school year was initially used at the beginning of the 2019-20 school year; however, the student tore up several of these daily point cards. School staff indicated that the student's daily point sheet was updated on August 19, August 30, September 10, October 11, and October 21, 2019 in an effort to find a system that works effectively for the student. The student's current daily point sheet targets the following behaviors 1) I can do my work 2) I can stay in my classroom 3) I can keep my body safe. He is able to earn points for displaying these behaviors throughout the school day.

USD #___ acknowledged that the IEP also includes the use of a reward system and giving choices. The student choses the reward he would like to earn each day. School staff noted that the student provided input into the choices for possible rewards earned through the daily point sheets. These rewards currently include lunch with specific staff members, indoor recess on the computer, an extra break, ledger money and classroom reward box. The student is also able to add other choices to the reward list. Staff noted that the student will still destroy his daily point sheet when he knows he will not get a reward at the end of the school day.

USD #___ indicated that the current IEP does not include a requirement for decreased verbalization or 1:1 adult:student engagement. Regardless, USD #___ reported that school staff have been trained to not engage in power struggles with children with oppositional behavior. The current IEP does not require the use of any supplementary aids and services for the student. USD #___ noted the current IEP does require 235 minutes per day of specialized instruction in the special education setting and 90 minutes per day of specialized instruction in the general education setting and stated that school staff are providing these services.

USD #___ reported that daily communication with the parent is not included in the student's current IEP although it has been required in the past. School staff explained that as students approach the transition to middle school, the general practice in USD #___ is to encourage increased independence by having the

student communicating more with adults, including their parent. This practice often results in the need for less frequent communication between the teacher and parent.

USD #___ stated the current IEP includes indirect OT services for 20 minutes per month and reported these services have been provided during the 2019-20 school year. The indirect OT services are described as "a collaboration amongst staff in regards to the student's sensory processing and visual-motor/handwriting skills throughout the school day." School staff indicated that the student's previous IEPs did include direct OT services to address motor skill goals; however, the student met all of his motor skill goals during the 2018-19 school year and per discussion at the April 26, 2019 IEP team meeting, those direct services were proposed to be removed. The parent was provided with appropriate prior written notice of this proposed change and she signed consent for this material change in services to occur on April 26, 2019.

## Applicable Regulations and Findings

Federal regulations at 34 C.F.R. 300.323(c)(2) each school district must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, there was only one IEP in effect during the 2019-20 school year. That IEP was developed at an IEP team meeting held on April 26, 2019 with the parent in attendance. The following findings are noted in regards to each specific allegation made by the parent:

1) Not using visual aids

The April 26, 2019 IEP includes an accommodation stating "use of visual reminders and prompts." Interviews and documentation show USD #___ has provided the student with multiple visual schedules during the 2019-20 school year which serve as visual reminders and prompts. These include a daily visual schedule on a clipboard that the student marks off with a marker throughout the school day, a visual schedule posted on the wall showing the classroom schedule and specific daily schedules for both the reading and math

instructional blocks showing the specific stations each student in the class is assigned to complete.

2) Not using decreased verbalization and maintaining 1:1 adult:student engagement

This requirement is not included in the April 26, 2019 IEP.

3) Not using a reward system or daily point system

The April 26, 2019 IEP includes an accommodation stating "Daily Point Sheet." In addition, the Positive Behavior Interventions and Supports also includes the use of a "Daily Point Sheet." Interviews and documentation showed that USD #___ has provided the student with multiple versions of daily point sheets to use during the 2019-20 school year.

4) Not providing choices

The Positive Behavior Interventions and Supports included in the April 26, 2019 IEP includes the statement "Giving Choices" which is described as "The student can be given choices so that he has a sense of control of his activities." Interviews and documentation showed that USD #___ has provided the student opportunities to make choices by having the student select the reward he is working to earn each day through the daily point sheet. In addition, the student's preferred activities and input were used to create the choices included in the reward list.

5) Not contacting the parent on a daily basis

This requirement is not included in the April 26, 2019 IEP.

6) Not providing occupational therapy (OT) services

An IEP team meeting was held on April 26, 2019 and the IEP team proposed changing the OT services from weekly direct services to monthly indirect services. USD #___ provided the parent with appropriate prior written notice and obtained written consent for this material change of services. The April 26, 2019 IEP includes the related service of 20 minutes per month of indirect OT services. Interviews and documentation showed that USD #___ has provided the indirect OT services during the 2019-20 school year.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to implement the student's IEP during the 2019-20 school year is not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON OCTOBER 27, 2019

DATE OF REPORT: NOVEMBER 27, 2019

This report is in response to a complaint filed with our office by ___ _____, education advocate, on behalf of _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student" and ___ _____ will be referred to as the "education advocate."

The complaint is against USD #___ (_____ Public Schools). In the remainder of this report, "school district" shall refer to USD #___.

The complaint was received by the Kansas State Department of Education on October 27, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on November 27, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the education advocate by telephone on November 5, 2019. ___ _____, Mediation / Due Process Supervisor for USD #___ was interviewed by telephone on November 20, 2019.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Email dated August 14, 2019 written by the education advocate to _____ _____, Special Education Teacher
- Email dated October 10, 2019 written by Mr. _____ to the education advocate

- Email dated October 11, 2019 (11:29 a.m.) written by the education advocate to ____ _____, School Social Worker
- Email dated October 11, 2019 (11:35 a.m.) written by Ms. _____ to the education advocate
- Email dated October 11, 2019 (11:43 a.m.) written by the education advocate to Ms. _____
- Email dated October 14, 2019 written by the education advocate to Ms. _____
- Email dated October 15, 2019 (9:57 a.m.) written by Ms. _____ to the education advocate
- Email dated October 15, 2019 (2:58 p.m.) written by the education advocate to Ms. _____
- Email dated October 15, 2019 (7:46 p.m.) written by Ms. _____ to the education advocate
- Notification of Meeting dated October 15, 2019 scheduling an IEP team meeting for October 25, 2019
- Email dated October 16, 2019 (9:22 a.m.) written by the education advocate to Ms. _____
- Email dated October 16, 2019 (11:01 a.m.) written by Ms. _____ to the education advocate
- Email dated October 17, 2019 (12:44 p.m.) written by _____ _____, Director of Behavior, to the education advocate
- Email dated October 17, 2019 (2:40 p.m.) written by the education advocate to Ms. _____
- Email dated October 17, 2019 (2:52 p.m.) written by Ms. _____ to the education advocate
- Formal Complaint written by the education advocate dated October 20, 2019
- Amendment to the student's February 22, 2019 IEP dated October 25, 2019
- IEP Amendment Form dated October 25, 2019 and signed by the education advocate
- Prior Written Notice for Identification, Initial Services, Placement, Change In Services, Change Of Placement, And Request For

Consent dated October 25, 2019 and signed by the education advocate

- Email dated November 15, 2019 written by ___ _____, Mediation / Due Process Supervisor, to the complaint investigator
- Notice of Meeting Procedures for USD #___ dated July 2019
- Amending a Current IEP Procedures for USD #___ dated July 2019

## Background Information

This investigation involves an 11-year-old male who receives special education services due to an exceptionality of Emotional Disturbance. The student resides with a foster family within the boundaries of USD #___ and has an education advocate. The student transferred into USD #___ on March 22, 2019 while in fourth grade. The student had an IEP in effect from his previous school district and was assigned to the _____ _____ Elementary School for the remainder of the 2018-19 school year. At the beginning of the 2019-20 school year, the student was assigned to a Positive Behavior Support (PBS) classroom at _____ Elementary School.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to follow appropriate procedures to conduct an IEP team meeting for the student in October 2019.

### Finding of Facts

The education advocate reported she attended a meeting with staff at _____ Elementary School on October 14, 2019 to discuss concerns with the student's

behavior. Because of this meeting, the education advocate stated that the school staff wanted to schedule a meeting for October 25, 2019 to discuss an IEP amendment to change the student's placement back to _____ _____ Elementary School.

However, ____ _____, School Social Worker, informed the education advocate that the meeting was changed to an annual IEP review in an email and Notification of Meeting dated October 15, 2019. Ms. _____ explained, "I reviewed our meeting with our District Behavior Director, _____ _____. She was in agreement as well, but suggested with all the updated data related to his behavioral goals, that we do an annual IEP rather than an amendment. We agree that would be best practice. It would still look very similar to the amendment just less signatures."

At first, the education advocate was in agreement with conducting an annual IEP team meeting but then changed her mind. She was concerned that the meeting was being scheduled for a shorter time due to her other meeting commitments on October 25, 2019. In addition, she indicated that she was already in agreement with the district's proposal to change the student's placement back to the alternative school and didn't think it was a good idea to have the IEP team from _____ Elementary School write an IEP for the IEP team at _____ _____ Elementary School to implement.

The education advocate sent an email to Ms. _____ on October 15, 2019 stating, "After thinking about it, I don't want to do an IEP meeting. I have no objection to moving the student from the PBS classroom, but find that schools writing IEPs knowing they won't be the ones implementing just makes for more meetings."

Ms. _____ responded in another email dated October 15, 2019 stating, "Not attending is within your educational rights, although we would greatly appreciate any form of your participations even if that was by phone. Since this was initially a mutually agreed upon time and date, we still plan to hold the meeting on the first attempt. However, if you don't attend I will send you copies digitally for your records, as well the documents that require an educational advocate signature to initiate the changes."

Ms. _____ emailed the education advocate on October 16, 2019 to further respond to the advocate's reasons for only wanting to discuss an amendment at the IEP team meeting on October 25, 2019. Ms. _____ explained, "Our team has compiled a lot of data and observations throughout the school year to help with the IEP process." She indicated that the social worker, administration and campus support staff at _____ _____ Elementary School had been updated about the situation and invited to the meeting. Ms. _____ stated that she had also visited with the principal and district behavior director to determine how to respond to the education advocate's request. Ms. Godinez wrote, "They made the choice that this needs to be an annual IEP with the 10 days notice we sent on 10/25/19."

On October 17, 2019, the education advocate contacted ___ _____, Mediation / Due Process Supervisor regarding the situation. The education advocate shared her concerns related to being told the IEP team meeting would be held without her with only one attempt to arrange a mutually agreeable time. In addition, she communicated her frustration with the school staff's insistence that the change to the student's IEP be made through an IEP team meeting and annual IEP review rather through an amendment to the current IEP.

Ms. _____ reported she investigated the education advocate's concerns in regards to holding an annual IEP review rather than creating an amendment to the current IEP that same day by speaking to the district director of behavior, _____ _____. She learned that Ms. _____ and the principal were following the district's practice to conduct an annual IEP review in order to make significant changes to a student's IEP. Ms. _____ reviewed the amendment process allowed in the IDEA with Ms. _____ and suggested that the IEP team consider amending the student's IEP at the October 25, 2019 meeting.

Following this discussion, Ms. _____ sent the education advocate an email stating:

> "You are right that this type of move (PBS to Alternative school) legally can happen by amendment. I personally, like for our teams to make these moves through the IEP process just because the team usually is needed to make several changes to the document

> and so best practice would be to go ahead and update the entire plan. However, if you prefer the team to do this through an amendment, I will direct them to do it that way. I am sorry it feels like the team is being rude. I will certainly be addressing this issue with this team as well. Please let me know how you would like to proceed."

The education advocate responded to Ms. _____'s email on October 17, 2019 stating that she preferred to make the proposed change through an IEP amendment. Interviews and documentation show the student's IEP was amended at the IEP team meeting held on October 25, 2019.

Ms. _____ also investigated the education advocate's concerns that the school staff told her the student's IEP team meeting would be held without her participation on the first attempt to schedule the meeting at a mutually agreed upon date and time. Ms. _____ visited with the school social worker, Ms. _____ regarding the situation and learned that Student Support Services had told the social worker that such action was in compliance with special education statutes and regulations.

Ms. _____ provided Ms. _____ with a copy of the Notice of Meeting (NOM) Procedures for USD #___ dated July 2019 and discussed how these procedures applied to this situation and to other scenarios that might occur. Ms. _____ shared the same NOM Procedures document at the Student Support Services staff meeting held on November 6, 2019.

Ms. Godsey reported that all social workers, special education teachers, school psychologists, and speech/language pathologists employed by USD #___ are required to attend one of the eight full day IEP Boot Camps during the 2019-20 school year. The Kansas Technical Assistance and Support Network (TASN), in collaboration with district special education leadership, are providing the IEP Boot Camp as an intensive training in state and federal statutes and regulations governing special education. Ms. _____ stated, "The district will continue to engage in its own corrective actions to address the complaint at a district-wide level to prevent further such incidents."

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.324(a)(4) and 300.324(a)(6), allow for changes to be made to the current IEP by amending the IEP rather than by redrafting the entire document either with or without an IEP Team Meeting. The changes may be made by the entire IEP Team at an IEP Team Meeting. Alternatively, the changes may be made without a meeting if the parent of a child with a disability and the school district representative agree not to convene an IEP Team Meeting for the purposes of making the changes and instead develop a written document to amend or modify the child's current IEP.

Federal regulations at 34 C.F.R. 300.322(a) require school districts to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place.

Federal regulations at 34 C.F.R. 300.322(d) allow school districts to conduct an IEP team meeting without a parent in attendance if the school is unable to convince the parents that they should attend., The school must keep a record of its attempts to arrange a mutually agreed on time and place to secure the parents' participation.

Kansas regulations at K.A.R. 91-40-17(e)(1) allow a school to conduct an IEP team meeting without parental participation if the school, despite repeated attempts, has been unable to contact the parent or to convince them that they should participate. K.A.R. 91-40-17(e)(2) requires the school district's record of attempts to include at least two of the following:

(A) detailed records of telephone calls made or attempted, including the date, time, person making the calls, and the results of those calls;

(B) detailed records of visits made to the parents' home or place of employment, including the date, time, person making the visit, and the results of the visits;

(C) copies of correspondence sent to the parents and any responses received; and

(D) detailed records of any other method attempted to contact the parents and the results of that attempt.

This means school districts must make at least two attempts, using at least two methods of communication, to involve the parents in the IEP team meeting.

In this case, USD #___ staff did provide the education advocate with incorrect information regarding holding an IEP team meeting without the parent in attendance. School staff were initially incorrect in their understanding of the procedure that requires school districts to make at least two attempts, using at least two methods of communication, to involve the parents in the IEP team meeting. This misunderstanding was corrected through a review of the district's Notice of Meeting Procedures dated July 2019 with the school social worker and the Student Support Services staff. Interviews and documentation found that the education advocate did attend the IEP team meeting on October 25, 2019 and was provided with the opportunity to participate in the IEP process.

In addition, USD #___ staff were initially unclear regarding the amendment procedures being one of the options available in the IEP process and believed that the IEP team meeting must be for the purposes of an "annual" review to be a "best practice." The IDEA does not include a description of a "best practice" but does lay out minimum procedures to be followed for legal compliance. An IEP team meeting must be held at least annually to review and revise the IEP to determine whether annual goals are being met and to address any lack of expected progress, results of any reevaluation, information provided by the parent, the child's anticipated needs, or other matters (34 C.F.R. 300.324(b)). In making changes to a child's IEP after the annual IEP team meeting for a school year, the IDEA does allow other procedures to be used to review and revise an IEP:

1) The parent and LEA agree to develop a written document to amend or modify the student's current IEP without a meeting and without redrafting the entire IEP. The LEA then informs the IEP team of these changes. See C.F.R. 300.324(a)(4).

2) Changes to the current IEP may be made by the entire IEP team at an IEP team meeting by amending the IEP rather than redrafting the entire IEP.. See C.F.R. 300.324(a)(6).

This misunderstanding by staff was corrected through a discussion and review of the IDEA procedures between Ms. _____ and district director of behavior who then shared the information with the student's IEP team. Interviews and documentation found that an amendment to the student's IEP was agreed upon at the IEP team meeting held on October 25, 2019.

It is noted that USD #___ currently has a district-wide plan in place to educate key staff involved in the IEP process regarding the requirements of the IDEA.

Based on the foregoing, the allegations of a violation of special education statutes and regulations of failing to follow appropriate procedures to conduct an IEP team meeting for the student in October 2019 by not ensuring that parents have the opportunity to participate in the IEP team meeting and not following appropriate procedures to allow for changes to be made to the current IEP by amending the IEP rather than by redrafting the entire document are not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
BLUE VALLEY PUBLIC SCHOOLS, USD #___
ON OCTOBER 28, 2019

DATE OF REPORT: NOVEMBER 27, 2019

This report is in response to a complaint filed with our office by _____ _____ on behalf of her 18-year old son, _____. Ms. _____ has Power of Attorney for _____ who 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 ____ _____, Assistant Superintendent of Special Education for _____ Public Schools, on November 4 and 18, 2019. The investigator spoke by telephone with the parent on November 19, 2019.

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

- IEP for the student dated September 19, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 6, 2019
- Letter dated November 12, 2019 from the Dispute Resolution Coordinator for Special Education and Title Services to the parent and the district

## Background Information

This investigation involves an 18-year-old student who is enrolled in the 12th grade in his neighborhood high school.

The student was first identified as an exceptional child during his freshman year. According to the parent, the student was, during his 8th grade year, determined by Children's Mercy Hospital to have dyslexia and dysgraphia. The student's initial placement in special education was, however, based upon emotional factors associated with anxiety which resulted from the student being bullied in the private parochial school he had been attending.

In February of 2009, the student was diagnosed with Attention Deficit Hyperactivity Disorder. In April of 2016, he was diagnosed with Bipolar Disorder.

## Issues

In her complaint, the parent raised four issues:

> Issue One: Because the district did not include basic reading, reading comprehension, reading fluency, written language, and math reasoning or math operations when determining the eligibility of the student for special education services, the student's current IEP lacks adequate accommodations, modifications, and services.
>
> Issue Two: The district failed to conduct a re-evaluation of the student when he was still struggling after the implementation of his initial IEP and after the parent requested re-evaluation this school year. As a result, the student's diagnosed learning disabilities have not been properly addressed.
>
> Issue Three: The Individuals with Disabilities Education Act (IDEA) requires schools to re-evaluate students with IEPs at least once every three years or if they are failing to make progress under a current IEP or if requested by parents. By refusing to evaluate the student's Communicative Skills, the district is not acknowledging the student's dyslexia diagnosis.

Federal regulations, at 34 C.F.R. 300.152(a)(3), provide school districts with the right to propose a resolution to a special education complaint. The district exercised that right and submitted a proposed resolution to the Kansas State Department of Education (KSDE) on November 8, 2019.

On November 12, 2019, the Dispute Resolution Coordinator for Special Education and Title Services notified the parent and the district that KSDE had accepted the district's proposal for the resolution of Issue One, Issue Two, and Issue Three and stated that

these issues would not be investigated further or included in the final report developed by this investigator.

The resolution proposed by the district includes the provision of an Independent Educational Evaluation (IEE) at district expense to be conducted by a private, licensed psychologist. By report of the parent, that evaluation will be completed by December 16, 2019.

In her letter of November 12, 2019, the Dispute Resolution Coordinator stated that the district's proposal for the resolution of the parent's fourth issue was not accepted, and that issue would be investigated.

> Issue Four: District staff is not trained or certified to provide a multi-sensory, peer-reviewed, research-based, data driven approach to the student's special education instruction that is recognized as appropriate for remediation of dyslexia.

## Parent's Position

The parent asserts that the student has not been receiving his special education services from a teacher who has been trained in research-based structured literacy reading instruction, nor has a teacher with such training been supervising the provision of the student's special education services. It is the position of the parent that because the student's special education teacher lacks specific training in the area of dyslexia, she does not understand the student's disability and the impact that disability has on language-based learning and is therefore unable to develop appropriate goals for the student or to implement appropriate, individualized remediation.

The parent further contends that, during the week of November 11, 2019, the Kansas State Board of Education passed new regulations regarding services to students diagnosed with dyslexia that would inform decision-making on this issue.

## District's Position

The district contends that neither state statute nor KSDE teacher licensing regulations require that special education staff be specifically trained in a "multisensory approach."

The district further asserts that pedagogy, such as multisensory approach, is not a consent item under IDEA.

## Applicable Laws and Regulations

Each school district must ensure that all personnel necessary to carry out the requirements of IDEA are appropriately and adequately prepared and trained. All special education personnel, as appropriate, shall have the content knowledge and skills to serve children with exceptionalities. This includes special education teachers, related services personnel and paraeducators. School districts must take steps to actively recruit, hire, train, and retain qualified personnel to provide special education and related services to children with disabilities (34 C.F.R. 300.156; 34 C.F.R. 300.207).

Federal regulations implementing the Individuals with Disabilities in Education Act (IDEA) at 34 C.F.R. 156(c) require that the state education agency (KSDE) must ensure that "each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school – (i) Has obtained full State certification as a special education teacher (including certification obtained through an alternate route to certification as a special educator), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher. (ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) Holds at least a bachelor's degree."

Kansas statutes, at K.S.A. 72-3404(j), define a "Special Teacher" as a "person, employed by or under contract with a school district or a state institution to provide special education or related services, who is: (1) Qualified to provide special education or related services to exceptional children as determined pursuant to standards established by the state board."

Regarding instructional methodology, the Office of Special Education Programs (OSEP), which is the office within the United States Department of Education that writes and enforces the federal regulations implementing the IDEA has stated that "the courts have indicated they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability." See *Federal Register*, Vol. 64, p. 12552, March 12, 1999. OSEP repeated this principle when the federal regulations were revised in 2006 after the reauthorization n of IDEA, "There is nothing in the Act [IDEA] that requires an IEP to

include specific instructional methodologies." See *Federal Register*, Vol. 71, p. 46665, August 14, 2006.

Further, in Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), the Supreme Court held that the primary responsibility for choosing instructional methodology is left with the local school district (also see Johnson by Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 316 F. Supp. 2d 960, D. Kan. 2003, 41 IDELR 64 stating that "So long as the court determines that a child's IEP is reasonably developed to provide the child a FAPE, then the court must leave questions of methodology to the school district."). The federal Circuit Courts of Appeal have continued to follow this precedence (see M.M. v. School Bd. Of Miami-Dade County, Fla., 45 IDELR 1 (11th Cir. 2006); Cerra v. Pawling Cent. Sch. Dist., 44 IDELR 89 (2d Cir. 2005); Barnett v. Fairfax County Sch. Bd., 17 IDELR 350 (4th Cir. 1991); Tucker v. Calloway County Bd. Of Educ., 27 IDELR 599 (6th Cir. 1998); Lachman v. Illinois State Bd. Of Educ., 441 IDELR 156 (7th Cir. 1988)). Regarding the selection of staff, see Slama by Slama v. Independent Sch. Dist. No. 258, 259 F. Supp. 2d 880, D. Minn. 2003, 39 IDELR 3 holding that "school districts have the sole discretion to assign staff" and "[a]lthough the Supreme Court [in Rowley] has recognized the importance of parental consultation, and participation in the IEP decision-making process, nothing in the Court's opinions suggest that parents usurp the District's role in selecting its staff to carry out IEP's provisions." Also, see OSEP Letter to Hall, 21 IDELR 58, 1994, stating "While Part B [of the IDEA] does mandate the required components to be included in each child's IEP to ensure that the child's identified educational needs can be addressed, Part B does not expressly mandate that the particular teacher, materials to be used, or instructional methods be included in a student's IEP."

On November 12, 2019, the Kansas State Board of Education approved the recommendations of the Dyslexia Committee for pre-service teacher programs, professional learning, screening and evaluation, and evidence-based reading practices and adopted a definition of dyslexia developed by the International Dyslexia Association (IDA). The KSDE Dyslexia Committee was established for the purpose of evaluating recommendations of the Legislative Task Force on Dyslexia which was created in 2018.

No new regulations – special education or otherwise – were passed by the State Board in November 2019 with regard to dyslexia. The approved recommendations mentioned above involve a number of actions that will take place based on established timelines beginning in July of 2020 with implementation into 2024. These approved recommendations and timelines are in the November 2019 Board Materials, pages 51

through 58, posted at https://www.ksde.org/Board/Kansas-State-Board-of-Education/Agendas-Meeting-Dates-and-Minutes/2019-Meeting-Materials-Minutes.

## Investigative Findings

This investigation has determined that the teacher assigned by the district to provide the services specified in the student's IEP meets state and district requirements with regard to licensure, certification, preparation and training. The teacher holds current certification in the area of Adaptive Special Education for preschool through grade 12.

## Summary and Conclusions

This investigation has determined that the teacher assigned by the district to provide the services specified in the student's IEP meets state and district requirements with regard to licensure, certification, preparation and training.

Special education statutes and regulations do not grant parents the right as a part of the IEP process to dictate either the personnel designated to deliver services to a student or the methodology or materials that will be used in the instruction of the student.

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

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the

date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Unified School District: 20FC___-001

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on October 28, 2019, by _____ _____ and ____ _____, on behalf of their son, ____ _____. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services (SETS) team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on November 27, 2019. That Complaint Report concluded that there was no violation of special education statutes or regulations.

Thereafter, the parents filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the Complaint Report, the parent's notice of appeal, and the district's response to the appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Final Report.

## PRELIMINARY MATTER

Scope of Inquiry: The Appeal Committee limits its inquiry to the one issue properly presented in the appeal (see the section titled "DISCUSSION OF ISSUES ON APPEAL" immediately below for explanation). No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

## DISCUSSION OF ISSUES ON APPEAL

The parent's notice of appeal states that the parent is filing an appeal with regard to issues 1, 2 and 4. The committee notes that, prior to an investigation, the district exercised its right under federal regulations to propose a resolution to the complaint. Special Education and Title Services (SETS) accepted the proposals made regarding

issues 1, 2, and 3. As a result, the investigator conducted an investigation and issued a report regarding only issue 4.

For clarification, the Appeal Committee notes the following:

1. School districts have a right to propose a resolution to complaints against them: 34 C.F.R. § 300.152(a)(3)

2. The state department of education has authority to resolve any special education complaint: 34 C.F.R. § 300.151(a)(1)

3. Complainants have a right to appeal any of the "findings or conclusions of a compliance report..." K.A.R. 91-40-51(f)(1).

In this complaint, all three of these regulations apply; (1) the school district exercised its right to propose a resolution; (2) the State Department of Education exercised its authority to approve the proposed resolutions regarding issues 1, 2, and 3; and (3) because the district's proposals were approved, the Complaint Report did not address issues 1, 2, and 3, and, there were no "findings or conclusions of a compliance report" which could serve as a basis for appeal on issues 1, 2, and 3.

Accordingly, the Appeal Committee will limit its inquiry to Issue 4, as it was the only issue with findings and conclusions addressed in the compliance report issued by the investigator.

In addition, Issue 4 in the original complaint did not allege that the district was not using a curriculum based on peer-reviewed research. Accordingly, the investigator did not investigate that topic, and the Appeal Committee cannot address it on appeal.

ISSUE 4: District staff is not trained or certified to provide a multi-sensory, peer-reviewed, research-based, data driven approach to the student's special education instruction that is recognized as appropriate for remediation of dyslexia.

The IDEA and its implementing regulations at 34 C.F.R. 300.156(a) require that "The SEA [State Education Agency] must establish and maintain qualifications [emphasis added] to ensure that personnel necessary to carry out the purposes of [the IDEA] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." Therefore, the authority and responsibility for setting forth requirements for teacher qualifications

and training in Kansas lies with the Kansas State Department of Education. The regulations further specify at 34 C.F.R. 300.156(c) that the SEA established qualifications described in 300.156(a) must ensure that each public school special education teacher in the state meets three requirements: "(i) Has obtained full State certification as a special education teacher, or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher; (ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) Holds a bachelor's degree."

On page 6 of the Complaint Report, the investigator found that the student's teacher holds current certification in the area of Adaptive Special Education for preschool through grade 12. No evidence was presented during the investigation to suggest otherwise. The Appeal Committee finds that the investigator properly concluded that the teacher assigned by the district to provide the services specified in the student's IEP meets state and district requirements with regard to licensure, certification, preparation, and training.

In their appeal, the parents cite recommendations of the Dyslexia Committee and of the Office of Special Education and Rehabilitative Services, in a "Dear Colleague" letter, dated October 23, 2015. These documents provide general, although valuable, guidance. However, special education complaints must allege a violation of special education statutes or regulations [34 C.F.R. 300.153(b)(1). Accordingly, a complaint, such as this one, may be successful only if a violation of a statute or regulation is substantiated.

## CONCLUSION

The Appeal Committee concludes that the findings and conclusion of the Complaint Report is sustained.

This is the final decision on this matter. There is no further appeal. This Final Report is issued this 17th day of December, 2019.

APPEAL COMMITTEE:

_____
Brian Dempsey

_____
Melissa Valenza

_____
Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON OCTOBER 31, 2019

DATE OF REPORT: NOVEMBER 29, 2019

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

The complaint is against USD #___ (_____ Public Schools) who contracts with the _____ Cooperative _____ (____) to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on October 31, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on November 30, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on November 20, 2019 as part of the investigation process. USD #305 made the following school district staff available for an interview on November 21, 2019:

- ____ _____, Director of Special Education for ____
- _____ _____, Building Coordinator for Special Education at _____ ____ Elementary School
- ____ _____, School Psychologist at _____ ____ Elementary School

- _____ _____, Principal at _____ _____ Elementary School
- _____ _____, Autism / Behavior Consultant at _____ _____ Elementary School
- _____ _____, Special Education Teacher at _____ _____ Elementary School
- _____ _____, General Education Teacher at _____ _____ Elementary School
- ____ _____, Assistant Director of Special Education for _____
- _____ ___, Paraprofessional for the student at _____ _____ Elementary School and _____ Child Care Center
- _____ _____, Attorney for USD #___

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- August 8, 2019 Amendment to the Individualized Education Program (IEP) dated February 19, 2019
- September 19, 2019 Amendment to the IEP dated February 19, 2019
- October 29, 2019 Amendment to the IEP dated February 19, 2019
- Copies the student's daily journal for second semester of the 2018-19 school year (months of January 2019, February 2019, March 2019, April 2019, May 2019, June 2019, and July 2019)
- Copies of the student's daily journal for the 2019-20 school year (months of August 2019, September 2019, October 2019, and November 2019)
- Student Attendance Report for the 2019-20 school year
- Email dated August 30, 2019 to the parent written by _____ _____, Autism/Behavior Consultant at _____ _____ Elementary School
- Email dated September 3, 2019 to Ms. _____ from the parent
- Email dated September 4, 2019 to the parent from Ms. _____
- Email dated September 4, 2019 to Ms. _____ from the parent
- Email dated September 5, 2019 to the parent from Ms. _____ Email dated September 6, 2019 to Ms. _____ from the parent

- Email dated September 9, 2019 to the parent from Ms. _____
- Email dated September 18, 2019 to Ms. _____ from the parent
- Email dated September 19, 2019 to Ms. _____ and ____ _____, Principal at _____ ____ Elementary School, from the parent
- Email dated September 19, 2019 to the parent from Ms. _____
- Email dated September 20, 2019 to the parent from Ms. _____
- Email dated October 17, 2019 between the student's father and _____ _____, Building Coordinator for Special Education at _____ ____ Elementary School
- Email dated October 18, 2019 between the student's father and Ms. _____
- Email dated November 5, 2019 to the parent written by Ms. _____
- September 7, 2018 Amendment to the IEP dated March 2, 2018
- Summary of the September 7, 2018 IEP team meeting written by ____ ____, Assistant Director of Special Education
- Formal Complaint written by the parent dated October 31, 2019
- Response to the Allegation written by ____ _____, USD #___ Attorney, dated November 1, 2019

## Background Information

This investigation involves a 5-year-old male who is currently enrolled in kindergarten at _____ ____ Elementary School in USD #___. Records and interviews found the student is a child with multiple disabilities, a number of medical diagnoses, and sensory processing differences. He has received special education and related services through USD #___ since the age of three due to an exceptionality of Multiple Disabilities.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed

to implement the student's Individualized Education Program (IEP) during the 2019-20 school year, specifically by not reporting behavioral concerns in the daily journal.

Parent Position

The parent reported the student's IEP includes the use of a daily journal as a Supplementary Aid and Service. The parent noted that the journal includes a behavioral section and alleges USD #___ has not followed the IEP because school staff have failed to report critical behavioral concerns in the daily journal. The parent indicated that the student had previously used this same daily journal in the early childhood special education program and that USD #___ had agreed at the August 8, 2019 IEP team meeting to continue its use as the student transitioned into kindergarten.

The parent provided a copy of the student's daily journal with a section titled "Sensory/Behavior/Mobility (ABC info)." The parent also provided multiple copies of the student's daily journal that showed this section as blank.

The parent noted that USD #___ staff have been collecting data documenting the frequency of targeted behavior the student displayed in the classroom since the beginning of the 2019-20 school year. The targeted behaviors in the classroom include yelling/squealing, pinching staff, dropping (sits down onto the floor and does not transition), hitting staff with hand or head, biting staff, and kicking staff. In addition, USD #___ staff collected behavioral data on the amount of time the student spent out of seat (rolling, crawling around on floor). However, the parent reported that USD #___ did not share any of this data in the student's daily journal.

On August 30, 2019, the parent learned, via email from _____ _____, Autism/Behavioral Consultant, that USD #___ staff had been collecting this data . The parent emailed Ms. _____ on September 3, 2019 and requested that USD #___ staff report this data in the student's daily journal stating, "My concern is that we already agreed in the IEP to fully communicate how each day is going in his journal. His frequency of behaviors should be reported daily in his Journal.

There has been nothing written in his behavior section of his journal since school started with the exception of two injuries that occurred in the classroom. The IEP team should already be aware that we are reporting all behavior daily. I advocated heavily for this, it's in the IEP and it's not happening."

The parent reported that USD #___ staff still did not provide this data in the student's daily journal. She received the following explanation from Ms. _____ in an email dated September 9. 2019:

> We are following the procedures listed currently in the Ziggurat as well as under accommodations (#1, 19, 21-22, 24-26) that were added as listed in his IEP that we had previously discussed and you had given consent to for managing his behaviors. I am not always at _____, so it is difficult for us to have all the data added up and sent home in the notebook. I usually swing by and pick it up, that is why you get it later . . . It is not my intention to neglect the behavior box, but was trying to make it easier for data to be taken on the go throughout the day on a separate sheet of paper.

The parent acknowledged that she did receive behavior data charts via emails but noted that these were not provided on a daily basis and were not provided in the format of antecedent-behavior-consequence (A-B-C) data as required on the daily journal form.

The parent stated that the intent of the daily journal is to coordinate the student's information for medical and behavioral issues. The parent was concerned that the data USD #___ staff collected and recorded on the behavior charts did not match the data USD #___ reported on the student's daily journal. She believes it was the intention of USD #___ staff to collect data that would support changing the student's services and placement to a more restrictive setting.

## School District Position

USD #___ disputes the parent's allegation that the district is not implementing the IEP as written by not reporting behavioral concerns in the daily journal. The school district notes that, while the student's IEPs include a requirement for the

use of a daily communication journal, there is no requirement for this journal to include behavior concerns. USD #___ maintains that the format of the journal has remained the same over the past two school years and the practice of only reporting unusual behavior or changes in the student's behavior has remained consistent over this timeframe.

USD #___ reported that three IEPs have been in effect for the student during the 2019-20 school year including the August 8, 2019 Amendment to the Individualized Education Program (IEP) dated February 19, 2019; the September 19, 2019 Amendment to the IEP dated February 19, 2019; and the October 29, 2019 Amendment to the IEP dated February 19, 2019. USD #___ staff acknowledged that all three of these IEPs include the following Supplementary Aid and Service:

> Beginning 02/19/19, the school will participate daily in the use of a shared communication journal for the student. The journal will be completed by staff while at the Childcare setting or educational setting to facilitate communication between the parent, child care agency, special education staff and general education staff.

School staff reported this same Supplementary Aid and Service was also included in the September 7, 2018 Amendment to the IEP dated March 2, 2018 that was in effect for the 2018-19 school year when the student received early childhood special education at the _____ Child Care Center. The student's daily journal served as a means of communication between school staff, daycare staff and the parent.

School staff noted that the format of the daily journal has been the same for both the 2018-19 and 2019-20 school years and does include a section for recording information related to "Sensory/Behavior/Mobility (ABC info)."

____ ____, Assistant Director of Special Education at ____, reported that the format of the daily journal was discussed at two meeting in the fall of the 2018-19 school year. The first time was at a staffing held on August 13, 2018 prior to the student receiving early childhood special education and related services at

the _____ Child Care Center. At this meeting, the parent requested that a daily communication log be used to facilitate communication between home, school, and the childcare center. The parent also provided a recommendation for the format of the daily communication journal that included diet, therapy services, consultation services, sensory, behavior, and mobility. USD #___ staff agreed with the concept of a daily communication system but stated that further discussion would need to take place at the IEP team meeting.

Mr. ___ reported the IEP team met on September 7, 2018 with the parent in attendance. The IEP team discussed the parent's request for the use of a communication journal and agreed that this would be a shared communication system with both parent and staff providing information regarding the student. USD #___ presented a format/template that incorporated the areas recommended by the parent but altered by the school team into what was believed to be a more usable, efficient and practical way to accomplish the goal of communicating about the student between school and home.

Mr. ___ reported that the parent wanted to discuss the specifics for the format but he reiterated, "We're agreeing to participate in open communication with a journal. We will participate in the process but not include specifications for the document itself."

USD #___ staff reported that the IEP team met on August 8, 2019 to discuss the student's transition into kindergarten. The IEP team amended the February 9, 2019 IEP, but there was no change made to the Supplementary Aid and Service to participate daily in the use of a shared communication journal for the student. School staff indicated that the IEP Team did not change this Supplementary Aid and Service at any of the subsequent IEP team meetings held on September 19, 2019 and October 29, 2019.

USD #___ staff reported that _____ ___, Paraprofessional, has completed the student's daily journal since January 2019 when she began working with the student at the _____ Child Care Center. Ms. ___ subsequently transitioned with the student to kindergarten at _____ ____ Elementary School and continues

to complete the student's daily journal. Ms. ___ reported that she only notes something about behavior in the Sensory/Behavior/Mobility box on the communication log if:

1) the behavior seemed to be unusual or out of the ordinary for the student,
2) he injured himself while at school,
3) he started having new behaviors that she had not seen before, or
4) it seemed like he was not feeling well.

USD #___ staff provided this investigator with copies of the student's daily journals for the second semester of the 2018-19 school year (the months of January 2019, February 2019, March 2019, April 2019, May 2019, June 2019, and July 2019). USD #___ provided this investigator with copies of the student's daily journal for all days the student was in attendance during the 2019-20 school year (the months of August 2019, September 2019, October 2019, and November 2019).

These journals included some days where USD #___ staff made comments in the Sensory/Behavior/Mobility box and other days when staff left the box empty. This pattern was found across both the 2018-19 and 2019-20 school years.

## Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, all of the IEPs in effect during the 2019-20 school year included the following Supplementary Aid and Service:

> Beginning 02/19/19, the school will participate daily in the use of a shared communication journal for the student. The journal will be completed by staff while at the Childcare setting or educational

setting to facilitate communication between the parent, child care agency, special education staff and general education staff.

The parent asserts that because the format of the student's daily journal includes a "Sensory/Behavior/Mobility (ABC info)" box, school staff are required to provide data in that area on a daily basis. However, interviews and documentation showed USD #___ staff and the parent discussed the daily journal at the September 7, 2018 IEP team meeting and the district staff stated, "We're agreeing to participate in open communication with a journal. We will participate in the process but not include specifications for the document itself."

Documentation and interviews found the format of the student's daily journal was the same in the 2018-19 and the 2019-20 school years. It was noted that the same staff person completed the student's daily journal beginning in January 2019 and continuing to the present time. That staff person only reported unusual behavior or changes in the student's behavior in the "Sensory/Behavior/Mobility (ABC info)" box. A review of the student's daily journals from both school years showed a practice where some days had comments written in the box and other days when staff left the box empty. It is clear that the practice of USD #___ staff has remained consistent over the 2018-19 and 2019-20 school years in regards to what is included in the student's daily journal.

It is noted that none of the student's IEPs specify what information must be included in the shared communication journal. The only requirement is that a journal is completed by staff in the educational setting and shared daily between school and home. Documentation showed USD #___ staff participated daily in the use of a shared communication journal for the student during the 2019-20 school year.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to implement the student's IEP during the 2019-20 school year is not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON NOVEMBER 18, 2019

DATE OF REPORT: DECEMBER 18, 2019

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

The complaint is against USD #___ who contracts with the _____ Cooperative to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education on November 18, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on December 18, 2019.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on December 6, 2019 as part of the investigation process.

____ ____, School Psychologist for _____ Elementary School in USD #___, was interviewed on December 6, 2019. ___ _____, Director of Special Education at _____ Cooperative (_____), was interviewed on December 9, 2019.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #___:

- Copy of the Psychological Evaluation written by Lauren Spears, Psychologist at Neuroeducational Associates
- Email dated October 15, 2019 from Dr. Spears, to ____ ____, Administrative Assistant at _____ Cooperative (_____) with a copy of the independent educational evaluation report attached
- Email dated October 20, 2019 from the parent to ____ _____, Director of Special Education at _____, and _____ _____, Superintendent of USD #___, requesting an IEP based on the results of the independent educational evaluation (IEE)
- Email dated October 31, 2019 from the parent to Mr. _____ and Mr. _____ checking the status of the request made on October 20, 2019
- Email dated November 5, 2019 at 12:39 p.m. from the parent to Mr. _____ and Mr. _____ again checking the status of the request made on October 20, 2019
- Email dated November 5, 2019 at 1:05 p.m. from Mr. _____ to the parent referring him to the building level staff
- Email date November 5, 2019 at 2:58 p.m. from Mr. _____ to the parent indicating he will provide an update soon
- Email dated November 6, 2019 from Mr. _____ to the parent stating a document is being mailed that will need a signature and that a meeting will be scheduled once the document is received
- Prior Written Notice (PWN) mailed to the parent on November 8, 2019 proposing a reevaluation and signed by the parent on November 11, 2019
- Notice of Meeting dated November 18, 2019 scheduling a meeting to consider the IEE

- Email dated November 23, 2019 from _____ _____, School Psychologist, to the parent confirming the date and time of an eligibility determination meeting
- Multidisciplinary Staffing Summary dated November 25, 2019
- Evaluation/Reevaluation Eligibility Report dated November 25, 2019
- Email dated December 10, 2019 written by Ms. _____ to the parent arranging an IEP team meeting
- Timeline of events dated December 11, 2019 written by Ms. _____
- USD #___ School Calendar for the 2019-20 school year

## Background Information

This investigation involves a male student who is enrolled in the 6th grade at _____ Elementary School in USD #___ during the 2019-20 school year. He has attended USD #___ since second semester of 2nd grade. Per parent report, the student has medical diagnoses of oppositional defiant disorder (ODD), attention deficit hyperactivity disorder (ADHD), and depression. USD #___ conducted an initial special education evaluation during the first semester of the 2018-19 school year resulting in a determination that the student was not eligible for special education services on January 17, 2019. The parent did not agree with the evaluation provided by the district and requested an independent educational evaluation (IEE) on March 4, 2019. USD #___ contracted with Lauren Spears, Psychologist at Neuroeducational Associates, to conduct the IEE.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to respond to the October 20, 2019 parent request for a meeting to consider the results of an independent educational evaluation (IEE) of the student.

## Parent Position

The parent believes USD #___ failed to respond to their request for an IEP for the student based on the results of the IEE report in a timely manner. An IEE paid for by the district was completed and the IEE report was sent to the district on October 15, 2019. The parent noted their request to consider the IEE in determining eligibility for an IEP was made on October 20, 2019 in writing to ____ _____, Director of Special Education at _____, and _____ ____, Superintendent of USD #___. However, the eligibility determination meeting was not held until November 25, 2019, more than a month after the initial request and a meeting to develop the IEP will not take place until December 18, 2019 which is almost two months from the date of the original request.

## School District Position

USD #___ staff reported they did respond in a timely manner to the parent's request. _____ _____, School Psychologist, indicated that she received a copy of the IEE report on October 18, 2019. USD #___ received the parent's email request for an IEP for the student based on the results of the IEE on October 21, 2019. Ms. _____ made an initial phone contact with the parent on November 6, 2019 to schedule a meeting to consider the IEE. This meeting was scheduled for November 25, 2019 and a written Notice of Meeting (NOM) was provided to the parent on November 18, 2019. Also on November 6, 2019, Ms. _____ prepared a Prior Written Notice (PWN) proposing to conduct an initial evaluation considering the new data included in the IEE and mailed the PWN to the parent on November 8, 2019. Ms. _____ noted that parent signed consent for this initial evaluation on November 11, 2019 and initial eligibility was determined on November 25, 2019 with the parent and mental health case manager in attendance. A meeting to develop an initial IEP is scheduled for December 18, 2019.

## Finding of Facts

The following finding of facts are based on both documentation review and interviews with the parties:

- On Tuesday, October 15, 2019, Dr. Spears emailed a copy of the IEE and invoice for payment to ____ ____, Administrative Assistant at ECKSEC.
- On Friday, October 18, 2019, Ms. _____ obtained a copy of the IEE from the _____ office.
- On Sunday, October 20, 2019, the parent emailed Mr. _____ and Mr. _____ requesting an IEP based on the results of the IEE.
- On Friday, October 25 and Monday, October 28, 2019, USD #___ had a scheduled Fall Break.
- On Thursday, October 31, 2019, the parent emailed Mr. _____ and Mr. _____ regarding the status of the original request.
- On Tuesday, November 5, 2019, Mr. _____ responded to the parent's email stating, "Please direct your questions to Mrs. _____ or the building principal. The Coop has nothing to do with scheduling local meetings."
- On November 5, 2019, Mr. _____ also responded to the parent's email indicating that he was "hoping to have an update anytime."
- On Wednesday, November 6, 2019, Mr. _____ emailed the parent stating, "There will be a document coming in the mail that will need a signature. My understanding is that the document was sent today. Once the document is returned, a meeting date will be set."
- Also on November 6, 2019, Ms. _____ prepared a Prior Written Notice (PWN) proposing an evaluation based on new information contained in the IEE and contacted the parent by telephone to arrange a meeting date.
- On Friday, November 8, 2019, the PWN proposing an evaluation was mailed to the parent. The parent signed the PWN giving consent to conduct the evaluation on Monday, November 11, 2019.
- On Monday, November 18, 2019, a Notice of Meeting verifying a meeting to "consider outside agency report" was mailed to the parent.
- On Monday, November 25, 2019, an eligibility determination meeting was held with the parent in attendance. The Multidisciplinary Staffing Summary of the November 25, 2019 meeting as well as the Evaluation/Reevaluation Eligibility Report dated November 25, 2019 reflect that the results of the IEE report were considered and that the

student was found eligible for special education and related services due to an exceptionality of Emotional Disturbance.

- On Tuesday, December 3, 2019, a Notice of Meeting scheduling an IEP team meeting for Wednesday, December 18, 2019 was mailed to the parent.

Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.502(c)(1) require that an IEE obtained by the parent at public expense must be considered by the school district, if the IEE meets the school district's criteria, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student

In this case, USD #___ paid for an IEE of the student that was conducted by Dr. Spears from Neuroeducational Associates. A copy of that IEE report was provided via email to the _____ on October 15, 2019. Ms. ____, the school psychologist for the student's attendance center in USD #___, obtained a copy of the IEE report on October 18, 2019. Documentation and interviews showed that the eligibility determination team considered the IEE when they met on November 25, 2019 and determined that the student was eligible for special education and related services due to the exceptionality of Emotional Disturbance.

It is noted that while the IEE was considered 38 calendar days after USD #___ was provided with a copy of the report, there is nothing in the IDEA regarding a timeframe for the district to consider the IEE. The only requirement is that the IEE must be considered with respect to the provision of FAPE to the student. The eligibility for special education is a key decision when determining the provision of FAPE and USD #___ did consider the IEE report when making this determination for the student at the November 25, 2019 meeting.

Federal regulations at 34 C.F.R. 300.301(b) allow the parent of a child to initiate a request for an initial evaluation to determine if the child is a child with a disability. Federal regulations 34 C.F.R. 300.503(a) require the school districts to

provide PWN a reasonable time before the school district proposes or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE to the child. In this case, the parent made a request to initiate or change the identification of the child.

Chapter 1, Section D of the Kansas Special Education Process Handbook specifies that the Kansas State Department of Education (KSDE) has interpreted a "reasonable time" as being no more than 15 school days, unless there are unusual circumstances. The KSDE Memo, "Reasonable Time" to respond to parent request for evaluation, January 8, 2002 can be found at https://www.ksde.org/Default.aspx?tabid=614. Accordingly, unless there is an unusual circumstance, districts must provide parents with a Prior Written Notice within 15 school days in response to any parent request regarding identification, evaluation, placement or the provision of a FAPE.

The parent believes the timeframe began on October 15, 2019 when Dr. Spears provided the IEE report to USD #___ because the IEE was required to be considered by the school district. However, as noted previously, there is no required timeline for considering the IEE.

Instead, the timeframe for responding to the parent's written request regarding the identification and evaluation of the student began on Monday, October 21, 2019 when USD #___ staff received the parent's email request for an IEP for the student. Considering the scheduled Fall Break on October 25 and 28, 2019, the 15 school day timeline for responding to this parent request ended on November 12, 2019. The school district treated this request as a parent referral for special education and initially responded to this request on November 6, 2019. On that date, Ms. ____ prepared a PWN proposing an initial evaluation of the student and contacted the parent by phone to schedule a meeting to consider the IEE as part of that evaluation. The PWN was mailed to the parent on November 8, 2019 and the parent signed consent for the evaluation on November 11, 2019. Subsequently, a Notice of Meeting was mailed to the parent on November 18, 2019 verifying the November 25, 2019 meeting.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to respond to the parent's request to schedule a meeting to consider the IEE during the 2019-20 school year is not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
___ _____ PUBLIC SCHOOLS, USD #___
ON DECEMBER 5, 2019

DATE OF REPORT: JANUARY 4, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with ___ _____, Assistant Superintendent of Special Education for ___ _____ Public Schools, on December 9, 17, 22, and 23, 2019. The investigator spoke by telephone with the parent on December 13, 2019.

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

- Evaluation by Kansas City Speech Professionals (KCSP) dated February 19, 2018
- Email dated February 18, 2019 from the parent to the student's kindergarten teacher
- Grade reports for the student for first and second grades
- Evaluation by Kansas City Speech Professionals dated June 27, 2019
- General Education Problem Solving Forms covering the period of October 7, 2018 through December 2, 2019
- Notice to Conduct a 504 Evaluation dated September 10, 2019
- Notice to Conduct a 504 Meeting dated September 10, 2019
- Email dated September 23, 2019 from the building counselor to the student's tutor
- 504 Evaluation Report dated September 25, 2019

- 504 Accommodation Plan dated October 3, 2019 and signed by the parent on October 15, 2019
- Documentation of 504 Plan Distribution dated October 16, 2019
- Email dated October 18, 2019 from the reading interventionist to the parent
- Letter dated November 30, 2019 from the parents to the superintendent of schools for the district
- Email dated December 6, 2019 from the reading interventionist to the parent
- 504 Progress Monitoring/Annual dated December 10, 2019
- Acadience Reading testing dated October 7 and December 2, 2019
- Intervention and assessment summary developed by the parent

Additionally, the parent provided the investigator with a total of approximately 40 emails specifically regarding the student covering the years of 2018-2019. The parent also provided the investigator with over 300 additional emails regarding this student and/or his brother who was the focus of a second complaint filed by the parent. All of those emails were reviewed and those considered most relevant to this investigation are referenced above and in the body of this report.

## Background Information

This investigation involves an 8-year-old student who is enrolled in the 2nd grade in his neighborhood elementary school.

An evaluation of the student was conducted by Kansas City Speech Professionals (KCSP) at the expense of the parents on June 27, 2019. The student had previously been evaluated by KCSP on February 11, 2018. At the time of the February 2018 evaluation, the student was, according to the evaluation report, given a provisional diagnosis of dyslexia. That diagnosis was confirmed in the June 2019 evaluation.

According to the KCSP report, the parents brought the student to be evaluated because of a family history of dyslexia and reading problems on both the mother's and father's side of the family. The student's older brother had also received a diagnosis of dyslexia from KCSP in January of 2018.

Between the first and second KCSP evaluation, the student participated in structured literacy instruction outside the school setting with a private tutor contracted by the parents. The student also received private instruction for remediation of articulation

errors.

According to the June 2019 KCSP evaluation report, the student's expressive and receptive language scores fell within the above average range; his sight word efficiency and phonemic decoding skills fell with the average range, and his hearing, voice, speech fluency and articulation skills fell within normal limits. Testing indicated that the student had "mild phonological awareness skills, average phonological memory skills, and average rapid naming skills." He was below average with regard to oral reading, and his difficulty decoding words appeared to be having a negative impact on what he is reading. Additionally, the student's word identification and spelling skills were assessed as being in the "poor" range as compared to age peers. Difficulties with pencil grip and handwriting were observed.

The student continued to receive twice-a-week private tutoring throughout the summer of 2019 for 30 minutes per session.

The student's speech and language skills were screened during his kindergarten year by a district speech/language pathologist. Speech sound errors were noted. During first grade the student was observed to have some fluency errors though, by report of the parent, the student was not so discrepant as to warrant intervention.

## Issues

In her complaint, the parent raised three issues:

Issue One: The district failed to identify and evaluate the student with a learning disability and did not provide Child Find as required under IDEA. The district failed to test the student for a disability and provide an Individualized Education Program (IEP).

### Parent's Position

The parent asserts that despite repeated discussions with the student's teachers, the building principal, and other staff members regarding the student and his progress, the district has failed to conduct a special education evaluation.

## District's Position

The district contends that it considered both of the outside evaluation reports provided by the parent and developed interventions through the SIT (student improvement team) process to address the student's needs. It is the position of the district that the student was making progress with appropriate support and has been learning and applying skills. The district asserts that it has continued to monitor the student's progress through the SIT process, and the parent has at no point prior the filing of the complaint made any request for the district to conduct a special education evaluation of the student. The district believes that it cannot be found in violation for a failure to evaluate the student when the parent has made no request for an evaluation and when progress data shows that the student is continuing to make progress.

## Applicable Statutes and Regulations

### Child Find:

Child find in Kansas involves a screening process for children from birth to age 5, and a general education intervention process for children from kindergarten through age 21 (K.A.R. 91-40-7(b)(1) and (2)). Schools in conjunction with parents use these processes to locate, evaluate, and identify children who may need special education and related services.

If it becomes evident that a child's needs require resources beyond those available in general education, and the school suspects the child is a child with an exceptionality the child must be referred for a special education evaluation.

In Kansas, screening is conducted, in part, through the required implementation of general education intervention (GEI) (K.A.R. 91-40-7(c)) . The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into evaluation for special education.

Kansas encourages schools to use a school-wide, multi-tiered model of support for all children. In Kansas, this is supported through the Multi-Tier System of Supports (MTSS) which includes both academic and behavior supports. The following briefly explains the multi- tiered aspect of the school-wide approach:

Tier 1: All children receive a core instructional program that uses a scientifically validated curriculum that is provided for all students. Schools choose curricula that have evidence of producing adequate levels of achievement (i.e., research-based) and instruction is differentiated within the core to meet a broad range of student needs. Therefore, interventions are provided via the general curriculum. Universal screening of all children to monitor progress and to identify children who may need additional support is conducted. Approximately eighty percent of children in the school will be successful in the general curriculum.

Tier 2: Those children who do not respond to the core instructional procedures will receive targeted group interventions in addition to core instruction. More frequent measures of progress monitoring are used to collect child progress data. Approximately fifteen percent of children in the school will need targeted (supplemental) support.

Tier 3: A few children receive intensive, individualized interventions. These may be in addition to, or instead of, the supports provided in Tier 1 and Tier 2 depending on the needs of the child. Interventions will be more intensive and delivered in more substantial blocks of time. Approximately five percent of children in the school will need this kind of intensive support.

Within a MTSS depicted above, children will receive GEI as a part of the system in place for all students. Data collected at each tier should guide school personnel as to the next steps to take based on the child's response to interventions tried. At least by the time a child is ready to access the more intensive supports of Tier 3, the school should employ the use of individualized problem solving to design the intensive individualized support the child will receive as well as a plan to monitor the child's progress and document the child's response to the scientifically research-based interventions. The approach of individual child problem-solving is therefore a component of the larger school-wide system, or it may stand alone as a method to conduct GEI as outlined below.

*Before a student is referred for a special education evaluation*, school personnel are required to have data-based documentation that:

(1) general education interventions and strategies would be inadequate to address the areas of concern for the child, or

(2) (A) the child was provided with appropriate instruction in regular education settings that was delivered by qualified personnel; and (B) the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction; and (C) the assessment results were provided to the child's parents; and (D) the assessment results indicate that a special education evaluation is appropriate (K.A.R. 91-40-7(c)).

In either case, there must be data-based documentation that provides a basis for determining that a referral of the student by the school for special education evaluation is warranted.

In most cases, school personnel will be documenting data from the GEI and strategies that have been tried. Schools must have data-based documentation that: (1) appropriate instruction was provided to the child, (2) the child was provided appropriate instruction delivered by qualified personnel in regular education settings; (3) the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction; and (4) the instructional strategies were used and student-centered data was collected. The data to document that appropriate instruction was provided to the child may include evidence that the school's curriculum has a solid research base and that it contains, for example in reading, the essential components of reading instruction.

The data to document the educational interventions and strategies that have been implemented may include records such as intervention plans that indicate the interventions and strategies selected and implemented for a given child. The requirement to provide data-based documentation of the repeated assessments of child progress during instruction (i.e. progress monitoring) is perhaps the most important of all. Progress monitoring data is used to evaluate the effectiveness of the intervention, to determine the intensity of interventions and resources needed to support child learning, and to provide a basis for school personnel to make decisions during intervention. Documentation of progress monitoring may include charts/graphs or records of other systematic data collection. This documentation must also include evidence parents were provided with the results of the assessment of child progress and that those results indicate that an evaluation is appropriate.

Referral for a special education evaluation can be triggered in either of the following ways (K.A.R. 91-40-7 (c)(1) through (3)).

(1) The parent (or adult child) requests an evaluation and the school agrees that an evaluation of the child is appropriate; or

(2) school personnel suspect, based on data, that a child may be a child with an exceptionality and needs special education services. Typically, school personnel determine this through the GEI process.

## Investigative Findings

### General Education Problem Solving

A student improvement team (SIT) referral was completed by the student's first grade teacher on October 7, 2018. The referral was made because the parents had expressed concerns to the teacher regarding the results of a private outside evaluation which had resulted in the student being determined to demonstrate characteristics of dyslexia. The teacher reported that she had conferenced with the parent who had shared with her some of the strategies the student's outside tutor was using with him. The parents wanted to facilitate consistency between techniques being used at school and during tutoring. On the referral form, reading, writing, and speech were checked as areas of concern.

In her referral, the teacher stated that "so far, [the student] is developing appropriately as a first grader and I don't have any specific concerns. He is slightly below as a beginning of the year reader, but he is making progress." The student's fall MAP (Measures of Performance) testing results placed the student at the 84$^{th}$ percentile in both reading and math. The "classroom data" recorded on the SIT referral form placed the student in the "developing appropriately" level in all areas except for "Social Interaction" where the student was noted to demonstrate strength.

A SIT meeting was held on October 8, 2018. The summary of the meeting included the following information:

- The speech/language pathologist (SLP) had "no concerns" with regard to the student's articulation.
- The SLP noted that the student's slight lisp did not impede his speech, and he was stimulable for the sound. The SLP saw the sound generalizing independently.
- No grammar or word find issues were noted in the student's conversation.
- The teacher reported no auditory comprehension concerns.

- The student scored 100% on two grade level auditory passages.
- On an informal convergent task, when given 3 clues, the student consistently named the correct noun.
- The student scored 7/8 correct on grade level auditory comprehension tasks.
- MAP scores for the student placed him at the 84th percentile in both math and reading.
- On reading comprehension tasks in the classroom, the student could retell with main idea and supporting details and consistently showed comprehension of characters, problems, and resolution. He was on level C which was at the lower end of the average range. He had earned 71% correct on the end of year pretest in reading.
- In spelling, his phonics were considered "typical" of other first grade spellers in the classroom.
- The student did not qualify for SIT Tier II intervention.

It was determined that the teacher would "keep the team alerted" if she saw concerns with the student's reading or his ability to "keep up with expectations and learn." It was also determined that articulation support which had to that point been provided as a general education intervention would be discontinued. A follow-up meeting would be held "if requested by the teacher."

The next SIT meeting regarding the student was held on September 9, 2019 after the student had advanced to second grade. The student's MAP score in reading in the fall had placed him at the 27th percentile; his score on MAP math testing was at the 41st percentile. However, each of these tests had been completed in 23 minutes or less, far more quickly than nearly any other student in the classroom.

The student was reading 48 words per minute with an oral reading accuracy of 92%. The student was averaging 69.5% on reading Unit pre-tests, and 99% on post testing. Classroom data showed that the student was "developing appropriately" in all areas except for "Social Interactions" where he was ranked as "demonstrates strength."

The student had begun a 30-minute per day "Reading Intervention" program with building level reading specialist on September 3, 2019. This general education intervention was to include Orton-Gillingham explicit phonics instruction and was to last for 5 weeks.

"Math Intervention" with the building support teacher for 30 minutes each day had been initiated on September 2, 2019.

Since the beginning of the year, the student had been allowed to have any assignment or test read to him "when needed or asked." "Desk Visuals" were available to the student beginning September 9, 2019.

According to the SIT meeting record, the student was:

> able to correctly hear and see sounds for all consonants and short vowels. Growth shown this area. Student is able to use resources in the room (white board, teacher notes, teacher created posters) to aid in memory of phonics rules. Student can apply most rules in writing with support and time to self-correct as needed. Red words [sight words that cannot be sounded out which students are taught to memorize using Orton-Gillingham techniques] are easier for him to state orally rather than to print. When printing does better in list form, sentences tend to confuse and interferes with memory sequence.

A SIT meeting to review the student's progress was held on November 4, 2019. At that time, the student was noted to be the "highest second grader in the reading specialist group." The student was reading 69 words per minute with only one error and was "on Benchmark." Although math intervention was to be discontinued, the team determined that the student should continue to work with the reading specialist under a Tier II intervention for an additional 8 weeks. The reading interventionist provided the following information for the SIT meeting report:

> Student is showing growth weekly. Has been able to learn specific vowel teams and patterns in class. He is able to apply those rules when reading text, but can still confuse some when applied to writing. Red words are practiced weekly. In class, he is able to read all of the red words with good accuracy. When asked to spell the same red words in list form, he will often spell them incorrectly. This is typical of students who have dyslexia. He is not counted wrong for the errors. Instead, we practice them in a different multi-sensory method to push into long term memory. When listening for sounds when writing nonsense words this is a strength. He can often hear the sounds and apply in his written expression. If I add a blend in those same sounds (nonsense words) he will at times confuse the order. I have learned that he needs extra wait time and repeated hearing of the sounds to correctly spell the nonsense words. We are currently working on the spelling of /c/ or /k/ at the beginning of the word and understanding the why. We are adding 3 to 5 red words each week or two. Note from parent meeting, they would like me to email the parents each week so they can share

the information with the outside tutor as well. This is to be done every Friday. Mom would like pictures of any charts I make that aid in his learning as well.

According to the November 4, 2019 update report, "the parent is continuing outside intervention with private tutor. Parent would like additional reader practice books…Sees small group instruction as beneficial. Is concerned about capitalization and punctuation."

Another SIT meeting regarding the student was held on December 2, 2019. The team report notes that the student was making "great growth. He is making progress each week. His words correct and accuracy have improved. We are currently working with level J text to practice fluency, comprehension and to locate specific phonics rules we learn in class. Next steps, continue working on fluency moving closer to text at level M which is an EOY [end-of-year] goal. Continue following phonics expectations as followed in the Gallistell-Ellis assessment per [district] guidelines."

Another review meeting is scheduled for January of 2020.

Grades:

The student's first grade report card shows that the student was considered "Proficient" in 4 of 33 measures of "English Language Arts" skills over the 2018-19 school year and "Developing" in 29/33. In the area of "Mathematics," the student was "Proficient" in 24/33 measures, "Developing" in 9/33.

At the end of the student's first grade year, his teacher wrote, "He has shown some impressive growth with his reading."

The student's second grade report card for the first quarter of the year showed that math continued to be an area of strength for the student. A grade of "3" shows a student to be "Meeting the standard" while a grade of "4" indicates the student is "Extending the Standard." The student earned an overall math grade of 3.25 in math with "Operations & Algebraic Thinking" at 3.5 and "Numbers & Operations – Base Ten" at 3.0.

A "2" on the second-grade report shows that a student is "Progressing toward the Standard," and may require additional time, support, or monitoring. The student earned an overall reading grade for the first quarter of 2.53. His "Reading; Literature grade was 3.0, "Reading; Informational" was 2.5, and "Reading; Foundational" was 2.1.

MAP Testing:

Student's in the district are assessed two to three times per year in math and reading using the Measures of Academic Performance (MAP) test.

MAP testing of the student was completed three times during his Kindergarten year. The student's reading score in the fall of 2017 placed him at the 60th percentile; at the 83rd percentile in the winter, and at the 89th percentile in the spring. His math scores that year placed him at the 70th percentile in the fall, at the 52nd percentile at the winter assessment, and at the 84th percentile on spring testing.

Three MAP measures were completed during the student's first grade year. His reading scores placed him at the 84th percentile in the fall, at the 76th percentile for the winter measure, and at the 85th percentile in the spring. Math scores were at the 84th percentile in the fall, 86th percentile at the winter assessment, and at the 62nd percentile in the spring.

The student's reading skills have been assessed twice thus far this school year. The student's performance on an August 27, 2019 assessment placed him at the 27th percentile. He completed the test in 23 minutes and scored in the Low Average range for Literature: Key Ideas and Details; Informational Text: Key Ideas and Details; and Informational Text: Language, Craft, and Structure. His performance in the area of Literature: Language, Craft, and Structure placed him in the Low range.

The student's scores improved significantly for the December 11, 2019 assessment. On this measure – which was completed in 57 minutes – the student scored at the 84th percentile overall. He earned High scores in 3 of 4 areas and scored in the High Average range for the fourth area.

While math is a classroom strength for the student, he completed the fall MAP math assessment in 22 minutes (the second fastest time of all the students in his class) and earned an overall score at the 41st percentile.

Reading Assessment:

The student has been assessed by the district's reading interventionist twice during his second-grade year using Acadience Reading (formerly Dibels). According to the company website (acadiencelearning.org), Acadience Reading is a universal screening

and progress monitoring assessment that measures the acquisition of early literacy skills from kindergarten through sixth grade. The assessment is comprised of six brief measures that function as indicators of the essential skills that every child must master to become a proficient reader. These measures are used to regularly monitor the development of early literacy skills in order to provide timely instructional support and prevent the occurrence of later reading difficulties.

Between October 7, 2019 and December 2, 2019, the student's Words Correct on the Arcadience measure increased from a mean of 54 to a mean of 89. Errors were reduced from an average of 4 to an average of 1. Reading accuracy improved from 93% to 99%. His comprehension score improved from 187 to 243.

An email dated October 18, 2019 from the reading interventionist for the district to the parent noted that on the October benchmark assessment, the student scored a reading composite score at benchmark level. The student's ability to decode nonsense words and correct letter sounds was above benchmark. The interventionist noted, "right now, he is right on track with his peers and progressing well."

Parental Request for Evaluation:

There is no evidence that, prior to the filing of this complaint, the parent had made a specific request that the district conduct a special education evaluation of the student. In an email to the investigator dated December 29, 2019, the parent states that at a meeting on December 10, 2019 she asked the team why they were not "going straight to eval with a documented disability, and they said that was their process." The parent did not assert that she made a specific request for the district to evaluate the student at that time.

According to the district, when asked by team members if she wanted to move ahead with an evaluation, the parent indicated she wasn't sure. In a conversation with the investigator on December 13, 2019, the parent questioned whether she should move ahead with a special education evaluation because she was unsure how that action might impact this complaint.

## Summary and Conclusions

The parents provided the district with the results of two outside evaluations. The first, completed in February of 2018 indicated that the student showed characteristics of

dyslexia and gave a provisional diagnosis. A second evaluation in July of 2019 substantiated the earlier assessment and resulted in a diagnosis of dyslexia.

There is evidence to show that the district considered these outside diagnoses. While the student's first-grade teacher felt that the student was progressing appropriately, she brought the concerns of the parents to the building level SIT team for discussion in October of 2018. General education interventions were provided to address the student's articulation errors.

The student's grade report showed that the student was considered "Proficient" in 4 of 33 measures of "English Language Arts" skills over the 2018-19 school year and "Developing" in 29/33. In the area of "Mathematics," the student was "Proficient" in 24/33 measures, "Developing" in 9/33. At the end of the year, his teacher wrote, "He has shown some impressive growth with his reading."

In early September of the student's second grade year, the student's teacher brought the student's name before the building SIT team after he had demonstrated MAP testing scores that were significantly lower than his previous scores on that test. By the time of the first SIT meeting on September 9, 2019, the district was already providing the student small group support from the reading interventionist as well as general intervention math support from the building support teacher. Each of these specialists saw the student for 30 minutes per day.

First quarter grades showed the student to be "meeting the standard" in all areas of math, and "progressing toward the standard" in the area of reading though he may require additional time, support, or monitoring. His overall reading grade was 2.53 (with a grade of 3 indicating a student is meeting the standard).

At the end of October, a 504-accommodation plan for the student was implemented. (See Issue Two below for additional information.)

The student's progress was reviewed at a SIT meeting on November 4, 2019 and again on December 2, 2019. Assessments completed by the reading interventionist showed that the student made significant progress with general education support which had been extended beyond the original 5-week plan. By December, the student was considered to be on track with his peers and progressing well. Math performance had improved by November to the extent that general education interventions in that area were no longer needed.

There is no evidence to show that the parent had, at any time prior to the filing of this complaint, asked the district to conduct a special education evaluation of the student. There is ample evidence to show that the district has considered the outside evaluations of the student provided by the parent, has developed and implemented interventions designed to help the student access and make progress in the general education curriculum, has taken multiple measures to determine the student's progress, and has discussed with the parent her desire for the district to conduct a special education evaluation of the student. The district has also provided evidence to show that the student has benefitted from the interventions put in place by the district and is making progress in the general education curriculum. Under these circumstances, a violation of special education laws and regulations related to Child Find is not substantiated.

Issue Two: The district failed to conduct a comprehensive evaluation even when the student continued to struggle after implementation of his 504 accommodation plan, and his diagnosed learning disability has not been addressed.

Parent's Position

The parent asserts that the 504 Accommodation Plan provided for the student by the district does not fully address his needs. It is the position of the parent that a comprehensive independent educational evaluation (IEE) should be conducted to identify all areas of need and provide a learning profile related to his documented and suspected areas of disability.

District's Position

The district disagrees with the parent's assertion that the student is "struggling" and asserts that he has made good progress with the general education interventions supplied by the district. The district asserts that the student was referred for a 504 evaluation because of the diagnosis presented by the parents, and an accommodation plan was put in place to provide the student with additional support in the general education setting. The district believes that a combination of supports currently being provided to the student are facilitating his access to and progress through the general education curriculum.

Applicable Statutes and Regulations

Failure to Conduct an Evaluation:

Statutes and regulations related to special education Child Find were outlined above under Issue One.

Section 504:
Section 504 complaints do not fall under the purview of this investigation because Section 504 is not a special education statute or regulation. If the parent wants to pursue a complaint regarding the district's actions with regard to Section 504 of the Rehabilitation Act, those allegations should be directed to the Office for Civil Rights at OCR.KansasCity@ed.gov.

Independent Educational Evaluation:
*After an initial special education evaluation is complete*, if the parents disagree with the school's evaluation, they have the right to ask for an independent educational evaluation (IEE) at public expense (34 CFR 300.502 (b)(1); K.A.R. 91-40-12(a)(1)). If the parents obtain an IEE at their own expense or at public expense, the results of the evaluation shall be considered by the school, if it meets the school's criteria, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the child (34 CFR 300.502(c)(1); K.A.R. 91-40-12(e)).

## Investigative Findings

Section 504:

On September 10, 2019, the parents were provided notice of the district's proposal to conduct a 504 evaluation. The reason for the proposal was that "[the student] has a diagnosis of Dyslexia. It is believed that he may need some accommodations in a 504 plan to help him access the academic curriculum the same as his peers."
On September 23, 2019, the building counselor reached out to the student's private tutor to ask for her input regarding possible accommodations for the student.

A 504 evaluation of the student was conducted. According to an evaluation report dated September 27, 2019, the student was determined to be eligible for and in need of a 504 accommodation plan. The evaluation report provided information regarding a number of interventions that were in place for the student including the following:

- "preloading" reading tasks to ensure the student is comfortable with an oral reading activity
- reading group with the teacher and the district reading specialist
- math intervention group

- when completing short answer questions on tests, the answers are spelled for the student or written for him
- using speech to text technology for writing assignments
- visuals on the student's desks
- not calling on the student to read in front of the class
- completing class work one on one with the teacher whenever possible
- using audio books when available

A meeting was held to review the results of the 504 evaluation. An accommodation plan was developed for the student which included the following "Instructional/Curriculum" accommodations:

- "Spelling errors on class work will not be graded.
- [The student] may be allowed to orally express answers on assessments.
- Allow extra time for test taking not to exceed 1.5 that of his peers.
- Use of text to speech/speech to text technology whenever possible for writing assignments.
- Allow access to audio books whenever possible.
- [The student] will not be asked to read aloud in class unless he is preloaded with his part to be read or he volunteers to read.
- [The student] will be able to use graphic organizers for multi-step assignments."

An additional "Environmental" accommodation was included in the plan: "Testing should be done in a quiet setting, and may be read aloud to him."

The parent gave her written consent on October 15, 2019 for the accommodation plan to be implemented. On October 17, 2019, a copy of the plan was distributed to all staff working with the student.

A 504 progress review meeting was held on December 10, 2019. The parent was in attendance. At the conclusion of the meeting, the building principal asked the parent if she wanted to request a special education evaluation of the student. By report of the staff, the parent indicated that she was unsure as to whether she wanted to make such a request. In a telephone call with the investigator on December 13, 2019, the parent told the investigator that she did not know whether she should ask the district to conduct a special education evaluation because she did not know how making such a request might impact the formal complaint process.

## Summary and Conclusions

A 504 accommodation plan was put in place for the student on October 17, 2019. That plan, in addition to other general education interventions outlined above under Issue One, have been designed by the district in response to the diagnostic information provided by the parent and to the parent's expressed concerns. As noted above, the district has provided evidence to show that it is providing interventions – including the provision of the accommodation plan – designed to assist the student to make progress in the general education curriculum. The student's progress is being monitored through both the SIT process and under Section 504. Thus far, the data indicates that the student has made progress. Under these circumstances, a violation of special education statutes and regulations related to child find or to the failure to conduct an evaluation is not substantiated.

Additionally, while the provision of a special education evaluation has been discussed with the parent by the district and may well be discussed again in January of 2020 at upcoming SIT and 504 meetings, no evaluation has yet been conducted. Therefore, the district is not required to provide the parent with an IEE at this time.

## Additional Comments

This investigation considered only alleged violations related to special education laws and regulations. Because Section 504 is not a special education law, no alleged violations related to Section 504 were considered.

Issue Three: The district does not have trained staff certified to offer an explicit, direct, systematic and multi-sensory approach that is peer reviewed, research-based, data-driven, and recognized as appropriate remediation for children with dyslexia like the student. The staff administering the services need to be supervised by the specific certifying body of that curriculum. The district did not offer appropriate services based on the student's outside diagnosis and educational needs as they are providing no specialized curriculum or trained staff. His classroom teacher and the reading interventionist, whom he currently has, are not trained experts in the science of reading.

## Parent's Position

It is the assertion of the parent that the student is neither receiving services from a teacher who is trained in research-based structured literacy reading instruction, nor is

he receiving instruction from a teacher who is under the supervision of another teacher with appropriate training.

## District's Position

The district contends that KSDE requirements do not compel the district to require staff to meet the training requirements outlined by the parent. However, the district asserts that the reading specialist, who has been working with the student as a part of the SIT process, has received training in the Orton-Gillingham approach. The district further asserts that each of the staff members assigned to work with the student is appropriately licensed and certified to deliver the services they have provided.

## Applicable Statutes and Regulations

Each school district must ensure that all personnel necessary to carry out the requirements of IDEA are appropriately and adequately prepared and trained. All special education personnel, as appropriate, shall have the content knowledge and skills to serve children with exceptionalities. This includes special education teachers, related services personnel and paraeducators. School districts must take steps to actively recruit, hire, train, and retain qualified personnel to provide special education and related services to children with disabilities (34 C.F.R. 300.156; 34 C.F.R. 300.207).

Federal regulations implementing the Individuals with Disabilities in Education Act (IDEA) at 34 C.F.R. 156(c) require that the state education agency (KSDE) must ensure that "each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school – (i) Has obtained full State certification as a special education teacher (including certification obtained through an alternate route to certification as a special educator), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher; (ii) Has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) Holds at least a bachelor's degree."

Regarding instructional methodology, the Office of Special Education Programs (OSEP), which is the office within the United States Department of Education that writes and enforces the federal regulations implementing the IDEA has stated that "the courts have indicated they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the

procedural requirements of the IDEA to meet the educational needs of an individual child with a disability." See *Federal Register*, Vol. 64, p. 12552, March 12, 1999.

Further, in Hendrick Hudson Dist. Bd. Of Ed. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 553 IDELR 656 (1982), the Supreme Court held that the primary responsibility for choosing instructional methodology is left with the local school district.

On November 12, 2019, the Kansas State Board of Education approved the recommendations of the Dyslexia Committee for pre-service teacher programs, professional learning, screening and evaluation, and evidence-based reading practices and adopted a definition of dyslexia developed by the International Dyslexia Association (IDA). The KSDE Dyslexia Committee was established for the purpose of evaluating recommendations of the Legislative Task Force on Dyslexia which was created in 2018.

No new regulations – special education or otherwise – were passed by the State Board in November 2019 with regard to dyslexia. The approved recommendations mentioned above involve a number of actions that will take place based on established timelines beginning in July of 2020 with implementation into 2024. These approved recommendations and timelines are in the November 2019 Board Materials, pages 51 through 58, posted at https://www.ksde.org/Board/Kansas-State-Board-of-Education/Agendas-Meeting-Dates-and-Minutes/2019-Meeting-Materials-Minutes.

Investigative Findings

The teachers who have been assigned by the district to provide services to the student meet state and district requirements with regard to licensure, certification, preparation and training. The parent has provided no evidence to show that these facts are in dispute.

General education reading interventions are currently being delivered to the student by a district reading interventionist. These services are not being provided under an IEP and are not being provided by an individual employed by the district as a special educator.

The district has provided 30 hours of classroom and practicum experience in the Orton-Gillingham approach to all elementary reading specialists in the district including the one who has been working with the student for the first half of the 2019-20 school year. The Orton-Gillingham approach is, as shown on its website, "a direct, explicit,

multisensory, structured, sequential, diagnostic, and prescriptive way to teach literacy when reading, writing, and spelling does not come easily to individuals, such as those with dyslexia."

## Summary and Conclusions

It is the responsibility of the complaint investigator to determine whether an issue raised in a formal complaint represents a violation of special education statutes and regulations.

The qualifications of those individuals employed by a district to provide general education instruction to students do not fall under special education statutes and regulations. Of the individuals who have worked with the student as a part of the SIT intervention process, only one is a special educator, and that individual provided the student with support in the area of mathematics, not reading or written language – the areas of concern identified by the parent.

None of the services delivered to the student have been a part of an individualized educational plan (IEP) for the student. All services – including those of the building support teacher – have been delivered under the umbrella of general education intervention.

This investigation has determined that all teachers assigned by the district to provide instructional services to the student meet state and district requirements with regard to licensure, certification, preparation and training. No evidence has been provided by the parent to dispute this.

Additionally, while a parent may allege a systemic failure on the part of a district, special education statutes and regulations do not grant parents the right to dictate either the personnel designated to deliver special education services or the methodology or materials that will be used in the instruction of the students.

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

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

Kansas statutes, at K.S.A. 72-3404(j), define a “Special Teacher” as a “person, employed by or under contract with a school district or a state institution to provide special education or related services, who is: (1) Qualified to provide special education or related services to exceptional children as determined pursuant to standards established by the state board.”

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
___ _____ PUBLIC SCHOOLS, USD #___
ON DECEMBER 5, 2019

DATE OF REPORT: JANUARY 4, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with ____ _____, Assistant Superintendent of Special Education for ____ _____ Public Schools, on December 9, 17, 22, and 23, 2019. The investigator spoke by telephone with the parent on December 13, 2019.

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

- Email dated January 17, 2018 from the 2nd grade teacher to the parent
- Email dated January 25, 2018 from the parent to the 2nd grade teacher regarding contact with the Occupational Therapist (OT) and reading interventionist
- Evaluation report dated January 31, 2018 from Kansas City Speech Professionals
- Email dated March 25, 2018 from the parent to the building principal
- Email dated April 20, 2018 from the parent to the 2nd grade teacher
- Email dated April 20, 2018 from the 2nd grade teacher to the parent
- Email dated February 6, 2018 from the school counselor to the parent
- Email dated October 9, 2019 from the parent to the 3rd grade teacher
- Undated letter from the parent to the building principal and 4th grade team
- Email dated April 2, 2019 from the parent to the 3rd grade teacher

- Email dated April 4, 2019 from the 3rd grade teacher to the parent
- Notice to Conduct a 504 Evaluation dated September 10, 2019
- Notice to Conduct a 504 Meeting dated September 10, 2019
- Email dated September 12, 2019 from the OT to the parent
- 504 Evaluation Report dated September 25, 2019
- 504 Accommodation Plan for the student dated October 3, 2019
- Documentation of 504 Plan Distribution dated October 16, 2019
- Email dated November 19, 2019 from the parent to the 4th grade teacher
- Email exchange dated November 21, 2019 between the parent and the 4th grade teacher
- Email dated November 26, 2019 from the counselor to the parent
- Email dated December 29, 2019 from the parent to the investigator
- List of Topics for Orton-Gillingham training
- 3rd Grade Report Card for the student
- MAP Student Progress Report for the student for grades kindergarten through the fall of 4th grade
- Online calendar for the school district

The parent provided the investigator with a total of over 305 emails covering the years of 2017-2019. Each of those emails was reviewed and those considered most relevant to this investigation are referenced above and in the body of this report.

## Background Information

This investigation involves a 10-year-old student who is enrolled in the 4th grade in his neighborhood elementary school.

There is a family history of dyslexia on both parents' sides of the family and a history of reading difficulties on the father's side of the family. After a niece of the parent was diagnosed with "stealth dyslexia," the parent began to see signs that the student might also have the condition. According to the parent, she and her husband decided to have the student evaluated on January 31, 2018 by Kansas City Speech Professionals.

According to their website, Kansas City Speech Professionals (KCSP) is a privately-owned speech language pathology practice founded by two speech/language pathologists in 2014. According to the company website (kcspros.com), "the mission of KCSP is to provide comprehensive speech and language evaluation and therapy including Dyslexia diagnosis and therapy to clients across the life span."

The evaluation report provided by KCSP indicated that, based on a measure of non-verbal intelligence, the student's cognitive skills fell at the 92nd percentile, placing him in the above average range as compared to same-aged peers. The student showed no evidence of voice or hearing problems, his oral structures were normal, articulation and fluency skills were within normal limits, and his receptive and expressive language skills were above average but a "mild phonological awareness impairment [was] observed on alternate phonological awareness supplemental testing." Based on these results, KCSP gave the student a diagnosis of dyslexia because he displayed "relative weakness in Phonological Awareness, Phonological Memory, and Rapid Symbolic Naming Skills…[and] weakness on Alt Phonological Awareness skills" on the Comprehensive Test of Phonological Process – 2nd Edition (CTOPP-2). By report of the evaluators, there was a difference of more than 1 standard deviation between his Core Language Score on the Clinical Evaluation of Language Fundamentals – 5 (CELF-5) and these subtest scores. The student displayed deficits in accuracy when decoding unknown words and in spelling regular words.

The KCSP report included a listing of possible accommodations that help students "with dyslexia to learn the same curriculum as peers to be able to prove knowledge despite difficulty reading, spelling, and writing."

The student has worked with a private tutor since second grade. He has also worked with a private counselor. His parents have also initiated a process to request a neuropsychological evaluation of the student by an outside agency.

## Issue

In her complaint, the parent raised the following issue:

> Issue One: The district failed to identify and evaluate the student as having a learning disability and did not provide Child Find as required under IDEA. The district failed to test the student for a disability and provide an Individualized Education Program (IEP).

## Parent's Position

The parent asserts that she and her husband have been concerned about the student's academic progress since he was in second grade, and they therefore secured a private evaluation of the student in January of 2018. According to the parent, the evaluation resulted in a diagnosis of dyslexia with a mild phonological awareness

impairment. The parents presented the reports of the evaluation to the district in February and March of 2018, but the district took no action to move ahead with an evaluation of the student to determine his eligibility for special education services.

The parent contends that the student's MAP (Measures of Academic Progress) testing scores have declined since second grade, yet the district has still not evaluated the student for a disability. The parent reports that she and her husband discussed their concerns about the student's reading and writing with the building principal and the building student improvement team (SIT team) on September 16 and October 3, 2019 as part of a 504 evaluation. Although a 504 Accommodation Plan was put in place for the student after the completion of the 504 evaluation, that plan does not, in the opinion of the parent, fully address the student's needs. The parent points out that the accommodations outlined by the 4th grade teacher as a part of the 504 evaluation process address written expression needs which have not been evaluated by the district. The parent also notes that, on the 504 Evaluation Teacher Input form, the classroom teacher rated the student's performance as "below average" with regard to work completion, task initiation, sustaining attention, independent work, and completing assignments and noted that the student's "writing weakness affects his learning in all subjects."

The parent states that as a result of the district's failure to address the student's disability, he is now dealing with anxiety, anger, and poor self-esteem which are affecting his behavior both at home and at school.

It is the position of the parent that because the district has not evaluated the student in all areas of identified need, the district should provide an independent educational evaluation (IEE) to identify all needs and provide a learning profile related to his documented and suspected areas of disability from which eligibility for special education services can be determined and an appropriate IEP can be developed.

## District's Position

It is the position of the district that the student made good academic progress in all areas throughout second and third grade. After concerns were raised by the parent in the fall of the student's fourth grade year regarding the student's writing skills, the district conducted an evaluation to determine 504 eligibility and identified him as a student with a disability. A 504 accommodation plan was put in place. The district contends that the school believed that the student was making progress under that accommodation plan and had not felt it necessary to propose a special education

evaluation. However, in early December of 2019, after the parent told the student's teacher that she was interested in pursuing such an evaluation, the district promptly convened a team meeting to further discuss the parent's request and subsequently provided the parent with prior written notice of a request for consent for the evaluation.

## Applicable Statutes and Regulations

Pursuant to federal regulations at 34C.F.R. 300.153(a)(1) and state regulations at K.A.R. 91-40-51(a), a state department of education may only investigate allegations of a violation of *special education* laws and regulations.

Child Find:

Child find in Kansas involves a screening process for children from birth to age 5, and a general education intervention process for children from kindergarten through age 21 (K.A.R. 91-40-7(b)(1) and (2)). Schools in conjunction with parents use these processes to locate, evaluate, and identify children who may need special education and related services.

If it becomes evident that a child's needs require resources beyond those available in general education, and the school suspects the child is a child with an exceptionality, the child must be referred for a special education evaluation.

In Kansas, screening is conducted, in part, through the required implementation of general education intervention (GEI) (K.A.R. 91-40-7(c)). The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into evaluation for special education.

Kansas encourages schools to use a school-wide, multi-tiered model of support for all children. In Kansas, this is supported through the Multi-Tier System of Supports (MTSS) which includes both academic and behavior supports. The following briefly explains the multi-tiered aspect of the school-wide approach:

> Tier 1: All children receive a core instructional program that uses a scientifically validated curriculum that is provided for all students. Schools choose curricula that have evidence of producing adequate levels of achievement (i.e., research-

based) and instruction is differentiated within the core to meet a broad range of student needs. Therefore, interventions are provided via the general curriculum. Universal screening of all children to monitor progress and to identify children who may need additional support is conducted. Approximately eighty percent of children in the school will be successful in the general curriculum.

Tier 2: Those children who do not respond to the core instructional procedures will receive targeted group interventions in addition to core instruction. More frequent measures of progress monitoring are used to collect child progress data. Approximately fifteen percent of children in the school will need targeted (supplemental) support.

Tier 3: A few children receive intensive, individualized interventions. These may be in addition to, or instead of, the supports provided in Tier 1 and Tier 2 depending on the needs of the child. Interventions will be more intensive and delivered in more substantial blocks of time. Approximately five percent of children in the school will need this kind of intensive support.

Within a MTSS depicted above, children will receive GEI as a part of the system in place for all students. Data collected at each tier should guide school personnel as to the next steps to take based on the child's response to interventions tried. At least by the time a child is ready to access the more intensive supports of Tier 3, the school should employ the use of individualized problem solving to design the intensive individualized support the child will receive as well as a plan to monitor the child's progress and document the child's response to the scientifically research-based interventions. The approach of individual child problem-solving is therefore a component of the larger school-wide system, or it may stand alone as a method to conduct GEI as outlined below.

Before a student is referred for a special education evaluation, school personnel are required to have data-based documentation that:

(1) general education interventions and strategies would be inadequate to address the areas of concern for the child, or

(2) (A) the child was provided with appropriate instruction in regular education settings that was delivered by qualified personnel; and (B)the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction; and (C) the

assessment results were provided to the child's parents; and (D) the assessment results indicate that a special education evaluation is appropriate (K.A.R. 91-40-7(c)).

In either case, there must be data-based documentation that provides a basis for determining that a referral of the student by the school for special education evaluation is warranted.

The requirement to provide data-based documentation of the repeated assessments of child progress during instruction (i.e. progress monitoring) is perhaps the most important of all. Progress monitoring data is used to evaluate the effectiveness of the intervention, to determine the intensity of interventions and resources needed to support child learning, and to provide a basis for school personnel to make decisions during intervention.

Referral for special education evaluation can be triggered in either of the following ways (K.A.R. 91-40-7(c)(1) through (3)):

> (1) The parent (or adult student) requests an evaluation and the school agrees that an evaluation of the child is appropriate; or
>
> (2) school personnel suspect, based on data, that a child may be a child with an exceptionality and need special education services. Typically, school personnel determine this through the GEI process.

## Investigative Findings Regarding Child Find

A formal complaint must allege that a violation of special education laws and regulations has occurred within the period one year prior to the date the complaint is filed (34 C.F.R. 300.153(b) and (c); K.A.R. 91-40-51(a) and (b)). However, in order to develop an in-depth look at the child find issues raised in this complaint, the investigator opted to include relevant information regarding the student beginning in the 2017-18 school year when the parent first presented the district with the report of the parent-initiated evaluation of the student by KCSP.

Second Grade (2017-18):

In January and again in March of 2018, the parents provided the school with copies of the report of an outside evaluation of the student. At their own expense, the parents began to engage a private tutor to work with the student on his writing skills for a total of an hour and a half per week.

MAP Testing:
All elementary school students in the district are assessed two or three times each year (August and May or August, December, and May) using the Measures of Academic Progress Test (MAP). MAP assessments are computer adaptive achievement tests in mathematics and reading. The tests are "computer adaptive," with the difficulty level adjusting to the responses of the student to previous questions. MAP tests allow teachers to design instruction for each student based on his/her skills and reflect how much growth a student makes between testing periods.

In December of 2017, the student's performance on winter MAP testing in the area of mathematics placed him at the 72nd percentile. Spring mathematics testing placed him at the 91st percentile. Winter MAP testing in the area of reading placed the student at the 91st percentile; spring results placed the student at the 81st percentile.

Building Level Intervention:
Screening of the student was completed by a district Occupational Therapist and by the building reading specialist.

Email Communication:
The parent and the 2nd grade classroom teacher as well as other school staff communicated via email on numerous occasions throughout the year about the student.

In an email dated January 12, 2018, the 2nd grade teacher told the parent that "if I looked at the handwriting in my class he would be in the middle. There are people that are better than him and people that are not as good as him. The spacing is still an issue. However, I have seen him do it correctly here at school when he seems to be focused…For the spelling piece…he is probably in the middle of my class with spelling as well."

On January 17, 2018, the 2nd grade teacher sent an email to the parent. According to the teacher, she was "not having to make any modifications of accommodations because [the student] is reading way above a 2nd grade level. I would say the only thing I am doing in class is helping with spacing in writing and now the iPad idea with fixing his misspelled words. As of now, the mistakes that [the student] is doing [sic] is very typical for a 2nd grader. Some of the words that he's changing while he's reading sound like he's reading too quickly. I would point out the word that he says too quickly and have him break it down into chunks so he says the whole word and not just the

beginning of the word that he is focusing on to read quickly. I have attached the high frequency words that we work on that he should know how to read by the end of 2nd grade. He should not be able to spell this words [sic]. Reading and spelling develop at very different ages. Reading comes way before spelling! As far as the spelling mistake, the way that he spelled killed as calied is because he recognizes the sounds of the words, and is able to quickly identify words based on the phonic sounds of the letters in the words. As of right now, I wouldn't worry as much on the spelling of words unless it's a simple spelling word that comes up all the time like the, and etc. Our iPad intervention will help with these common words. Benchmark does not have any list that the students should know how to spell at the end of the year. Will continue to monitor his writing, and be watching for any signs that stand out to me, but currently what I am seeing is very typical for a 2nd grader. I will send the journal home next week because I want the OT to see it before and she is here tomorrow!"

On March 2, 2018, the school counselor sent an email to the parent regarding the scheduling of a conference call on March 5, 2018 to discuss questions the parent had about a "possible 504 plan" for the student. In preparation for the phone call, the parent sent a list of possible accommodations for the team to consider:

- "Word bank for commonly misspelled
- Dictation for longer writing assignments
- Use of an iPad for spelling errors (Use of text-to-speech and speech-to-text software as appropriate)
- Allow student to take tests in a quiet environment outside of classroom.
- Grade handwritten assignments on content only. Do not take points off for spelling or grammar errors, or for penmanship.
- Reduced writing assignments
- Word spacing tool
- Questions before reading text
- Do not require individual reading out loud in classroom unless materials have been provided to student for practice at home prior to the reading task or unless the child volunteers.
- Reduce amount of homework as needed. Amount of homework should be based on the time it would take students without this disability to complete the assignment. The student should spend no more than 1 1⁄2 the amount of time on homework as other students.
- Provide alphabet strip for alphabetizing activities"

In an email to the building principal dated March 25, 2018 regarding the student's classroom placement for third grade, the parent noted "[the 2nd grade teacher] is currently very open to using technology to assist [the student's] progress in his spelling practice and trying out different strategies or preparing him for longer writing assignments with some foundational thinking activities and supports and we would love to see this continue."

On April 20, 2018, the parent sent an email to the teacher to let the teacher know that the private tutor engaged by the family was "focusing on his writing skills and we have been creating an outline and pre-writing activities before he journals here at home. We have been using a lot of the handwriting without tears curriculum and working on changing his grip. He seems to be doing well but he's still struggling with starting with a capital, random capital words and ending with a period…What would you think about a check sheet/reminder visual/anchor poster for his desk?"

The classroom teacher responded via email on April 20, 2018 stating, "[The student] has told me all about his writing skills and how his tutor has been practicing with him on how to pick up the pencil correctly! At school, we as well use graphic organizers and pre-writing activities before formal writing assignments. I have seen some of [the student's] work where he does forget the capitals and periods. For second grade this is pretty normal. However, I wanted to check with third grade about their expectations for next year. I went over to [a third-grade teacher] here at [the school]. She told me that third graders are still working on this skill as well and that the third-grade standards state that this skill is still developing and shouldn't be mastered until the end of third grade. However, with [the student's] diagnosis I know he may need extra practice with this skill. I will go ahead and print that anchor chart for his desk. Another idea is that we can have him go through and highlight the first letters in a sentence after he writes and change the letter if necessary."

According to an email dated August 26, 2018 from the parent to the student's third grade classroom teacher, the parent reported having previously met with the student's second grade classroom teacher and building principal. According to the parent, the results of the student's private evaluation had been reviewed at that time. According to the email, the parent subsequently had a telephone conference with the school psychologist and "discussed 504 accommodations…and the team felt [the student] was not requiring enough specialized interventions to warrant [an accommodation plan] yet. We concluded to re-visit in the Fall in his new grade and with increased demands." The parent noted that in second grade, the teacher had the student speak misspelled words into the iPad and correct them using the help of technology. The

parent also noted that an "anchor chart" for his desk at school and at home provided the student with a visual reminder of some punctuation expectation. Additionally, the second-grade teacher had the student go through and highlight the first letters in a sentence after he writes and change the letter if necessary."

Summary of Interventions/Accommodations as Outlined by the Parent:
At the beginning of the student's fourth grade year, the parent sent the classroom teacher a summary of the interventions/accommodations that had been provided for the student over the years. Under the heading of "2nd Grade," the following interventions/accommodations were listed:

- Anchor chart for SWAG (grammar, handwriting, mechanics) provided by the parents and used at home and at school
- Graphic organizers provided by the teacher
- Pre-writing activities provided by the teacher to be available before formal writing activities
- Highlighting of the first letter in a sentence with correction allowed by the teacher
- Work with an outside tutor to change the student's writing grip
- Colored lined paper provided by an outside Occupational Therapist (OT) to provide support in writing capital/lower case letters
- OT-provided Handwriting Without Tears materials used at home
- Word spacer provided by the teacher and the home
- Use of an iPad for spelling correction on assignments
- OT and reading interventionist conducted screening
- Twice weekly outside tutoring

Third Grade (2018-19):

MAP Testing:
The student completed MAP testing in the areas of reading in the fall and spring of his 2018-19 school year. His performance is reflected in the table below.

| | Fall | Spring |
|---|---|---|
| Reading | 77th percentile | 54th percentile |
| Mathematics | 77th percentile | 86th percentile |

Grades:

The 3rd Grade Report Card for the student shows that he earned grades of A- or better in the areas of reading, written and oral communication, mathematics, science, and social studies in all grading periods except for the fourth quarter of the year when he was given a B+ in the area of written and oral communication. The report card shows that during the second half of the school year (the period of the year falling within the 12 months covered by this complaint), the student often or consistently displayed expected behaviors with regard to completing assignments on time and writing legibly.

Communication Between Parent and District Staff:

On August 26, 2018, following back-to-school night, the parent sent an email to the student's third grade teacher regarding the student's adjustment to third grade. The parent shared a copy of the student's January 2018 private evaluation and told the teacher that the student was receiving outside tutoring for 2 hours each week. The parent told the teacher that the student had been seeing the tutor since the previous March and was showing improvement. On August 31, 2018, the teacher responded, noting that the student was "adjusting quite well. His content knowledge and practices are right on grade level if not above his peers for the third week of school. I would love and really need to see more data before we determine any accommodations [the student] would need to continue the success he is experiencing currently. Next week we take the District MAP testing and this information will help us plot his growth and needs. Can we have a meeting at that time and review what we know, then determine an appropriate plan of action..."

The parent followed up with the teacher via email on September 18, 2018 and expressed her desire to "continue the 504 conversation we had started last year and make sure we are addressing his writing needs." After a subsequent conference with the teacher, the parent emailed the teacher to thank her for meeting and to let the teacher know that outside tutoring would focus in part on the student's writing while the parents would be working with the student at home to provide practice with text to speech and keyboarding.

The parents subsequently spoke with the building principal and shared their concerns regarding the student's progress. Hearing of the parents' concerns, the teacher contacted the parents to arrange a meeting to talk about the parents' concerns. The parent subsequently followed up with the building principal to let her know that "the meeting went well yesterday. [The teacher] was very receptive to hearing about all [the student] is doing outside of school and his unique learning needs. I think we have a good plan for accommodations and modifications should he need those and we will

hopefully plan to meet to discuss a possible 504 plan in the near future after implementing some of the items we discussed. She also said she would no longer be taking off for grammar or spelling errors but rather grade on content in writing assignments. Overall I was very pleased and feel like we are on a better road of partnering for [the student's] needs…"

Throughout the year, the parent and the third-grade teacher exchanged emails regarding the student. On October 9, 2018, the parent emailed the teacher to let her know of problems the parents were experiencing with the student regarding homework and possible accommodation.

On April 2, 2019, the parent sent an email to the teacher to "see if we needed to meet as a team to discuss possibly formalizing any accommodations or modifications (504) [the student] may be utilizing in the classroom in order to transition to Fourth Grade with the supports he needs/is utilizing in place. Let me know your thoughts/availability." On April 4, 2019, the teacher responded via email to the parent regarding the student's need for accommodations as he moved on to fourth grade. The teacher wrote, "I have been thinking about [the student] and considering his needs going forward, and if that includes any accommodations. At this point after really thinking and reflecting on different scenarios in the classroom, I cannot say he requires any at this time. In the future, when work does become more rigorous that could change…He still would prefer not to write and does require some redirection [if] there is a writing component but he will do it."

On May 2, 2019, the parent emailed the teacher to thank her for meeting with the parents that morning. In her message, the parent stated "we are going to focus more on the writing with his outside tutor as well as what he is doing at school. [We] also plan on giving him more practice with text to speech and keyboarding at home. I think in time he will see the value in its use. Please let us know of any changes…that [the student] may exhibit after our meeting today."

<u>Summary of interventions/Accommodations as Outlined by the Parent:</u>
As noted above, at the beginning of the student's fourth grade year, the parent sent the classroom teacher a summary of the interventions/accommodations that had been provided for the student over the years. Included in the parent's summary for 3rd grade was the following:

- Decreased work expectations at home if knowledge of the concept was demonstrated

- Scribing of assignments at home
- iPad available at school for voice to text
- Voice typing tool in his Google drive at school
- Assignments recorded and submitted on Seesaw
- Check-in on problems with greater writing output with explanations provided at home and school

During the summer of 2019, the student continued twice-weekly sessions with an outside tutor for a total of 2 hours per week.

Fourth Grade (2019-20)

On April 12, 2019, the student's parents sent a letter to the building principal and the school's fourth grade team in preparation for the development of class lists for the upcoming school year. In their letter, the parents noted that they wanted him to have a classroom teacher "who is familiar with the needs of a student with dyslexia" particularly one "with knowledge of Orton-Gillingham based reading approaches." The parents described the student as a "prolific reader" who "appears to be on grade level, but struggles with spelling and decoding skills." The parents noted that "so far [the student] has needed only a few accommodations or modifications but we are seeing more of these struggles as the difficulty of his homework increases, which is indicative of stealth dyslexia."

MAP Testing:

MAP testing of the student has again been conducted during the 2019-20 school year. MAP testing on August 28, 2019 in the area of reading placed the student at the 76$^{th}$ percentile in reading. Skills were assessed in the following areas:

A. Literature: Key Ideas and Details
B. Literature: Language, Craft, and Structure
C. Informational Text: Key Ideas and Details
D. Informational Text: Language, Craft, and Structures

The student's performance placed him in the high average range when compared to peers in area A, in the low average range in area B, and in the high range for areas C and D.

MAP testing in the area of mathematics was completed on August 30, 2019 and again on December 11, 2019. The following areas were assessed:

A. Operations and Algebraic Thinking
B. Number and Operations
C. Measurement and Data
D. Geometry

The student's overall mathematics score in August was at the 89th percentile. His performance placed him in the high range for areas A, B, and D and in the high average range in C. The student's overall mathematics score in December was at the 90th percentile. Again, his performance in areas A, B, and D placed him in the high range; his performance in area C was in the high average range.

504 Accommodations:

At the beginning of the 2019-20 school year, the parent contacted the student's teacher to provide a copy of the outside evaluation report. In an email to the teacher, the parent noted that the student's "biggest struggle is writing. He has difficulty with both the mechanics and the speed/quantity of output…[and the parent strongly suspects] he also has dysgraphia." The parent noted that the student was working with an outside tutor and told the teacher that she wanted to schedule a student improvement team (SIT) meeting in hopes of putting more modifications and accommodations in place to help the student be "more supported both in the classroom and with homework." The parent also noted that she wanted to continue the 504 discussions "we have been put on hold with now for two years."

A team meeting was held on September 9, 2019. According to a form entitled "Notice to Conduct A 504 Evaluation" dated September 10, 2019 and signed by the parent on that date, "[The student] has the diagnosis of Dyslexia. Although [he] has managed to keep up with his academics through the 3rd grade, the writing requirements are increasing in 4th grade in all academic areas so there may be some needed accommodations to keep [the student] on track with his peers."

Over the period of August 29 through September 24, 2019, a 504 evaluation was conducted. The results of that evaluation were reviewed in a meeting on October 3, 2019 and summarized in a report signed by the parents, the building principal, the student's general education teacher, and a case manager on October 3, 2019. In the report, the general education teacher stated, "[The student's] strengths are in Math and Reading Comprehension. [The student] cannot write at the rate, with syntax and grammar skills or spelling skills of his peers. This is causing him to fall behind and I worry that it will impact his self-image. We have and encourage [him] to use Google Voice when drafting longer assignments. Some written assignments are shortened. I

allow [the student] to verbalize his thinking instead of writing it out in sentence form on Math tests. He also uses a coding system (when needed) on quizzes where he will write a corresponding number instead of a word."

The team determined that the student demonstrated a "physical or mental impairment that substantially limits a major life activity" and noted that he needed "accommodations…services or specially designed instructions to have equal access to the district's programs and activities." The team determined that the student was eligible for a 504 plan.

A 504 Accommodation Plan was developed for the student on October 7, 2019. After email exchanges regarding the content of the plan, both parents gave their written consent on October 15, 2019 for the plan to be implemented. The building principal, the student's general education teacher, and an assigned case manager signed off on the plan on October 16, 2019. The plan notes that "[The student] has a diagnosis of Dyslexia. The amount of writing that is required at school in all subject areas has impacted his ability to keep up with his schoolwork. We believe that by putting some accommodations in place, [the student] will be able to keep up with the learning pace of his peers." The plan outlined the following "Instructional/Curriculum" accommodations/modifications:

- "Allow access to audio books whenever possible.
- [The student] should not be asked to read out loud in class unless he volunteers or he is preloaded with the information to be read.
- Do not grade spelling errors on in [sic] class work.
- Allow [the student] to orally express answers on tests.
- Allow extra typing practice whenever possible.
- Access to text to speech/speech to text technology.
- Reduce format for homework assignments equivalent to ½ that assigned to the class. The reduced format items will reflect key concepts and current standards that have been taught.
- Allow extra time for test taking not to exceed 1.5 that of his peers.
- Teacher will provide copy of notes when possible so [the student] does not have to write them or copy them from the board.
- [The student] will be able to use graphic organizers for multi-step assignments.
- Highlighting key directions to preload right before testing."

The plan also allowed for one "Environmental" accommodation: "Testing should be offered in a quiet setting and may be read aloud to [the student]."

On October 17, 2019, district staff signed a "Documentation of 504 Plan Distribution" form to indicate that each had received a copy of the plan and that the student's 504 case manager had reviewed the plan with the signatories. By signing the form, each person confirmed that he/she was "aware of the accommodations in the 504 Plan and will make the changes necessary in your class/building to fulfill the requirements of the plan."

- administrator
- art teacher
- general education teacher
- language teacher
- library media specialist
- music teacher
- physical education teacher
- computer teacher

The case manager provided the above-listed staff with additional information provided by the parent regarding the student including his diagnostic history, his performance on MAP testing and accommodations/modifications that had been provided to the student during his second and third grade years as well as a list of possible accommodations for students diagnosed with Dyslexia or who are considered "Emotionally Disturbed."

A meeting was scheduled for December 10, 2019 for the purpose of reviewing the student's progress under the 504 Plan. According to an email sent to the parent by the counselor (who is also the building 504 coordinator), the purpose of the meeting would be to determine whether the student was making adequate progress. If it was determined that progress was not adequate, a team review would be needed. If it was determined that the student was not using the accommodations outlined in his plan, a team discussion would be needed.

Grades:

The student's first quarter grade report for the 2019-20 school year shows that he was performing well, earning A grades in the areas of reading, mathematics, science, and social studies and a B in writing and geography.

Email Communication:
School staff and parent have communicated about the student's needs via email during the school year.

On September 12, 2019, the OT at the school contacted the parent to suggest that in view of the student's dyslexia and dysgraphia diagnoses he could "benefit from technology accommodations to truly show what he knows." The OT offered the name of a technology program she believed could benefit the student and indicated that she would be willing to teach the student how to use the program.

On November 19, 2019, the parent sent an email to the teacher asking, "Do you think any of the accommodations are relieving any stress?... Do we need to get him more help with his writing? Is this a change in his mood from the beginning of the school year?" The 4th grade teacher responded, noting that she did not think that the accommodations were relieving stress for the student because "he is not taking me up on using them. He also hasn't been following my directions of how to use the typing program well so I don't know how much the typing practice is going to help him...His effort is the same as the beginning of the school year, but I've starting [sic] expecting more of him and the entire class as we near the ½ way point in the year. It's been challenging with the writing/taking notes in science & social studies in particular. I'll continue offering him a break from the notes & offer to have some written in for him & hope that he will agree to use it."

On November 21, 2019, the parent sent an email to the teacher stating, "It is so very hard for him not to be like his peers, but it is having a devastating toll. I feel like maybe we need to just put some of the accommodations in place and see if they ease any of these feelings. I don't know how a highly sensitive and aware 4th grader actively asks to be different from his peers, but I think we need to start involving [the student] in the process. I know we have a meeting scheduled on December 10th but maybe we could meet with [the student] to problem solve and address his feelings...The biggest thing I want him to get from this downturn is that yes, things can be hard but we are here to help him with the hard things and that's how we learn. I have been reading more on his 'fear of failure' and we will continue to have conversations about strengths and weaknesses and how to overcome challenges. Does he possibly need some breaks in his day? An extra project or anything that is over and above I don't feel like will work for him as he is not great at any independent study and it probably feels like one more thing. Is there another student he can check in with/work together with? Thanks for keeping the lines of communication open."

Referral for Special Education Evaluation:

A 504 review meeting regarding the student was held on December 10, 2019. By report of the parent, the building principal, counselor, the school psychologist, and the student's classroom teacher were in attendance. The parent expressed concern regarding the student's performance in the area of written expression and asked the school team whether they continued to see the student's skill level was age appropriate. The parent talked to the team about the level of frustration the student was expressing at home.

The school psychologist then explained the special education evaluation process. At the conclusion of the meeting, the building principal asked the parent if she was requesting a special education evaluation of the student, and the parent responded affirmatively. The school psychologist subsequently provided the parent with prior written notice of a proposed evaluation and requested her consent.

In an email to the investigator dated December 29, 2019, the parent reported that on December 20, 2019 she had returned her written consent to the school for a comprehensive evaluation. December 20th was the last day of school before the district's winter break.

## Summary and Conclusions

Because there was a family history of dyslexia and reading-related problems, and because of the parents' concerns regarding the student's learning, the parents opted to have the student privately evaluated in January of 2018.

Upon receiving a diagnosis of dyslexia for the student, the parent provided copies of the evaluation report to the school in February and March of 2018 and met with staff to discuss the student's need for accommodations/modifications. Emails provided by the parent show that the team considered the student's need for a 504 accommodation plan, but it was determined that the student was not requiring enough specialized intervention to warrant the development of a plan at that time. A number of accommodations/interventions were put in place by the classroom teacher to assist the student with writing tasks.

There is no evidence to show that the parent made a specific request for a special education evaluation of the student at any time during the student's second grade year (2017-18), but, as a part of general education interventions, the OT and reading specialist for the building did observe the student and provided input. Results of MAP

testing in the winter and spring of the 2017-18 school year showed that the student was making good progress in the area of math, increasing from the 72nd percentile to the 91st percentile over that period. The student's performance in reading over that period fell from the 91st percentile to the 81st percentile.

In the fall of the 2018-19 school year, the parent again approached the district regarding the student's possible need for a 504 accommodation plan. While she implemented individualized classroom accommodations for the student, the student's teacher did not feel that the student's need for accommodation warranted a formalized plan, and none was developed. In April 2019, the parent contacted the 3rd grade classroom teacher to ask if a team meeting was needed to discuss formalizing accommodations/modifications for fourth grade. The teacher indicated that after giving thought to the student's needs she did not feel that he required any specific accommodations/modifications though she acknowledged that could change as requirements became more rigorous.

During the student's third grade year, his reading performance as measure by MAP testing had dropped to the 77th percentile and fell further to the 54th percentile in the spring. Math skills at the beginning of the year were also at the 77th percentile but increased by year's end to the 86th percentile. The student earned grades of A- or better in all areas over all grading periods except for a B+ in the area of written and oral communication during the last quarter of the year.

There is no evidence to show that the parent made a specific request for a special education referral/evaluation at any time during the 2018-19 school year. Rather, the student's possible need for 504 accommodations appeared to be the primary concern expressed by the parent.

At the beginning of the 2018-19 school year, the parent contacted the student's teacher to discuss the student's performance and to share information about the 2018 evaluation. Although the student performed well during the early weeks of the year, the classroom teacher observed that his writing skills were beginning to have a negative impact. A referral for a 504 evaluation was made in early October of 2019, and the student was deemed eligible to have a 504 accommodation plan. That plan was implemented after the consent of the parent was obtained on October 15, 2019. There is no evidence to show that the parent or the school felt that the student should be referred for a special education evaluation at that time.

On December 10, 2019, a meeting was held for the purpose of reviewing the student's progress under the 504 plan and determining what action, if any, was needed. The school psychologist who was present at the meeting explained the evaluation process and, after determining that the parent wanted to proceed with a special education evaluation, subsequently provided the parent with prior written notice of the district's proposal to conduct an evaluation. The parent returned a signed written consent for evaluation form to the district on December 20, 2019.

In summary, evidence was presented which shows that the parent provided the district with the report of a private evaluation conducted in January 2018 which included a diagnosis of the student as dyslexic. There is also ample evidence to show that the parent and the district discussed the student's need for accommodations under a 504 accommodation plan during the student's second and third grade years. The student's grades over that period show he was progressing well in the general education curriculum and finding success with the accommodations/modifications/interventions being provided by his classroom teachers. Early in the student's fourth grade year, however, his writing needs began to interfere with his classroom performance. At that point, a 504 evaluation was conducted. The student was determined to be eligible for 504 identification, and an accommodation plan was developed. The student's progress was monitored and reviewed and need for referral for a special education evaluation was addressed on December 10, 2019 at a 504 review meeting. The parent provided her signed consent for a comprehensive evaluation on December 20, 2019.

The parent has, on a number of occasions since January of 2018, communicated with school staff regarding the student's need for a 504 accommodation plan. Because this investigation is limited to a determination of violations with regard to special education laws and regulations, investigations of alleged violations of Section 504 fall outside of the purview of this investigator. If the parent wants to pursue a complaint regarding the district's actions with regard to Section 504 of the Rehabilitation Act, those allegations should be directed to the Office for Civil Rights at OCR.KansasCity@ed.gov.

The task of this investigator is to determine whether the district failed in its special education Child Find responsibilities to the student. Information obtained by the investigator during the course of this investigation shows that while teachers and others were aware that the student had received a diagnosis of dyslexia, there is no indication that staff believed the student was in need of special education services. While MAP testing showed a relative drop in performance as compared to peers over the years, the student's grades indicated that he was making good year-over-year progress through the general education curriculum, responding well to core

instructions with accommodations/modifications being provided by general education teachers.

The parent and the student's teachers communicated regularly about his progress. The parent has acknowledged to the investigator that she did not ask for a special education evaluation prior to December of 2019 but was waiting for the district to "do the right thing" for her son. Once the district was aware that the parent wanted to pursue a special education evaluation for the student, the parent was provided with information regarding the special education evaluation process and her consent for evaluation was sought. Under these circumstances, a violation of special education laws and regulations with regard to special education Child Find is not substantiated.

## Independent Educational Evaluation (IEE)

As a resolution to her complaint, the parent proposed that a non-biased, comprehensive and independent educational evaluation be conducted by a qualified examiner who is not employed by the school district.

### Parent's Position

The parent asserts that an IEE is needed in order to identify all of the student's areas of need and to provide a "learning profile" related to documented and suspected areas of disability. That IEE would establish the student's eligibility for special education services as well as IEP goals.

### District's Position

It is the district's position that while the parent has the right to obtain an IEE at public expense if the parent disagrees with an evaluation completed by the district, the district has not, in the case of this student, completed an initial evaluation for special education.

### Applicable Statutes and Regulations

*After an initial special education evaluation is complete*, if the parents disagree with the school's evaluation, they have the right to ask for an independent educational evaluation (IEE) at public expense (34 CFR 300.502(b)(1); K.A.R. 91-40-12(a)(1)). If the parents obtain an IEE at their own expense or at public expense, the results of the evaluation shall be considered by the school, if it meets the school's criteria, in any

decision made with respect to the provision of a free appropriate public education (FAPE) to the child (34 CFR 300.502(c)(1); K.A.R. 91-40-12(e)).

Investigative Findings and Conclusions

The parent has provided written consent for the district's proposed comprehensive evaluation of the student. Until that evaluation is complete, a request for an IEE at public expense is premature. To have a right to request an IEE at public expense, a parent must first disagree with a special education evaluation conducted by the district.

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON DECEMBER 9, 2019

DATE OF REPORT: JANUARY 8, 2020

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

The complaint is against USD #___ (_____ Public Schools). In the remainder of this report, USD #___ may also be referred to as the "school district" or the "local education authority (LEA)."

The complaint was received by the Kansas State Department of Education on December 9, 2019. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on January 8, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent and the student by telephone on December 19, 2019 as part of the investigation process.

USD #___made the following school district staff available for an interview on December 17, 2019:

- JH, Director of Special Education
- DD, Principal at _____ High School
- CC, Associate Principal at _____ High School
- LK, General Counsel for USD #___

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- IEP for the student dated December 19, 2018 and amended on March 27, 2019
- Timeline dated November 18 through November 26, 2019 written by the parent
- Email dated August 29, 2019 from CC, Associate Principal at _____ High School, to the parent
- Screenshot of texts between the parent and the Sports Therapy Group on November 18, 2019
- Screenshot of texts between the parent and grandparent on November 19, 2019
- Email dated November 21, 2019 at 10:46 a.m. to DD, Principal at _____ High School, from the parent
- Email dated November 21, 2019 at 10:54 a.m. to Mr. C from the parent
- Email dated November 21, 2019 at 11:43 a.m. from MH, Associate Head Boys Basketball Coach for _____ High School, to Mr. C
- Email dated November 21, 2019 at 3:27 p.m. to the parent from Mr. C
- Email dated November 21, 2019 at 4:40 p.m. to JH, Director of Special Education, from the parent
- Email dated November 22, 2019 at 8:48 a.m. to the parent from Dr. H
- Email dated November 22, 2019 at 9:15 a.m. to Dr. H from the parent
- Email dated November 22, 2019 at 9:33 a.m. to Dr. H from the parent
- Email dated November 22, 2019 at 12:20 p.m. to the parent from Mr. C
- Email dated November 22, 2019 at 12:45 p.m. to Mr. C from the parent
- Email dated November 25, 2019 at 9:59 a.m. to Mr. D from RB, Head Boys Basketball Coach for _____ High School

- Email dated November 26, 2019 at 4:47 p.m. to Dr. H from the parent
- Response to the Allegation written by LK, General Counsel for USD #50, dated December 26, 2019
- Co-Curricular and Extracurricular Activities Requirements from the 2019-2020 _____ High School Student Handbook
- Guidelines and Expectations for Player Selection from the 2019-2020 _____ High School Basketball Handbook
- Board Policy 8375 – Student Activities for USD #___
- Administrative Regulation 8375-001 – Management of Athletic Programs for USD #___
- 2019-2020 Kansas State High School Athletic Association (KSHSAA) Handbook
- Kansas Open Records Act (KORA) request dated November 21, 2019 to USD #___ from the parent
- Response to the KORA request dated November 25, 2019 to the parent from Ms. K
- 2019-2020 _____ High School Boys Basketball Information
- June-July 2019 issue of the _____ High School Parent Newsletter
- November 2019 issue of the _____ High School Parent Newsletter

## Background Information

This investigation involves a 14-year-old male who is currently enrolled in the ninth grade at _____ High School in USD #___ for the 2019-2020 school year. Records and interviews found the student was originally found eligible for special education under the eligibility category of emotional disturbance on November 2, 2017. The student has received special education services since the beginning of the second semester of seventh grade at Landon Middle School in USD #___.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to take steps to provide the student with an equal opportunity to participate in extracurricular and other nonacademic activities during the 2019-2020 school year, specifically participation in the school's basketball program.

## Parent Position

The parent believes the student needs to have basketball accommodations that would allow him to participate in sports due to his disability. The parent reports that because of his disability, the student gets overwhelmed and shuts down in new situations. The student also displays anxiety in large groups of students.

The parent reported there were three days of basketball tryouts. On Monday, November 18, 2019, the student left basketball tryouts early because he became overwhelmed. On Tuesday, November 19, 2019, the student was able to stay and participate in the basketball tryouts. On Wednesday, November 20, 2019, the parent and student reported that basketball uniforms were given to students who made the basketball team. The student did not receive a uniform and did not stay for the remainder of the practice that day.

On Thursday, November 21, 2019, the parent contacted the principals at _____ High School wanting to know why the student had not made the basketball team. The parent reported Mr.C, Associate Principal at _____ High School, told her in an email and in a phone call that the coaches make these decisions and the coaches do not have to explain why the student did not make the team. The parent stated, "He advised me that the school had never gave basketball accommodations and they weren't about to start now with the student. I explained the coach is looking at skills and the student's disability impacts his skills as is evident by him not going to gym and how at the middle school level he never had the opportunity to interact with his peers . . . I said the student needs an accommodation and Mr. C said the decision was already made and nothing would change it. I said I was filing a complaint if they weren't willing to meet to discuss, allow me to talk to the coach, offer the student more time,

accommodate his disability and Mr. C said it was my choice to file a complaint if I wanted."

The parent indicated that USD #___ has continued to refuse to let her speak to MH, Associate Head Boys Basketball Coach and Freshman Basketball Coach for _____ High School. The parent stated, "I understand the selection process is left to the coach, but in my opinion, the coach isn't considering the impact that his disability has on his skills and abilities as it relates to basketball. Therefore he shouldn't be excluded from sports just because he has a disability."

The parent indicated that the IDEA allows him the opportunity to participate with his peers and believes that if his disability hinders his participation then he should be accommodated for it. The parent reported that she wanted two accommodations to decrease the student's anxiety. First, she requested that the student be allowed to have a separate tryout with the coach so the student could demonstrate his basketball skills. Second, she requested the student be provided with two additional days of practice with the team so the student could become acquainted with the other players. The parent believed these two accommodations would decrease his anxiety and allow the student to display his basketball skills without the effect of his disability.

The parent indicated that USD #___ is aware of the student's IDEA label and his needs because of his IEP. The parent said she asked for the additional tryout times for the student as he obviously struggles with adapting in a larger environment because he does not go to the gym for his physical education class during the first period this school year. The parent also stated, "Asking for more days to try out, given his disability, I feel is reasonable and wouldn't modify anything or cost them anything. Especially when he has modification on everything else. He isn't expected to complete assignments or test when other students do because he has a short attention span and easily shuts down."

The parent believes the problem started back to middle school when the student was not given the opportunity to interact with his peers and was not allowed to play on the middle school basketball team, which resulted in the student not being accustomed to the large crowd of a team. The parent stated, "The issue I have with this is the student's IEP is for Emotionally Disturbed (ED)

and it has also been known and documented , in his IEP that he needs modifications/ accommodations . . . so therefore my request for accommodations were reasonable, given his label and needs."

The parent said, "The Office of Civil Rights (OCR) and IDEA have clarified the value of governing bodies and school districts adopting a collaborative approach to developing and implementing reasonable accommodations for disabled students in order to maximize their opportunity to participate in sports on a level playing field with other student-athletes (See Kempf v. Michigan High School Athletic Association). OCR and the courts applied three categories of accommodations; my request wouldn't have been a fundamental alteration, undue financial burden or safety/ health risk. Again, given the student's disability and the fact that he currently has accommodations for gym, then my requests were again reasonable."

In addition to USD #___ not providing appropriate accommodations, the parent also believes USD #___ did not provide the student with an equal opportunity to participate in the basketball program because of not informing the student or parent about additional opportunities to develop basketball skills that were provided to other students.

Both the student and parent reported that Coach H told the student he wished he had more time with the student so he could better see his basketball skills. It was also reported that Coach H said that the freshman players who made the basketball team came to the summer workout basketball session and he was able to see their skills and better develop them.

The parent stated, "The student said he was never made aware of the summer workout sessions and even so he was doing tutoring as part of a state complaint that was sustained. Therefore, the school had opportunity to tell him while he was at tutoring or even mention the basketball camp to me and it was never mentioned."

In summary, the parent alleges that the student was never given an equal opportunity to participate in the basketball program because USD #___ did not make the student aware of the summer basketball camp where the student

could have worked more closely with the coach to develop his basketball skills to the level required to make the team. The parent also alleges that USD #___ did not provide the necessary accommodation of extended time to address the student's anxiety during the tryouts simply by allowing the student to attend the third day of tryouts. The parent stated, "The student felt embarrassed and hurt and didn't know how to deal with being around other people. Whether the school intended this to be an extra day, they were passing out uniforms to players who made the team so if you didn't get a uniform then you know you didn't make the team." These two failures resulted in the student not being given an equal opportunity to participate in the school's basketball program during the 2019-2020 school year.

School District Position

USD #___ disputes the parent's allegation that the district did not provide the student with an equal opportunity to participate in the basketball program.

USD #___ reported there is nothing in the student's IEP that requires any supplementary aids and services or other supports in order for the student to participate in extra-curricular activities. The IEP in effect during the 2019-2020 school year was developed on December 20, 2018 and amended on March 27, 2019. This IEP required specialized instruction in math and study skills in the special education setting and inclusion support in English, Social Studies, and Biology classes. No supplementary aids or services were required by this IEP. The IEP included modifications for shortened tests and a modified math curriculum. The IEP also included accommodations for chunking work, use of a calculator and word processor, breaks when the student feels overwhelmed, extended time to complete work, assistance with writing tasks, the option to take tests over multiple class periods, testing in the special education setting, and paper copies of assignments, assessments, and class notes. This IEP also included a Behavior Intervention Plan (BIP) that required breaks and outlined the steps to take to redirect the student when inappropriate language or behaviors occur because of frustration.

USD #___ reported eighth grade students at Landon Middle School were first informed about the _____ High School athletic programs by the coaches, including the basketball coaches, during the spring semester of the 2018-19 school year. During that meeting, the coaches passed out a summer calendar with the off-season schedule and the students were informed that there were no fees associated with these voluntary off-season activities. In addition, information about summer programs including the boys basketball camp scheduled from June 3 through July 11, 2019 was published in the June/July 2019 issue of the _____ High School Parent Newsletter, which was emailed to all incoming freshman and was available on the district's website.

Since the beginning of the 2019-2020 school year, daily school announcements to all students have included reminders about upcoming athletic activities and opportunities including pre-season basketball workouts. In addition, the winter sports parent meeting scheduled for November 14, 2019 was publicized in the November 2019 _____ High School Parent Newsletter, which was emailed to all parents and available on the district's website.

The 2019-20 Boys Basketball Calendar is available on the _____ High School page of the district's website, under the Activities tab, under the Athletics tab, under the Boys Basketball tab. The calendar for November 2019 shows November 18, 2019 as the first day of practice with November 19, 2019 as the date the first cut would be posted and November 21, 2019 as the date the final cut would be posted.

In addition to the information provided to all parents and students, Mr. C reported that he shared information about pre-season basketball workouts during the 2019-2020 school year in an email to the parent on August 29, 2019. Mr. C reported that he also took the student to meet with Coach H on that same date in order to get the specific workout times. USD #___ indicated that the student participated in a couple of these pre-season workouts but did not attend consistently.

USD #___ staff reported the tryouts for the _____ High School basketball program were held on November 18 and 19, 2019 in the high school gym. The

student did not participate in the first day of tryouts; therefore, he and another similarly situated student were allowed a second tryout day on November 20, 2019. The student attended the tryouts on both November 19 and November 20, 2019. The district believes this additional day provided the student with extended time to participate in the basketball tryout process.

USD #___ also reported that the student was provided with an accommodation to waive the _____ High School academic requirements during the 2019-2020 school year. At the time of the tryouts, the student did not meet the academic eligibility requirements as described in the 2019-2020 _____ High School Student Handbook. Despite this fact, Mr. C waived the academic eligibility requirement for the student. This allowed the student to participate in the basketball tryouts and would have allowed him to practice and play if he made the team and met the Kansas State High School Athletic Association (KSHSAA) eligibility requirements. School staff noted that waiving the academic eligibility requirement has never been done for any student in the past, but was an accommodation provided to this student to allow him the opportunity to try out and participate.

USD #___ noted that _____ High School boys' basketball team participates in competitive high school athletics, which are governed by the Kansas State High School Athletic Association (KSHSAA). School staff stated there are always more students who try out than make the team so cuts are necessary. School board policy and procedures allows the coaches to make decisions regarding which students make the athletic teams.

The 2019-2020 _____ High School Basketball Handbook lists the guidelines and expectations for player selection for the basketball team. These guidelines and expectations include basketball skills; physical talent; size/height/position played; positive attitude; desire; commitment; self-discipline; being a team player; academics; citizenship; communication; remaining years of eligibility; work ethic; and the squad size.

School staff reported that the three days of tryouts included both individual and group drills focusing on shooting, ball handling, and agility. Students also

participated in 3-on-3 and 5-on-5 scrimmages in order for the coaches to assess student based on the guidelines and expectations.

Coach M replied to Mr.C 's inquiry on November 21, 2019 regarding why the student did not make the basketball team by stating, "The student is at least one year behind skill wise to compete on the high school level. From my observation, the student has not played a lot of organized basketball. This is evident from his two days of tryouts. If the student wants to tryout next year for the basketball program, I suggest he takes full advantage of the off-season program. The off-season program consists of spring/summer weight training, spring league basketball, summer basketball workouts and tournaments."

USD #___ believes their policy, procedure, and practice are equitable and meet the KSHSAA association guidelines and the requirements of the IDEA and OCR. USD #___ also referenced the United States Department of Education's OCR Dear Colleague Letter dated January 25, 2013, which states, "Schools may require a level of skill or ability for participation in a competitive program or activity; equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out."

USD #___ noted that 19 freshman and 23 sophomores, juniors and seniors tried out for the 2019-20 boys' basketball team. Of those students 15 freshman and 18 sophomores, juniors, and seniors made the team. Eight students with disabilities tried out for the team with five of those students making the team. Two students with disabilities were chosen for the varsity team and three students with disabilities were chosen for the freshman team.

While nothing in the student's IEP required accommodations or modifications for extra-curricular activities, the district waived the academic eligibility requirement to allow the student to participate in the basketball tryouts and provided extended time for the student to participate in the tryouts. USD #___ reported the student was allowed to participate in two days of basketball tryouts despite missing the first scheduled day and not meeting the school's academic eligibility requirement. USD #___ believes the student was provided an equal

opportunity to participate in the basketball program; however, the student simply did not have the skill level to make the team at this time.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.107(a), require school districts to take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to afford students with disabilities an equal opportunity for participation in nonacademic and extracurricular services and activities. Federal regulations, at 34 C.F.R. 300.107(b), states that nonacademic and extracurricular services and activities includes athletics sponsored by the school district.

The United States Department of Education's Office of Civil Rights issued a Dear Colleague Letter on January 25, 2013 that states, "Schools may require a level of skill or ability for participation in a competitive program or activity; equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out."

Interview and documentation found there are specific requirements and procedures for all students to participate in the basketball program. The _____ High School states that students must meet specific academic standards as well as meet KSHSAA eligibility requirements. In addition, the _____ High School Basketball Handbook describes the specific guidelines and expectations for player selection for the team and school board policy and procedures allow the basketball coaches to choose which players will be on a team. The 2019-2020 _____ High School Basketball Calendar shows there were three days of tryouts on November 18 through November 20, 2019 with the first cut following the second day of tryouts and the final cut being posted following the third day of tryouts on November 21, 2019.

The student's IEP in effect during the first semester of the 2019-2020 school year does not include any supplementary aids and services in order for the student to participate in extra-curricular activities. However, the IEP does include accommodations for extended time, breaks when the student feels

overwhelmed, and a BIP that outlines the steps to take to redirect the student when inappropriate language or behaviors occur because of frustration.

Interviews and documentation shows USD #___ did take steps to allow the student an equal opportunity to participate in the _____ High School's basketball program. First, the _____ High School's academic requirement was waived which allowed the student the opportunity to participate in the basketball tryouts and would have allowed him to practice and play if he made the team and met the Kansas State High School Athletic Association (KSHSAA) eligibility requirements.

Second, the student was provided additional days to participate in the basketball tryouts. The student became overwhelmed during the first day of basketball tryouts and left the practice; however, despite missing the first day of tryouts and the first round of cuts, the student was allowed to participate in the second and third day of tryouts.

During these tryouts, the student was allowed to participate in both individual and group drills focusing on shooting, ball handling, and agility. The student also participated in 3-on-3 and 5-on-5 scrimmages in order for the coaches to assess the student's basketball skills based on the guidelines and expectations for player selection. The coach reported the student did not make the basketball team because the student is at least one year behind skill wise to compete on the high school level based upon his performance during his two days of tryouts. It is noted that eight other students were also cut during the basketball tryouts by the coaches based on the guidelines and expectations for player selection.

The parent also contends the student was not informed of the summer camp opportunity and, even if he had been informed, the student would not have been able to participate due to attending special education tutoring during the summer. The parent believes this resulted in the student not having an equal opportunity to develop his basketball skills through the coach having additional time to work with the student.

Interviews and documentation found that USD #___ disseminated information about the summer basketball program to all students at _____ High School via multiple methods including an in person meeting with students during the spring of 2019 and written information in the June/July 2019 _____ High School Parent Newsletter provided to parents of freshman students via an email and on the LEA's website. The summer camp ran from June 3 through July 11, 2019 and participation in the camp was voluntary and not a requirement to make the basketball team. In addition, pre-season workouts were also available during the first quarter of the 2019-2020 school year for the student to practice and develop his basketball skills. It appears the student was aware of these opportunities and that he took part in several of the pre-season workouts although not consistently.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to take steps to provide the student with an equal opportunity to participate in extra-curricular and other nonacademic activities, specifically to participate in the school's basketball program, during the 2019-20 school year is not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ Public Schools: 20FC___-001

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on December 9, 2019, by _____, on behalf of her son, _____. In the remainder of this decision, Ms. _____ will be referred to as "the parent," and Jamarion will be referred to as "the student." An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education, and Title Services team at the Kansas State Department of Education. Following the investigation, a Complaint Report, addressing the allegations, was issued on January 8, 2020. That Complaint Report concluded that there was no violation of special education statutes and regulations

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an appeal committee was appointed and it reviewed the original complaint filed by the parent, the Complaint Report, the parent's notice of appeal, and the district's written response to the appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

## PRELIMINARY MATTERS

A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Complaint Report. That regulation states, in part, that: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Committee does not attempt to locate the missing support.

No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate investigation. The appeal committee's function will be to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

In a special education complaint to a State Education Agency, such as this one, the Kansas State Department of Education (KSDE) is limited in jurisdiction to allegations of a violation of special education statutes and regulations [See 34 C.F.R. 153(b)(1); and K.A.R. 91-40-51(a)]. The parent's appeal referenced a number of regulations related to Section 504 of the Rehabilitation Act of 1973. Because the Department lacks jurisdiction over the requirements of Section 504, it will not address how that statute may apply to the facts of this complaint.

## DISCUSSION OF ISSUES ON APPEAL

This complaint involved a single issue.

The parent stated the issue in her original complaint as: "Failure to recognize [the student's] disability and provide reasonable accommodations or modification which resulted in a loss of the opportunity for [the student] to participate with his non-disabled peers." In the Complaint Report, the investigator stated the issue as "The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to take steps to provide the student with an equal opportunity to participate in extracurricular and other nonacademic activities during the 2019-2020 school year, specifically participation in the school's basketball program."

In the appeal, the parent states that the district committed procedural violations by denying her requests for an IEP meeting and by not responding to her request with a prior written notice (PWN). However, neither the parent's statement of the issue nor the investigator's statement of the issue includes allegations related to the procedures used by the district. Accordingly, the investigator addressed only the substantive issue of whether the district took steps to provide reasonable accommodations to enable the student to have an equal opportunity to participate in extracurricular activities (basketball), and did not investigate the procedures used by the district in handling this matter. Because the investigator investigated only the allegation made by the parent, the complaint report made no findings or conclusions regarding procedural matters. K.A.R. 91-40-51(f)(1) only allows for the appeal of "the findings or conclusions of a compliance report." As a result, this committee cannot now address the procedural concerns expressed by the parent in her appeal.

The applicable findings in the Complaint Report, all specified on pages 11 through 13, were as follows:

(1) The applicable regulation regarding this issue presented by the parent is 34 C.F.R. 300.107(a). That regulation states:

> a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. (Report, p. 11).

(2) there are specific requirements and procedures for all students to participate in the basketball program. The _____ High School states that students must meet specific academic standards as well as meet the Kansas State High School Activities Association (KSHSAA) eligibility requirements. In addition, the _____ High School Basketball Handbook describes the specific guidelines and expectations for player selection for the team and school board policy and procedures allow the basketball coaches to choose which players will be on a team. The 2019-2020 _____ High School Basketball Calendar shows there were three days of tryouts on November 18 through November 20, 2019 with the first cut following the second day of tryouts and the final cut being posted following the third day of tryouts on November 21, 2019. (Report, p. 11-12).

(3) The student's IEP in effect during the first semester of the 2019-2020 school year does not include any supplementary aids and services in order for the student to participate in extra-curricular activities. (Report, p. 12).

(4) the student was provided additional days to participate in the basketball tryouts. The student became overwhelmed during the first day of basketball tryouts and left the practice; however, despite missing the first day of tryouts and the first round of cuts, the student was allowed to participate in the second and third day of tryouts. (Report, p. 12).

(5) During these tryouts, the student was allowed to participate in both individual and group drills focusing on shooting, ball handling, and agility. The student also participated in 3-on-3 and 5-on-5 scrimmages in order for the coaches to assess the student's basketball skills based on the guidelines and expectations for player selection. The coach reported the student did not make the basketball team because

the student is at least one year behind skill wise to compete on the high school level based upon his performance during his two days of tryouts. (Report, p. 12).

(6) The High School's academic requirement was waived which allowed the student the opportunity to participate in the basketball tryouts and would have allowed him to practice and play if he made the team and met the Kansas State High School Athletic Association (KSHSAA) eligibility requirements. (Report, p. 12).

(7) The parent first contacted school officials regarding the student's participation in basketball on November 21, 2019, to inquire why the student had not made the basketball team. (Report, p. 4).

Based on these findings, the investigator concluded that the allegation of a violation of special education statutes and regulations of failing to take steps to provide the student with an equal opportunity to participate in extra-curricular and other nonacademic activities, specifically to participate in the school's basketball program, during the 2019-20 school year was not substantiated.

The Committee notes that 34 C.F.R. 300.107(a) requires the district to take steps determined to be "appropriated and necessary by the child's IEP team" to provide extracurricular activities in a manner necessary to afford children with disabilities an equal opportunity for participation in those activities. This regulation does not require that schools guarantee participation. It requires these steps in order to provide a child with a disability an equal opportunity for participation. The student must still demonstrate the required skills for participation. In this case, it is evident that the student's failure to make the basketball team was because the coach did not believe the student demonstrated sufficient skills to make the team, and was "at least one year behind skill wise to compete on the high school level." (Report, p. 10). The Appeal Committee finds nothing in this decision by the coach to suggest the decision was based on the student's disability.

Instead, the evidence shows that district personnel applied a pro-active approach by providing accommodations prior to any request for accommodations. It waived its eligibility academic requirements and provided an opportunity for the student to participate in an additional day of tryouts. The student's IEP team did not address what steps might be necessary for this student to participate in the basketball

program, but there was insufficient evidence presented to the Appeal Committee to indicate: (1) that the parent believed accommodations were needed in the IEP; (2) that the parent had requested an IEP Team meeting to consider accommodations; (3) that the parent had made any previous request for accommodations for this kind of activity; (4) that the IEP Team had prior notice of the student's intent to try out for a sport team; or (5) that accommodations might be needed in the IEP to support the student in extracurricular activities. Without this kind of information, it would be unusual for an IEP Team to address whether a child needed accommodations in order to participate in a particular sporting activity, such as basketball. In a district the size of USD___, there are multiple options for students to participate in extracurricular activities, such as athletics, special interest groups or clubs, or various recreational activities. It is unreasonable to expect that an IEP Team must determine what supports are needed for a child with a disability to participate in any particular activity when it has not been informed that a student intends to attempt to participate in that activity.

## CONCLUSION

The evidence presented convinces the Appeal Committee that even the student's parent did not indicate to anyone that there was a need for an accommodation of any kind in order for the student to have an equal opportunity to participate in the basketball program until, on November 21, the parent contacted school officials to inquire why the student did not make the basketball team. At that point, the school officials had already taken steps to provide the student with accommodations by waiving its academic eligibility requirements and by allowing the student an additional tryout session. The Appeal Committee finds these steps meet the substantive requirements of 34 C.F.R. 300.107. Therefore, the Appeal Committee concludes that there is sufficient evidence to support the findings and conclusions of the investigator. The Complaint Report is sustained.

This is the final decision on this matter.  There is no further appeal.  This Appeal Decision is issued this 6th day of February, 2020.

APPEAL COMMITTEE:

_____
Mark Ward on behalf of Laura Jurgensen

_____
Kerry Haag

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ PUBLIC SCHOOLS #___
ON DECEMBER 9, 2019

DATE OF REPORT: JANUARY 8, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Dr. _____ _____, Director of Special Education and Special Services for USD #___ on December 11, 2019. On December 20, 2019, the investigator spoke via conference call with the following individuals from USD #___:

- _____ _____, Director of Special Education
- _____ _____, Early Childhood Special Education Coordinator
- _____ _____, Speech/Language Pathologist
- _____ ____, Early Childhood Special Education teacher
- _____ _____, School Psychologist

The investigator spoke by telephone with the parent on December 27, 2019.

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

- Excerpts of a document entitled Amended Agreed Permanent Parenting Plan dated July 10, 2018 provided by the parent
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated October 25, 2018
- Evaluation/Reevaluation Report dated December 19, 2018

- Notice of Meeting regarding an eligibility meeting dated November 9, 2018 addressed to the student's father
- Notice of Meeting regarding an eligibility meeting dated November 9, 2018 addressed to the student's mother
- Notice of Meeting regarding eligibility and possible IEP development dated December 19, 2018
- IEP for the student dated December 19, 2018
- Conference Summary IEP Team Considerations dated December 19, 2018
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent dated December 19, 2018
- Notice of Meeting dated March 19, 2019
- IEP for the student dated March 27, 2019
- Conference Summary IEP Team Considerations dated March 27, 2019
- Notice of Meeting dated December 10, 2019
- Letters from the Special Education Coordinator to the parent regarding IEPs for the student

## Background Information

This investigation involves a 4-year-old girl who resides primarily with her biological father in _____. The student's biological mother currently lives in _____ but plans to move to the _____ area in the near future. The student's parents have never been married but share joint legal custody of the student. According to a court document provided by the student's mother, "each parent shall be entitled to receive complete information with respect to matters affecting or related to [the student], including, but not limited to: school records and grade/progress reports…upon the written request of either parent."

While neither parent is identified in the court order as the "educational decision maker" for the student, neither parent is specifically precluded from assuming that role.

According to the parent, she was first made aware that the student was receiving special education services after the biological father shared a copy of the student's IEP with the parent's mother who is a special education teacher.

The student was first determined to be eligible for and in need of special education services under the category of Developmental Delay while attending a private parochial preschool in the district. The student's father gave his written consent for the student to receive those services.

Between December 19, 2018 and March 27, 2019, the student received 40 minutes per week of service from an Early Childhood Special Education teacher in her preschool classroom along with support from a paraprofessional. The student also received 20 minutes per week of pull-out service from a speech/language pathologist as well as 45 minutes of support in a speech phonology group.

The student left the private parochial preschool program in March of 2019. The student's IEP was revised on March 27, 2019 to reflect changes in the delivery of her special education services. For the remainder of the 2018-19 school year, the student received 45 minutes per week of special education services during a once-weekly play therapy group and 15 minutes of speech/language services while in the play therapy group. The student also continued to receive 45 minutes per week of speech/language services through the phonology group.

At the March 2019 meeting, the team discussed the possibility of the student's participation in the State Pre-K (SPK) program in an elementary school close to the student's home. Upon entry into the SPK program in the Fall of 2019, the student began receiving 20 minutes of special education instruction 2 days each week and 40 minutes of speech/language services. The student's participation in the phonology group ended at the start of the 2019-20 school year

## Issues

In her complaint, the parent raised two issues:

Issue One: The district failed to notify the parent of the special education eligibility meeting for the student and did not invite her to that meeting.

### Applicable Statutes and Regulations

To strengthen the role of parents in the special education process, Congress has mandated that schools afford parents the opportunity to be members of any decision-making team for their child, including eligibility, initial evaluation

and reevaluation, and development of an individualized education program (IEP) for the provision of a free appropriate public education (FAPE). Schools must make reasonable efforts to ensure that parents have the opportunity to participate in all decision-making meetings regarding their child.

In Kansas, the listing of individuals who are defined as "parent" includes, among others, a child's natural (biological) parent. In the case of biological parents who do not cohabit, no preference is given to the parent with whom the child primarily resides unless a court order precludes one biological parent from making educational decisions regarding the child.

At the time an initial evaluation is completed and the information is compiled, a team meeting shall be convened in order to make the determination of the student's eligibility for special education services (K.A.R. 91-40-8(f)(2)). Eligibility decisions are made by a team of qualified professionals and the parents of the child who has been evaluated (K.A.R. 91-40-10(a)(1)). Parents are to be provided an opportunity to participate in the eligibility meeting, which can be conducted at the same time as the initial IEP team meeting. The school must provide parents with a notice of the meeting at least 10 calendar days prior to the meeting date (K.A.R. 91-40-8(f)(2); K.A.R. 91-40-17(a)), although parents can waive that required notice and allow a meeting to be held more quickly. Regardless of whether either parent has primary custody of the child, the school must provide Prior Written Notice of any special education action and notice of meetings to ***both*** parents unless a court order stipulates otherwise. The Office of Special Education Programs (OSEP), the office in the U.S. Department of Education that oversees special education requirements, has provided guidance regarding notice and consent of divorced parents. OSEP has said, "In situations where the parents of a child are divorced, the parental rights established by the [IDEA] apply to both parents, unless a court order or state law specifies otherwise" (Federal Register, August 14, 2006, p.46568). OSEP has further clarified that in such cases when the parents are divorced there is no requirement in the IDEA that the public agency obtain consent from both parents. (Letter to Ward, OSEP, August 31, 2010, 111 LRP 13076).

The parent and the school may agree to use alternative means to facilitate meeting participation, such as video conferences or conference calls (K.A.R. 91-40-17(c); K.A.R. 91-40-25(d); 34 C.F.R. 300.322(e)).

## Parent's Position

The parent asserts that her parental rights have not been severed and that she, in addition to the student's father, should have been notified of the special education eligibility meeting. According to the parent, prior to the filing of this complaint, she had never received any paperwork regarding the provision of special education services to the student.

## Investigative Findings

On October 25, 2018, the district requested the written consent of the student's father to conduct an initial evaluation because the student had not passed speech/language screening administered by the district. The student's father gave signed written consent for the evaluation.

Documents provided by the district show that upon completion of the initial evaluation of the student, each parent was provided with a written notice of meeting on November 9, 2018 regarding a meeting to "review the evaluation and determine [the student's] eligibility" for special education services. According to both meeting notice forms, the meeting was to be held on December 19, 2018 at 8:00 AM at "St. Matthews Preschool."

An Evaluation/Reevaluation Report provided by the district dated December 19, 2018 states that both parents were provided notice of the meeting in "written" form on November 9, 2018 and by email on December 18, 2018.

A form entitled "Conference Summary IEP Team Considerations" dated December 19, 2018 indicates that the student's "biological mother was mailed a Notice of Meeting" but does not indicate when that notice was mailed. According to the Conference Summary "[the student's] Dad reported that biological Mother [would] not be attending the meeting." The parent states that to the best of her recollection she never received written notice of the eligibility meeting.

## Summary and Conclusions

The district has provided the investigator with copies of several written notice of meeting forms. Two of those forms, each dated November 9, 2018, show that a meeting was to be held on December 19, 2018 for the purpose of discussing

the results of an evaluation conducted by the district as well as the student's eligibility for special education services. One of these forms was sent to the student's father; a second was sent to the student's mother.

A third written notice of meeting form, this one dated December 19, 2018, was addressed to both the student's father and her mother. That form stated that the results of the evaluation would be discussed at a meeting on December 19, 2018 as would the student's eligibility for special education. Additionally, the form stated that if it was determined that the student was eligible to receive special education and related services, an IEP would be developed.

While only the student's father was present at the time of the eligibility meeting, and while the student's mother denies ever having received written notice of the meeting, the district has supplied evidence to show that both parents were provided with written notice of meeting regarding an evaluation/eligibility meeting 30 days before the meeting was held. A violation of special education statutes and regulations is not substantiated on this issue.

## Additional Identified Issues

While the specific complaint regarding failure to provide notice raised by the parent under Issue One was not substantiated, the investigator has, while looking into the issue, identified other written notice violations with regard to this case.

## Evaluation Consent:

### Applicable Statutes and Regulations

Whenever a child has been referred for an evaluation, the school must provide Prior Written Notice to the parents that describe any evaluation procedures the school proposes to conduct (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.304(a)). If parents are divorced, regardless of whether either parent has primary custody, the school must provide Prior Written Notice of any special education action to ***both*** parents, even if only one parent has the right to consent, unless a court order precludes this from happening.

Consent from one parent is sufficient. In the event that the district receives responses from both parents, with one providing consent and the other denying

consent, the district is deemed to have received consent and must fulfill its obligation to the student. The parent who denies consent has the right to request mediation or file for due process.

Investigative Findings

The prior written notice and consent for evaluation request forms provided by the district show that the student's father was notified of the district's proposal to evaluate the student by telephone on October 24, 2018 and was given written notice of the proposal on October 25, 2018. The student's father gave his written consent for the evaluation on October 25, 2018. The district provided no evidence to show that the student's mother was provided with prior written notice of the proposed initial evaluation. In a telephone conference with the investigator on December 20, 2019, district staff confirmed that the student's mother was not provided with written notice of the district's proposal to evaluate the student.

Summary and Conclusions

While the district was able to proceed with the evaluation because the student's father gave his written consent for the evaluation to be conducted, that consent did not obviate the district's responsibility to provide the student's mother with prior written notice of evaluation. A violation of special education laws and regulations is identified on this issue. However, because this violation occurred outside of the one year window of complaint investigation specified in K.A.R. 91-40-51(b)(1), no corrective action with regard to this violation will be required.

Notice of December 19, 2018 IEP Team Meeting and Content of the Notice:

Applicable Statutes and Regulations:

Parents must be given notice of eligibility meetings and IEP team meetings (K.A.R. 91-40-8(f)(2); K.A.R. 91-40-17). As noted above under Issue One, schools must provide parents with written notice at least 10 calendar days prior to the meeting date (K.A.R. 91-40-17(a)(2)) although parents can waive that required notice and allow a meeting to be held more quickly.

State regulations, at K.A.R. 91-40-17(b), spell out the required content of notices of IEP team meetings. At K.A.R. 91-40-17(b)(1), the regulations state that the notice "shall indicate the purpose, time, and location of the IEP team meeting and the titles or positions of persons who will attend on behalf of the agency…"

Investigative Findings:
A notice of meeting form dated December 19, 2018, was provided by the district. This notice of meeting form contained the names of both parents as well as their individual physical addresses. According to the notice, the meeting was to be held on December 19, 2018 at "__. _____ Early Learning Center." The time of the meeting is not shown on the form.

According to this notice of meeting, "if it is determined that your child is eligible, or continues to be eligible for special education and related services, the IEP team will develop an individualized education program (IEP) for your child and determine appropriate placement."

However, neither parent was given the notice of meeting 10 days prior to the date of the IEP meeting. The student's father was the only parent present at the December 19, 2018 meeting, and he waived his right to 10-day notice of meeting. The student's mother was not given timely notice of an IEP meeting and did not waive her right to proper 10-day notice. Additionally, the notice provided to both parents on December 19, 2019 did not specify what time of day the meeting would be held.

Summary and Conclusions:
The parent was not provided with 10-day notice of the December 19, 2018 IEP team meeting, and the notice which was provided did not specify the time of the meeting. Violations of special education statutes and regulations are identified.

Consent for Placement in Special Education:

Applicable Statutes and Regulations:
K.S.A. 72-3430(b)(6) states that parents have the right to "consent, or refuse to consent, to the initial placement of their child and to any substantial change in the placement of, or a material change in services for, their child…" Informed written parental consent is required for the initial provision of services under an IEP. The written consent of one parent is sufficient for a district to implement the services outlined in an IEP, but the district was required to provide both of these parents with prior written notice of the district's proposed action.

Investigative Findings:
Following the evaluation/eligibility/IEP meeting on December 19, 2018, the student's father provided his written consent for the student to receive special education and related services under an IEP developed on that same date.

Summary and Conclusions:
The district provided no evidence to show that the student's mother was provided with prior written notice of the district's proposal to deliver special education services to the student. In a telephone call with the investigator on December 20, 2019, district staff confirmed that the student's mother was not provided with prior written notice regarding proposed placement and services to the student. A violation of special education statutes and regulations is identified.

Notice of March 27, 2019 IEP Team Meeting:

Applicable Statutes and Regulations:
As noted above under Issue One, parents are to be provided an opportunity to participate in decision-making meetings regarding their child. The school must provide parents with a notice of the meeting at least 10 calendar days prior to the meeting date (K.A.R. 91-40-17) although parents can waive that required notice and allow a meeting to be held more quickly.

Investigative Findings:
On March 27, 2019, an IEP Team meeting was convened for the purpose of reviewing and potentially revising the student's December 19, 2018 IEP. The student's father was provided with notice of the meeting via email and in writing on March 19, 2019 and was again provided with written notice of the meeting on March 26, 2019. The district provided no evidence to show that the student's mother was given notice of the March 27, 2019 meeting.

Summary and Conclusions:
In a telephone conference with the investigator on December 20, 2019, district staff acknowledged that the student's mother was not provided with notice of the March 27, 2019 IEP team meeting. Under these circumstances, a violation of special education statutes and regulations is identified on this issue.

Consent for Change in Services or Placement:

Applicable Statutes and Regulations:
Federal regulations, at 34 C.F.R. 300.101 require public schools to make a free appropriate public education (FAPE) available to children with disabilities. At 34 C.F.R. 300.17, the regulations define FAPE, in part, as special education and related services provided in conformity with an IEP.

As stated under K.S.A. 72-3430, a district is required to obtain written parental consent prior to making a substantial change in placement, 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.A.R. 91-40-1(sss)). Parental consent also must be obtained before a district makes a material change in services, defined 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" (K.A.R. 91-40-1(mm).

Investigative Findings:
The student's December 19, 2018 IEP was revised on March 27, 2019. The student's participation in the private parochial preschool program had been terminated by the student's father, and, as a result, a plan was developed to deliver special education and related services to the student in a different setting. The impact on those services for the remainder of the 2018-19 school year was minimal and did not result in either a substantial change in placement or a material change in services. Beginning in the Fall of 2019, the student was to transition into an SPK program with no significant changes to either her special education or speech/language services. However, according to the IEP, the student's participation in the 45-minute weekly phonology group would be ended for the 2019-2020 school year.

Summary and Conclusions:
The student's father was present for the meeting, and there is no indication that he was opposed to the changes proposed by the district. However, the district provided no evidence to show that either parent was given prior written notice of the proposed changes to the student's services or placement, and neither

parent gave informed written consent to terminate the phonology group services, which was a material change in services. A violation of special education statutes and regulations is identified.

Issue Two: The district failed to provide the parent with a copy of the student's IEP after the parent requested that document in August of 2019.

Applicable Statutes and Regulations

Districts are required to provide, at no cost to parents, a copy of their child's IEP (K.A.R. 91-40-18(d)) and should respond to a parental request for a copy of their child's IEP within a "reasonable time." The Kansas State Department of Education (KSDE) determined that 15 school days is a reasonable time for providing parents with a Prior Written Notice of the district's proposal to conduct the evaluation or the district's refusal to conduct the evaluation (See KSDE Memo, "Reasonable Time" to respond to parent request for evaluation, January 8, 2002, at https://www.ksde.org/Default.aspx?tabid=614). KSDE also applies this same standard with regard to any parent request related to identification, evaluation, placement, or the provision of FAPE, unless there is an unusual circumstance that would extend that timeline.

Parent's Position

The parent asserts that she contacted the student's school of attendance on August 22, 2019 and asked for a copy of the student's IEP, providing her address, telephone number, and email address. At the time of the filing of this complaint on December 9, 2019, the parent had not yet received a copy of her daughter's IEP.

Investigative Findings and Conclusions

There is no evidence to indicate that the district had at any time prior to the filing of this complaint provided the student's mother with copies of either the student's December 19, 2018 IEP or her March 27, 2019 IEP.

Subsequent to the parent's filing of this complaint the Director of Special Education has contacted the parent regarding the issues raised by the parent. The parent was provided with copies of the student's December 19, 2018 IEP as well as the student's March 27, 2019 IEP. Arrangements have now been made

to allow for future communication regarding the student to be sent to the parent via email.

In a telephone conference on December 27, 2019, the parent confirmed that she has now received copies of both the December 2018 IEP and March 2019 IEP for the student.

Because the district did not provide the parent with a copy of the student's December 2018 IEP and March 2019 IEP at the time those documents were developed and failed to respond in a reasonable time to the parent's request for a copy of the student's IEP, a violation of special education statutes and regulations is substantiated on this issue.

## Additional Comments

In a telephone call with the investigator on December 27, 2019, the parent reported that she has not received a copy of the student's initial evaluation/eligibility report.

According to the Director of Special Education, a reminder will be sent to all special education staff that prior written notice of proposed action, 10-day notice of meetings, and copies of student IEPs must be provided to both parents in cases where biological parents do not reside in the same household.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Violations have occurred with regard to the following:

- K.S.A. 72-3430(b)(2), which requires districts to provide prior written notice of proposals to conduct an evaluation or change services or placement.
- K.A.R. 91-40-8(f)(2) and K.A.R. 91-40-17(a), which require that parents be given notice of all eligibility meetings and IEP team meetings regarding their child, and that notice must be provided 10-days prior to the meeting;
- K.A.R. 91-40-17(b)(1), which requires that notice of meeting includes the

time and purpose of an IEP team meeting;
- K.S.A. 72-3430(b)(6), which requires that parents be given the right to provide their written consent, or refuse to consent, to the initial placement of their child and to any substantial change in the placement of, or a material change in services for, their child before such a change is made; and
- K.A.R. 91-40-18(d), which requires that parents be provided with copies of their child's IEP at no cost to the parent.

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

1) Within 20 days of the receipt of this report, the district shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that, in cases where biological parents do not reside together, it will, unless otherwise precluded by court order, comply with

   - K.S.A. 72-3430(b)(2), by providing prior written notice to parents when proposing to conduct an evaluation or proposing a change to services or placement;
   - K.A.R. 91-40-8(f)(2) and K.A.R. 91-40-17(a), by providing to both parents notice of all eligibility meetings and IEP team meetings regarding their child at least 10 days prior to the meeting;
   - K.A.R. 91-40-17(b)(1), by including on the notice of meeting the time and purpose of the IEP team meeting;
   - K.S.A. 72-3430(b)(6), by giving both parents the right to provide their written consent, or refuse to consent, to the initial placement of their child and to any substantial change in the placement of, or a material change in services for, their child before such a change is made; and
   - K.A.R. 91-40-18(d), by providing parents with copies of their child's IEP at no cost to the parent.

2) Within 20 school days of the date of this report, the district shall submit to SETS evidence that training has been administered to the special education staff delivering special education and related services to this student regarding the provision of notice of meeting, prior written notice, and requests for informed written consent to both of the student's parents. This evidence shall include the date of the training, a description of the content of the training, a list of special education staff that attended the training, and the name of the individual who provided the training.

3) Within 5 school days of the date of this report, the district shall send a memo to all district staff and to SETS. The memo must inform staff of the requirement to provide notices of meetings, prior written notices, and requests for informed written consent to both parents in all cases when a student's biological parents are divorced or do not reside together.

4) Within 5 school days of the date of this report, the district shall schedule an IEP team meeting with both of the student's parents to discuss the changes in services and placement that resulted from the termination of the student's participation in the phonology group which occurred upon the student's transfer to the SPK program in the Fall of 2019. Within 5 school days of the date of this report, the district shall provide SETS with a copy of the notice of meeting sent to both parents. Within 5 school days after the IEP team meeting is held, the district shall provide SETS with a copy of the prior written notices and requests for consent that result from the meeting. At the IEP team meeting, the team must

    a. determine whether any compensatory services are warranted due to the district's failure to provide the parents with prior written notice of the change and to request their informed written consent for the change;
    b. provide both parents with prior written notice of the proposed change and request the written consent of the parents for that change.

5) Within 5 school days of the date of this report, the district shall provide to the student's mother a copy of the initial evaluation/eligibility report regarding this student. Within 5 school days of the date of this report, the district shall provide SETS with evidence that the student's mother was given a copy of the initial evaluation/eligibility report.

6) Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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 (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, Landon State Office Building, 900 SW Jackson Street, Suite 600, 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 Regulations 91-40-51 (f), are outlined below.

_____

Diana Durkin, Complaint Investigator

(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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON DECEMBER 11, 2019

DATE OF REPORT: JANUARY 13, 2020

This report is in response to a complaint filed with our office by ____ "____" _____, education advocate, on behalf of ____ _____. In the remainder of this report, ____ _____ will be referred to as "the student" and ____ "____" _____ will be referred to as "the education advocate" or "the complainant."

The complaint is against USD #___ (_____ ____ Public Schools). In the remainder of this report, USD #___ may also be referred to as the "school district" or the "local education authority (LEA)."

The complaint was received by the Kansas State Department of Education on December 11, 2019. The Kansas State Department of Education generally allows for a 30-day timeline to investigate the child complaint. However, due to the staff from USD #___ being unavailable due to the holiday break between December 20, 2019 and January 6, 2020, the timeline was extended until January 13, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the educational advocate by telephone on December 19, 2019 as part of the investigation process. In addition, the Education Advocate Program Coordinator at Families Together, Darla Nelson-Metzger, was interviewed on December 18, 2019.

USD #___ made the following school staff available for a telephone interview on January 7, 2020:

_____ _____, Principal at ___ _____ _____ Academy
____ _____, Special Education Coordinator for USD #___
_____ _____, Attorney for USD #___

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Authorization to Release Confidential Information (ROI) dated August 20, 2019 and signed by Kena Battle from St. Francis Ministries authorizing staff at ___ _____ _____ (___) Academy in USD #___ to communicate with KVC Children's Psychiatric Hospital staff (KVC Hospital)
- Email dated August 21, 2019 from ____ _____, School Psychologist, requesting records for the student from USD #___
- Email dated August 27, 2019 from Ms. _____ to Laci Reamer at Families Together requesting an education advocate for the student
- Appointment letter dated August 30, 2018 appointing the complainant as the education advocate for the student at _____ Middle School in USD #___
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) to the complainant dated August 27, 2019 proposing to "immediately begin providing special education and related services that are comparable to those described on your child's current out-of-district IEP in accordance with federal and state regulations."
- Email dated September 5, 2019 from the education advocate to Ms. _____ stating that he did not attend an IEP team meeting and that he would not consent to the proposed action in the PWN dated August 27, 2019
- Email dated September 5, 2019 from Ms. _____ to the education advocate stating that a meeting had not been held and requesting the education advocate to call her for an explanation

- Email dated September 6, 2019 from Ms. _____ to the education advocate acknowledging his request to conduct an IEP team meeting
- Notice of Meeting to the complainant dated September 6, 2019 scheduling an IEP team meeting for September 17, 2019 at ___ Academy
- Meeting Summary of the September 17, 2019 meeting noting the meeting was not held as the education advocate was not available via phone
- Notice of Meeting dated September 25, 2019 scheduling an IEP team meeting for October 10, 2019 at ___ Academy
- Meeting Summary of the October 10, 2019 IEP team meeting reflecting discussions of student's present level of performance and need for IEP team to meet again
- Email dated October 14, 2019 at 9:20 a.m. from the education advocate to Ms. _____ wanting to know why he had not been contacted by _____ _____, Special Education Coordinator for Alternative Programs at USD #___
- Email dated October 14, 2019 at 5:43 p.m. from Ms. _____ to the education advocate responding to the request for a phone call
- Email dated October 15, 2019 at 8:22 a.m. and 1:07 p.m. from Ms. _____ to the education advocate indicating the student's therapist at KVC Children's Psychiatric Hospital would obtain consent from the student's legal guardian, the case manager from St. Francis Ministries, in order for the education advocate and the KVC hospital therapist to communicate
- Email dated October 15, 2019 at 3:22 p.m. from the education advocate to Ms. _____ questioning if there was a release of information (ROI) between the school district and the hospital
- Email dated October 17, 2019 at 6:56 a.m. and 1:08 p.m. from Ms. _____ to the education advocate indicating a ROI was obtained when the student was enrolled in USD #___ by the case manager from St. Francis Ministries and indicating a copy would be sent to him

- Email dated October 21, 2019 at 2:08 p.m. from the education advocate to Ms. _____ indicating the ROI does not allow him to communicate with KVC Hospital
- Email dated October 21, 2019 at 6:46 p.m. from Ms. _____ to the the education advocate explaining he is correct and that is why the KVC Hospital therapist was obtaining another ROI for the student
- Notice of Meeting to the complainant dated October 21, 2019 scheduling an IEP team meeting for October 31, 2019 at ___ Academy
- Email dated October 23, 2019 at 9:10 a.m. from Ms. _____ to the education advocate apologizing for failing to obtain a ROI signed by the education advocate when the student enrolled back in August and requesting he provide his consent on the attached ROI forms
- Email dated October 23, 2019 at 9:19 a.m. from the education advocate to Ms. _____ questioning who would report the HIPPA violation
- Email dated October 29, 2019 at 4:16 p.m. from Ms. _____ to the education advocate sharing that his concerns of a HIPPA violation had been shared with Dr. _____ _____, Executive Director of Schools, and Ms. _____
- Meeting Summary of the October 31, 2019 IEP team meeting reflecting discussion to review and revise the student's current IEP
- PWN provided to the complainant dated October 31, 2019 proposing the continuation of 60 minutes for 5 days per week of special education services in an alternative setting and noting that the residential treatment at the KVC Hospital was not an educational placement determined by the IEP team
- Email dated November 25, 2019 from Lynnea Laing at Families Together to _____ _____, USD #___ Attorney, providing a copy of the August 30, 2018 appointment letter
- Email dated December 2, 2019 at 11:29 a.m. from Darla Nelson-Metzger at Families Together to Ms. _____ stating that a new

appointment letter will not be issued because the student has moved from the _____, Kansas area

- Email dated December 2, 2019 at 1:45 p.m. from Ms. _____ to the education advocate summarizing her conversation with St. Francis Ministries staff regarding the authorization to release information
- Email dated December 3, 2019 at 9:06 a.m. from Ms. Nelson-Metzger to Ms. _____ summarizing the IDEA definition of "parent" and explaining the St. Francis Ministries staff do not have authority to sign consent to share educational information
- Email dated December 3, 2019 at 9:26 a.m. from Ms. _____ to Ms. Nelson-Metzger explaining the St. Francis Ministries and its case managers did not meet the definition of "state" and referring her to St. Francis Ministries to resolve the issue
- Formal Complaint filed by the education advocate on December 10, 2019
- Email dated December 18, 2019 from Mark Ward, Attorney for Special Education and Title Services (SETS) to the Complaint Investigator describing the education advocate appointment process used by the Kansas State Department of Education (KSDE)
- Emails dated December 18, 2019 at 10:02 a.m. and 3:06 p.m. from Ms. Nelson-Metzger to the Complaint Investigator describing the education advocate appointment process at Families Together
- Response to the Allegations dated January 8, 2020 written by Ms. _____
- USD #___ Enrollment Procedures for 2019/2020 School Year
- USD #___ School Psychologists Responsibilities when Students Move
- IDEA and FERPA Confidentiality Provisions published by the US Department of Education, June 6, 2014

## Background Information

This investigation involves a 14-year-old female student who enrolled in the eighth grade at the ___ _____ _____ (___) Academy in USD #___ on August 21, 2019 with a current IEP from USD #___. The ___ Academy is an alternative school program run by USD #___ and is located on the campus of the KVC Children's Psychiatric Hospital. Students who reside at the KVC Hospital attend ___ Academy which allows these students to participate in trauma focused treatment, behavioral healthcare, and education all in one location. The student transferred out of USD #___ on November 1, 2019 and subsequently enrolled in USD #___.

## Issues

Based upon the written complaint, the complainant raised three issues that were investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to recognize the education advocate as the educational decision maker for the student during the 2019-2020 school year.

### Complainant Position

The education advocate reported that that he served as the student's education advocate when she was enrolled in USD #___ and that Families Together allowed him to continue to serve as the student's education advocate when she transferred to USD #___ in August 2019. However, USD #___ refused acknowledge him as the education advocate for the student because he could not provide the district with proof of his appointment as the student's education advocate. He indicated that he was unable to locate the signed copy of the appointment letter but that Families Together verbally confirmed his appointment and provided the school district with an unsigned copy of the appointment letter. However, USD #___ continued to refuse to recognize him as the student's education advocate because he could not provide what the LEA's attorney referred to as "a fully executed appointment letter."

Ms. Nelson-Metzger stated that the system of verbal verification and a copy of the unsigned appointment letter provided by Families Together has always been

sufficient in the past for school districts, including USD #___, to acknowledge an individual as the education advocate for a particular student. Ms. Nelson-Metzger reported that verbal verification and a copy of the education advocate's unsigned appointment letter for USD #___ dated August 30, 2018 was provided to USD #___ following an email request dated August 27, 2019.

A second copy of this appointment letter was provided to _____ _____, USD #___ attorney, on November 25, 2019 in an effort to confirm the education advocate's authority to act on behalf of the student. Ms. Nelson-Metzger also stated that a new appointment letter would not be created at this time just to verify the education advocate's authority because the student has transferred to another school district and re-issuing the education advocate's appointment letter for USD #___ dated after the student's transfer out of the district would be confusing.

School District Position

USD #___ staff reported the student enrolled at the ___ Academy in USD #___ on August 21, 2019. On that same date, ____ _____, School Psychologist for ___ Academy, followed the district procedures for the transfer of a student with an IEP between two Kansas school districts. Ms. _____ emailed USD #___, the previous school district, and requested the student's IEP and evaluation report. Upon receipt of those documents, it was noted that the student had an education advocate.

On August 27, 2019, Ms. _____ emailed Laci Reamer at Families Together and requested that the student be appointed a new educational advocate due to her transfer to a new school district. In response, Families Together emailed Ms. _____ an unsigned copy of the August 30, 2018 appointment letter showing the complainant as the education advocate for the student at _____ Middle School in USD #___. Despite the appointment letter not reflecting an appointment in USD #___, the district treated the complainant as the student's education advocate by providing him with PWN and inviting him to IEP team meetings in regards to the student.

Ms. _____ stated, "The only time the complainant's authority to act on behalf of the child was questioned was after the student had left the district and enrolled at USD #___. At that time, the complainant had alleged the district violated the student's confidentiality. His complaints were escalated to me. To ensure I could discuss the student with him, I asked the complainant to demonstrate he was appointed as the student's educational advocate. He could not do so. Instead, he directed me to Families Together, who forwarded to me the same unexecuted Word document it had initially provided to the district. They said it was the only document they had and the complainant should have had the signed original. I informed them that was insufficient, and they indicated they would get the complainant reappointed. Subsequently, Families Together realized the child was no longer enrolled with USD #___ and they said they were halting the reappointment process. Because the complainant has yet to prove he was appointed to act as the child's educational advocate, I question his ability to file this complaint on behalf of the student. Absent evidence he is the student's properly appointed educational advocate, this entire complaint should be dismissed."

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.153(a), allow any organization or individual to file a signed written complaint with the state if they believe that a school is not complying with federal or state laws or regulations relating to special education.

In this case, the complainant believes USD #___ violated state and federal regulations relating to special education in regards to the student. As such, he is allowed to file a formal complaint with the KSDE. For this reason, the district's request to dismiss the compliant is denied.

Federal regulations, at 34 C.F.R. 300.30(a)(5) and 34 C.F.R. 300.319, require public agencies to follow state law for appointing a surrogate parent to act as the educational decision maker for a child with a disability when the child's parents are unknown, unavailable, or the parental rights have been severed.

In Kansas, a surrogate parent is referred to as an education advocate. The Kansas state special education statutes, at K.S.A. 72-3404, and the Kansas state regulations, at K.A.R. 91-40-24, give the Kansas State Board of Education (KSBE) the authority to appoint education advocates to act on behalf of the child with a disability if the parents are unknown, unavailable, or the parental rights have been severed or relinquished.

The KSBE and the Kansas State Department of Education (KSDE) contracts with the IDEA funded Parent Information and Training Center, Families Together, as the agency to coordinate the educational advocate program and to train volunteers to serve as education advocates throughout the state. Families Together has trained and maintained a pool of available individuals to serve as education advocates for over 30 years.

Darla Nelson-Metzger, Education Advocate Program Coordinator at Families Together, and Mark Ward, Attorney for the SETS at KSDE, reported that referrals for an educational advocate are accepted from any party, i.e. school district, private child welfare agency, or foster parent. The status of the parents' rights must be verified through the child welfare agency prior to the initial appointment of an educational advocate.

Once the child is determined eligible for an appointment, Families Together contacts volunteers until an individual agrees to serve as the education advocate for the individual child. Chapter 1, Section I of the Kansas Special Education Process Handbook states that the appointment of an education advocate is to be made within 3 business days of receiving a request for an appointment. Once a volunteer is identified, the practice of Families Together is to create an appointment letter identifying the child, the school building, the school district, and the educational advocate's name and contact information.

This password protected unsigned appointment letter is then electronically disseminated by Families Together to the special education director of the school district or cooperative, the building principal or early childhood contact, the child's child welfare agency worker, and the educational advocate. A hard copy of the appointment letter is then mailed to the KSDE where a signature stamp is used to "sign" the appointment letter. KSDE records the appointment

in an Excel spreadsheet and then mails the signed copy of the appointment letter to the education advocate for his/her records. Families Together keeps both an electronic version and a hard copy of all unsigned appointment letters. School districts are able to verify the identity of the current education advocate by calling or emailing Families Together.

Ms. Nelson-Metzger reported that when students transfer to a different school district, a new education advocate is generally appointed because of the geographical preferences of the volunteers. However, the complainant chose to continue to serve as the student's education advocate when she transferred from USD #___ to USD #___.

In this case, the student enrolled in USD #___ on August 21, 2019 and student records were requested following written district procedures. Once it was determined the student's parents were unavailable, USD #___ contacted Families Together to request the appointment of an education advocate for the student following written district and state procedures.

Families Together allowed the complainant, who was the student's education advocate in USD #___, to continue to volunteer as the student's advocate in USD #___. However, Families Together did not create a new appointment letter reflecting his appointment in USD #___ and listing the name of the school building where the student was attending. Instead, Families Together provided USD #___ with an unsigned copy of the education advocate's previous August 30, 2018 appointment letter for _____ Middle School in USD #___.

Despite the appointment letter not reflecting an appointment in USD #___, interviews and documentation showed the district recognized the complainant as the student's education advocate by providing him with PWN and invitations to IEP team meetings in regards to the student while the student was enrolled in USD #___. Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to recognize the complainant as the student's education advocate and educational decision is not substantiated.

It is noted that this situation was initially created when Families Together failed to follow its practice to create a new appointment letter reflecting the student's placement in USD #___ and listing the name of the school building where the student was attending upon receiving the email request from USD #___ staff on August 27, 2019. The education advocate exacerbated the situation by failing to keep his signed copy of the August 30, 2018 appointment letter issued for USD #___. In addition, by failing to disseminate the signed copy of the appointment letter and to maintain a copy of the signed appointment letter, the KSDE failed to follow the written procedures described in the Kansas Special Education Process Handbook in Chapter 1, Section I which states, "KSDE sends the formal letter of appointment to the education advocate, with a copy to the special education director, the building principal at the student's school, and the student's primary DCF or Department of Corrections (DOC) caseworker. KSDE and Families Together retain copies of the appointment letter." It is suggested that Families Together and the KSDE review and align procedures and practices related to the appointment of education advocates so future issues can be avoided.

> ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to obtain a release of information prior to sharing educational records with the KVC Hospital during the 2019-2020 school year.

Complainant Postion

The education advocate reported that USD #___ released confidential information to the KVC Hospital without obtaining his written consent. He stated that the ___ Academy staff allowed the case manager from St. Francis Ministries to sign the consent to release confidential information form when the student enrolled in USD #___ on August 21, 2019. He believes that the student's St. Francis Ministries case manager does not meet the definition of "parent" for the purposes of the IDEA because of his education advocate training provided by Families Together.

Ms. Nelson-Metzger stated, "A contractor of the State, such as St. Francis Ministries, may not sign as the parent for special education actions, including consent to release educational records. The education advocate program is our State's surrogate parent program which meets the above requirement. KSDE is the responsible entity to ensure the rights of children in custody whose parents are unavailable are protected. The KSDE has contracted with Families Together for over 30 years to coordinate this program and train volunteer education advocates. And while we are not attorneys, we work closely with KSDE to ensure we are training and informing all parents accurately."

The complainant also alleges USD #___ committed a violation of the Health Insurance Portability and Accountability Act (HIPPAA) when they communicated with KVC Hospital without obtaining the proper consent.

School District Position

USD #___ attorney, Ms. _____, stated, "The school district obtained an authorization that enabled the student to receive services and that authorization was signed by a representative of the agency appointed by the state to do so. The school district engaged in no wrong doing and did not breach any privacy rights the student had. St. Francis has the authority to act on behalf of the child."

USD #___ reported the student was placed in the custody of St. Francis Ministries by the Kansas Department of Children and Families (DCF). St. Francis Ministries was legally responsible for the student when she was placed at the KVC Hospital for treatment.

Ms. _____ stated, "As part of the KVC Hospitals admission process, the district has provided to KVC Hospital a release of confidential information to be executed on behalf of the child. This release allows for the immediate and necessary collaboration between KVC Hospitals and ___ Academy. In this case, the release was signed by Kena Battle, case manager at St. Francis Ministries (St. Francis), as her legal guardian. There is no dispute that St. Francis can

otherwise act on behalf of the child.  At dispute here, is whether St. Francis and its employees can sign the release Ms. Battle executed."

USD #___ acknowledged that the IDEA definition of "parent" describes one person who could serve in this role as "a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State)."

USD #___ believed St. Francis Ministries was authorized to act as the student's parent because DCF placed the student with St. Francis Ministries, a contracted agency, and that St. Francis Ministries does not meet the definition of "State" as used in the IDEA.  Ms. _____ argued, "state doesn't mean a contractor like St. Francis or a St. Francis case manager like Ms. Battle. Instead, it has a very limited definition. "State means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas." 34 CFR § 300.40. In other words, the State of Kansas is not a parent for the purposes of special education law."  For this reason, USD #___ recognized the student's case manager from St. Francis Ministries as the student's parent and accepted her signature on the ROI form as providing written consent to release confidential information.

USD #___ also acknowledged that the IDEA definition of "parent" describes another person who could serve in this role as "an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare)."  USD #___ believed St. Francis Ministries was legally responsible for the student and, therefore the case manager from that agency met this IDEA definition of "parent."

The district believed St. Francis Ministries, as the child's legal guardian, had the authority to act as the student's parent when enrolling the student at ___ Academy and when signing the ROI authorizing the release of confidential information.

Ms. _____ also referred to K.S.A. 38-2218, the Kansas statute that governs educational advocates for exceptional children. She stated, "There, it is DCF's responsibility to notify the Kansas State Board of Education that a child is in need of an educational advocate. Additionally, it states that when a pupil moves from one school district to another, it is DCF's responsibility to manage the transfer of educational records—not the educational advocate. Implicit in this responsibility is the authority to execute releases on behalf of the student."

Applicable Regulations and Conclusions

The IDEA only grants the KSDE the authority to investigate complaints alleging a violation of special education statutes and regulations. For this reason, the allegation of a HIPPA violation will not be addressed through this investigation as the Office of Civil Rights in the federal Department of Health and Human Services has the authority to investigate those types of complaints.

Federal regulations, at 34 C.F.R. 300.622(a), 34 C.F.R. 99.30, and 34 C.F.R. 99.31, require public agencies to obtain parent consent prior to disclosing or releasing personally identifiable information from a student's educational records to third parties unless allowed by specific exceptions.

Federal regulations, at 34 C.F.R. 300.30, define the term "parent" as a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a properly appointed surrogate parent.

Federal regulations, at 34 C.F.R. 300.45(a)(3), define the term "ward of the State" as a child who, as determined by the State where the child resides, is in the custody of a public child welfare agency.

Kansas statutes, at K.S.A. 72-1046(d)(2), define the term "person acting as a parent" and includes, as part of its definition of the term, the following: "(B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction."

State regulations, at K.S.A. 38-2218, state that when the court has granted legal custody of a child in a hearing to an agency, association or individual, the custodian or an agent designated by the custodian shall have authority to make educational decisions for the child if the parents of the child are unknown or unavailable. When the custodian of the child is the secretary, and the parents of the child are unknown or unavailable, and the child appears to be an exceptional child who requires special education, the secretary shall immediately notify the state board of education, or a designee of the state board, and the school district in which the child is residing that the child is in need of an education advocate.

Federal statute, at 20 U.S.C. § 1232g, known as the Uninterrupted Scholars Act, enacted in 2013 permits, but does not require, a school district to disclose, without parent consent, student education records to a caseworker or other representative of a state or local child welfare agency authorized to access the student's case plan when such agency or organization is legally responsible, in accordance with State, for the care and protection of the student. The Uninterrupted Scholars Act does not, however, give caseworkers and representatives of child welfare agencies the right to provide consent for the disclosure of personally identifiable information (PII) from education records.

In this case, interviews and documentation show that the state of Kansas, through the DCF, placed the student with one of two state contractors, Saint Francis Ministries, to provide foster care for the student. The student was subsequently placed in the KVC Hospital for psychiatric treatment and enrolled in the ___ Academy.

At the time of enrollment, USD #___ obtained a signed Authorization to Release Confidential Information on August 20, 2019. This authorization was signed by Kena Battle, a St. Francis case manager, and allowed communication between ___ Academy staff and KVC Hospital staff. The ROI was obtained prior to the student's first day of school at ___ Academy and prior to the August 27, 2019 request from USD #___ to Families Together for an education advocate for the student.

USD #___ contends that the case manager from St. Francis Ministries was authorized to sign the ROI because DCF placed the student in the custody of the St. Francis Ministries, which resulted in St. Francis ministries becoming the student's legal guardian and authorized St. Francis Ministries to make education decisions for the student, including granting consent to release confidential information. USD #___ believes that as the student's legal guardian, the St. Francis Ministries met the IDEA definition of "parent" in two ways.

First, the district contends that the case manager would be considered "an individual who is legally responsible for the child's welfare." As an employee of the legal guardian, St. Francis Ministries, the case manager would also be considered the legal guardian of the student.

However, interviews found the state of Kansas through its Kansas Department of Children and Families (DCF) placed the student in the custody of a contracted agency, St. Francis Ministries, not the individual case manager. As such, the case manager does not meet the IDEA definition of "parent."

Second, USD #___ contends that St. Francis Ministries would be considered "a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State)." USD #___ believes the St. Francis Ministries would not be considered the "state" in the IDEA definition of "parent" because the term "state" only refers to each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

However, the Kansas Department of Children and Families is a state agency. This state agency placed the student with one of two state contractors, Saint Francis Ministries, to provide foster care for the student. As such, St. Francis would be considered the "state" for the purposes of the IDEA and would not be able to serve in the role of "parent" for the student.

USD #___ also believes that K.S.A. 38-2218 give DCF the responsibility to manage the transfer of educational records when a student moves from one district to another. USD #___ argues that the authority to execute releases on behalf of the student is implicit in this responsibility.

K.S.A. 38-2218(b) states that "it shall be the duty of the secretary to transfer, or make provision for the transfer, of all school records of such pupil to the district or school to which the pupil is transferred." Nothing in this statute gives DCF or its contractors the authority to provide consent for the disclosure of PII from education records. Further, state regulations, at K.S.A. 38-2218(a), required DCF or St. Francis to immediately notify USD #___ that the student was in need of an education advocate when the student enrolled into the district on August 20, 2019. In addition, the Uninterrupted Scholars Act makes it clear that a caseworker or other representative of a state or local child welfare agency legally responsible for a student does not automatically have access to that particular student's education records because school districts *may, but are not required,* to disclose those records to a child welfare agency without parent consent.

The findings of Issue One are incorporated herein by reference and indicate that the education advocate was designated to serve in the role of "surrogate parent" by the KSDE. As such, the education advocate met the definition of "parent" for the purposes of the IDEA.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to obtain a release of information signed by a person meeting the IDEA definition of "parent" prior to sharing educational records during the 2019-20 school year is substantiated.

ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the educational advocate with the opportunity to participate in IEP team meetings for the student during the 2019-2020 school year.

## Complainant Position

The education advocate reported that he was not invited to an IEP team meeting held in USD #___ when the student initially enrolled in August 2019. The complainant indicated that he only became aware of this IEP team meeting when he received a PWN dated August 27, 2019.

The PWN stated "On 8/27/19, we met to review the evaluations/assessment data on your child, including any evaluations or information you provided, current classroom-based assessments and observations, and teacher or other staff observations to determine, with your input: special education and related services needed by your child." The education advocate stated that he was never informed about this meeting, that he did not attend any meeting on August 27, 2019, and that he never provided any information or input into the decisions related to the special education and related services to be provided to the student.

The education advocate acknowledged that he received notifications of the subsequent IEP team meetings and participated via telephone.

## School District Position

USD #___ reported that only three IEP team meetings were scheduled for the student while she was enrolled in USD #___. School staff stated that the education advocate was invited to all of those IEP team meetings.

The first meeting notification provided to the education advocate was dated September 6, 2019. That IEP team meeting was scheduled to be held on September 17, 2019 but the education advocate was unavailable to participate so the meeting was cancelled.

The second notification of meeting was provided to the education advocate on September 25, 2019. That IEP meeting was scheduled for October 10, 2019 and the Meeting Summary documents that the education advocate provided input during the meeting.

The third notification of meeting provided to the education advocate was dated October 21, 2019. The IEP team meeting was held on October 31, 2019 and again, the Meeting Summary documents that the education advocate provided input during that meeting as well.

USD #___ staff stated that no IEP team meeting was held on August 27, 2019. Instead, the PWN was provided to the education advocate by the school psychologist following the steps outlined in the USD #___ School Psychologists Responsibilities when Students Move document. This procedure requires the school psychologist to complete and mail a Prior Written Notice to the student's parent/guardian stating that services and placement comparable to those in the IEP from the previous school district will be provided to the student.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.107(a), require school districts to ensure that parents are given the opportunity to participate in meetings with respect the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.

Federal regulations, at 34 C.F.R. 300.323(e), require that, if a child with a disability who had an IEP that was in effect in a previous school district in the same State transfers to another school district within the same State, the new school district, in consultation with the parents, must provide FAPE to the child, including services comparable to those described in the child's IEP from the previous public agency, until such time that the new public agency either adopts the child's IEP from the previous public agency or develops, adopts, and implements a new IEP for the student.

In this case, interviews and documentation show USD #___ scheduled three IEP team meetings for the student between September 17 and October 31, 2019. The education advocate was provided with notification of these IEP team meetings. The Meeting Summary of the first IEP team meeting reflects that the meeting was not held because the education advocate was not able to participate. The Meeting Summaries of the second and third meetings show the parent did participate via phone calls during these meetings.

The education advocate also believes an IEP team meeting was held on August 27, 2019. The PWN dated August 27, 2019 does describe a meeting where the education advocate provided input into the determination of the appropriate special education and related services to be provided to the student. That PWN proposes "other changes to IEP, not involving services or placement (parental consent not required)." The action proposed states, "The district will immediately begin providing special education and related services that are comparable to those described on your child's current out-of-district IEP in accordance with federal and state regulations. However, the education advocate reported that he neither attended a meeting nor provided input regarding the determination of the special education and related services required to provide FAPE to the student following her transfer from USD #___ to USD #___ as stated in the August 27, 2019 PWN.

Documentation found the school psychologist provided the August 27, 2019 PWN to the education advocate as a result of following the written transfer procedure described in USD #___ School Psychologists Responsibilities when Students Move document. This written procedure includes the following steps:

- Upon determining that a child with an IEP has moved into the district, the School Psychologist will call the last school of attendance to obtain verbal confirmation of the special education and related services the student was receiving and the special education placement the child was in at the prior school.
- The School Psychologist will email all service providers, Special Education Teacher Leader (secondary school only), and School Counselor (secondary school for scheduling) outlining the special education and

related services that need to be provided and the placement in which those services are to be delivered.

- Upon the child's first day of attendance, the child will receive special education and related services in the placements as confirmed via the phone conversation.
- Upon receipt of the IEP and supporting documents, Evaluation Summary Report, and any other records relating to the provision of special education and related services to the child, the School Psychologist will email copies of the IEP to all service providers responsible for the provision of special education and related services to the child.
- The School Psychologist will complete and mail a Prior Written Notice for the services and placement outlining the comparable services in the IEP from the previous district.

This written procedure does not include any opportunity for a parent to consult with USD #___ staff regarding the provision of FAPE, including special education and related services, when a student transfers into the district from another district within Kansas as is required by the IDEA.

Based on the foregoing, a violation of special education statutes and regulations for failing to follow appropriate procedures to consult with parents to determine FAPE, including special education services and related services, for a student transferring from another in-state school district is found.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. Violations have occurred in the following areas:

A. Federal regulations, at 34 C.F.R. 300.323(e), require that, if a child with a disability who had an IEP that was in effect in a previous school district in the same State transfers to another school district within the same State, the new school district, in consultation with the parents, must provide FAPE to the child, including services comparable to those described in the

child's IEP from the previous public agency, until such time that the new public agency either adopts the child's IEP from the previous public agency or develops, adopts, and implements a new IEP for the student.

In this case, USD #___ failed to consult with the education advocate to determine the special education and related services required to provide FAPE to the student upon her transfer from USD #___ to USD #___ on August 21, 2019. Further, the written procedures described in the USD #___ School Psychologists Responsibilities when Students Move document do not include parent consultation in the transfer process.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a. Comply with federal regulations, at 34 C.F.R. 300.323(e), requiring that, if a child with a disability who had an IEP that was in effect in a previous school district in the same State transfers to another school district within the same State, the new school district, in consultation with the parents, must provide FAPE to the child, including services comparable to those described in the child's IEP from the previous public agency, until such time that the new public agency either adopts the child's IEP from the previous public agency or develops, adopts, and implements a new IEP for the student.

    b. Comply with Federal regulations, at 34 C.F.R. 300.622(a), 34 C.F.R. 99.30, 34 C.F.R. 99.31, and 34 C.F.R. 300.30 which require public agencies to obtain consent from a person meeting the IDEA definition of parent prior to disclosing or releasing personally identifiable information from a student's educational records to third parties unless allowed by specific exceptions.

2. No later than February 28, 2020, USD #___ shall review and revise the transfer procedures described in the USD #___ School Psychologists Responsibilities when Students Move document to include parent consultation in the transfer process. USD #___ shall share this new written procedure with all school psychologists, building principals, and special education coordinators in the district no later than March 6, 2020. USD #___ shall share with SETS a copy of the new written transfer procedure and documentation showing that the new written procedure has been disseminated to all of the identified staff no later than March 15, 2020.

3. No later than February 28, 2020, USD #___ shall review, revise, and create written procedures for obtaining parent consent at ___ Academy. USD #___ shall train school district staff involved in the enrollment process at ___ Academy on these revised procedures as well as who is authorized to serve in the role of parent no later than March 6, 2020. USD #___ shall also send a letter to St. Francis Ministries and KVC Hospital explaining the revised written procedures. USD #___ shall share with SETS a copy of the new written procedure for obtaining parent consent, documentation showing that the training has been provided to all of the identified school district staff, and a copy of the letter sent to St. Francis Ministries and KVC Hospital no later than March 15, 2020.

4. Because the student is no longer enrolled in USD #___, no individual corrective action is ordered.

5. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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(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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___,
_____ ___ _____ Public Schools: 20FC___-001

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on December 11, 2019, by ___ "___" _____, education advocate, on behalf of ___ _____, student. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services (SETS) team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on January 13, 2020. That Complaint Report concluded that there were violations of special education statutes and regulations.

Thereafter, the school district filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the education advocate's original complaint, the Complaint Report, and the district's notice of appeal. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

## PRELIMINARY MATTER

Scope of Inquiry: The Appeal Committee limits its inquiry to the one issue properly presented in the appeal. No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

## DISCUSSION OF ISSUES ON APPEAL

The Complaint Report included three issues which were investigated (Issue One, Issue Two, and Issue Three). The district's notice of appeal addresses the findings and conclusions contained in Issue Two of the Complaint Report. Therefore, the Appeal Committee will limit its inquiry to Issue Two, as the notice of appeal did not contest any of the findings or conclusions in Issue One or Three of the Complaint Report.

Issue Two: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to obtain a release of information prior to sharing education records with the ___ Academy during the 2019-2020 school year.

The investigator made the following findings and conclusions regarding Issue Two in the Complaint Report:

- "[I]nterviews and documentation show that the state of Kansas, through DCF [Department for Children and Families], placed the student with one of two state contractors, Saint Francis Ministries, to provide foster care for the student. The student was subsequently placed in the KVC Hospital for psychiatric treatment and enrolled in the ___ Academy." (see page 15 of Complaint Report)

- "At the time of enrollment, USD #___ obtained a signed Authorization to Release Confidential Information on August 20, 2019. This authorization was signed by ____ _____, a St. Francis case manager, and allowed communication between ___ Academy Staff and KVC Hospital staff. The ROI [release of information] was obtained prior to the student's first day of school at ___ Academy and prior to the August 27, 2019 request from USD #___ to Families Together for an education advocate for the student." (see page 16 of Complaint Report)

- "[I]nterviews found the state of Kansas through its Kansas Department of [sic] Children and Families (DCF) placed the student in the custody of a contracted agency, St. Francis Ministries, not the individual case manager. As such, the case manager does not meet the IDEA definition of 'parent'." (see page 16 of Complaint Report)

- "[T]he Kansas Department of [sic] Children and Families is a state agency. This state agency placed the student with one of two state contractors, Saint Francis Ministries, to provide foster care for the student. As such, St. Francis would be considered the 'state' for the purposes of the IDEA and would not be able to serve in the role of 'parent' for the student." (see page 17 of Complaint Report)

- "Nothing in [K.S.A. 38-2218(b)] gives DCF or its contractors the authority to provide consent for the disclosure of PII from education records. Further, state regulations, at K.S.A. 38-2218(a), required DCF or St. Francis to immediately notify USD #___ that the student was in need of an education advocate when the student enrolled into

the district on August 20, 2019." (see page 17 of Complaint Report)

- "[T]he education advocate was designated to serve in the role of 'surrogate parent' by the KSDE. As such, the education advocate met the definition of 'parent' for the purposes of the IDEA." (see page 17 of Complaint Report)

- "Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to obtain a release of information signed by a person meeting the IDEA definition of 'parent' prior to sharing educational records during the 2019-20 school year is substantiated." (see page 17 of Complaint Report)

On appeal, the district makes the following three arguments (Notice of Appeal, p. 2):

1. "[I]mplicit in the investigator's conclusion is the assumption that educational records were actually shared between USD ___ and KVC Hospitals. The investigator's report does not include any factual findings demonstrating records were actually released to KVC Hospitals by USD ___. The release that was executed in this case was limited to 'communications between staff.' There is no evidence records subject to the release were exchanged, much less documents that contained personally identifiable information, as defined in 34 C.F.R. 300.32, or educational records. Therefore, the finding that USD ___ breached the student's confidentiality by sharing records with a third party is unsubstantiated and should be set aside."

2. "[T]he investigator cited 34 C.F.R. 300.622(a), 34 C.F.R. 99.30, and 34 C.F.R. 99.31 as federal regulations that require parent consent prior to disclosing or releasing personally identifiable information from a student's educational records to third parties unless allowed by specific exceptions. To the extent the investigator found USD ___ violated 34 C.F.R. 99.30 and 34 C.F.R. 99.31, both found in the Family Educational Rights and Privacy Act (FERPA), those regulations are beyond the scope of the investigator's inquiry as they are not special education laws. Rather, those regulations apply to all students. Findings as they relate to alleged violations of FERPA are beyond the scope of the investigation and should be set aside."

3. "[T]he real issue here is whether St. Francis and its employees are authorized to execute the release at issue. As noted in USD ___'s initial response, St. Francis and the Kansas Department for Children and Families (DCF) take the position that St. Francis has authority to execute the release."

With regard to the district's first argument (1.), the Appeal Committee makes the following findings and conclusions:

- The investigator did make a conclusion that USD ___ shared education records on page 17 of the Complaint Report by stating: "[T]he allegation of a violation of special education statutes and regulations of failing to obtain a release of information signed by a person meeting the IDEA definition of 'parent' prior to sharing educational records [emphasis added] during the 2019-20 school year is substantiated."

- The Appeal Committee finds that the underlying investigation did not reveal whether confidential information shared as a result of the inappropriately executed release of information constituted education records subject to IDEA protections. However, the investigation revealed district policies and practices which are confusing and misunderstood by district staff and which likely would result in violating student privacy laws. Therefore, the Committee modifies this finding as follows: The district's policies and actions investigated herein are sufficiently problematic to warrant corrective action. To the extent a specific finding is required to justify such corrective action, the committee finds the district in violation of special education law.

With regard to the district's second argument (2.), the Appeal Committee makes the following findings and conclusions:

- The federal regulations implementing the IDEA at 34 C.F.R. 300.622(a) expressly incorporate the FERPA regulations (34 CFR part 99). Thus, the Appeal Committee finds that the investigator properly incorporated 34 C.F.R. 99.30 and 34 C.F.R. 99.31 in the scope of the investigation as those regulations apply to children with IEPs.

With regard to the district's third and final argument (3.), the Appeal Committee makes the following findings and conclusions:

- To support its argument that the student's St. Francis Ministries caseworker has the authority to act as an IDEA "parent", the district contends that the caseworker qualifies as an IDEA parent pursuant to 34 C.F.R. 300.30(a)(3) and/or (a)(4): "(a)(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); (a)(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare." Notably, 34 C.F.R. 300.30(a)(3) prohibits "the State" from acting as the child's guardian if the child is a ward of the state. The district argues that "the State" does not refer to a state agency or its contractors (such as DCF and St. Francis), but that term instead refers to Kansas itself in light of the IDEA definition of the term "State" at 34 C.F.R. 300.40:

"State means each of the 50 States…." The Appeal Committee finds this argument unconvincing and an interpretation of the IDEA that would lead to inconsistent and absurd results. The Appeal Committee also finds it beneficial to look at how the term "State" is used elsewhere within the IDEA regulations. While it is true that 34 C.F.R. 300.40 defines "State" by referencing the geographical description of an area of land, it is absurd to think the area of land referred to as "Kansas" is somehow responsible for determining whether a child in the custody of a public child welfare agency is a "ward of the state." See 34 C.F.R. 300.45. Clearly the use of the term "state" within IDEA refers to political subdivisions and/or agencies of the state. See also 34 C.F.R. 300.33 "Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivision of the State that are responsible for providing education to children with disabilities [emphasis added]." It is imperative to examine the IDEA as a whole to determine what the legislature intended by the term "but not the State". The following case law sets forth relevant rules of statutory construction: "[L]aws are not to be construed so strictly as to defeat the obvious intent of the legislature" (Helvering v. Stockholms & Co. Bank, 293 U.S. 84 (1934)). "In construing a statute, the legislative intent is determined from a general consideration of the whole act. Effect must be given, if possible, to the entire statute and every part thereof. To this end a court should reconcile the different provisions so as to make them consistent and practicable" (Hessel v. Lateral Sewer District, 202 Kan. 499, 449 P.2d 496 (1969)). Finally, "[w]hen construing statutes where there is a conflict between reasonable intention and literal meaning, it has long been a judicial function to avoid glaringly absurd results" (Sherman v. Holiday Construction Company, 435 P.2d 16 (Alaska 1967); also see Robbins v. Chronister, 402 F.3d 1047, 1050 (10th Cir. 2005)).

Under IDEA regulations, this student is clearly a ward of the state because she is in the custody of a public child welfare agency (See 34 C.F.R. 300.45(a)(3)).

The IDEA regulations at 34 C.F.R. 300.519(a)(3) require that public agencies must ensure that the rights of a child are protected when a child is a ward of the state. One of the ways specified in this regulation to protect a child who is a ward of the state is to appoint a surrogate parent. In Kansas, a surrogate parent is referred to as an education advocate. The complainant was appointed the education advocate for this student by an organization authorized by the Kansas State Board of Education to make such an appointment, and, thereby, the education advocate has all of the special education rights of a parent, for this student, under both the IDEA and state law. That includes state regulation K.A.R. 91-40-24(e)(4), which says a

person appointed by the state board of education to be an education advocate for a particular student is authorized to "exercise all the rights given to parents under the special education for exceptional children act." To the extent the district took any action to diminish the rights of this education advocate, it is in violation of both state and federal regulations.

The IDEA regulations at 34 C.F.R. 300.519(d)(2)(i)-(ii) require that "public agencies must ensure that a person selected as a surrogate parent [education advocate in Kansas] is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child and has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents." Here the IDEA prohibits an employee of an agency involved in the care of the child (such as a child welfare agency) from serving as a surrogate parent or education advocate. To interpret 34 C.F.R. 300.30(a)(3) and (a)(4) as permitting a child welfare agency employee or contractor to serve as an IDEA parent would produce the absurd result of both permitting public agencies involved in the care of the child, and their employees, to have the IDEA rights of a parent, while at the same time, prohibiting that very result. This strained interpretation is in clear conflict with the intent of the IDEA as a whole, and is particularly in conflict with the intent of the cited regulations that children who are wards of the state and whose parents are unknown and unavailable, should be protected by assigning them a surrogate parent (or education advocate), who is not an employee of an SEA, an LEA, or any other agency that is involved in the care of the child. The Office of Special Education Programs (OSEP) in the U.S. Department of Education agrees with this analysis. When providing guidance on the meaning of "parent" at 34 C.F.R. 300.30, OSEP stated: "The exclusion of an agency involved in the education or care of the child from serving as a parent is consistent with the statutory prohibition that applies to surrogate parents in sections 615(b)(2) and 639(a)(5) of the Act [IDEA}.... A private agency that contracts with a public agency for the education or care of the child, in essence, works for the public agency, and therefore, could not act as a parent under the Act" (Federal Register, Vol. 71, August 14, 2006, p. 46568).

- The district also contends, in support of its third argument, that K.S.A. 38-2218 implies that DCF has the authority to execute releases of confidential information on behalf of the student because the statute requires DCF to "transfer or make the provision for the transfer of all school records" when a student is transferred from one school district to another. The Appeal Committee finds this argument unconvincing. Nothing in K.S.A. 38-2218 permits DCF to consent to the disclosure of personally identifiable information from education records of a student with an

exceptionality. On the contrary, this same statute states that when a court has granted legal custody of a child to an agency, the custodian has authority to make educational decisions for the child if the parents are unknown or unavailable, unless the child is an exceptional child. In that case, the statute requires DCF to "immediately notify the state board of education, or designee of the state board, and the school district in which the child is residing that the child is in need of an education advocate." The district's position that children with exceptionalities who are in the custody of DCF already have a person who can make education decisions as "parent" who is available to do so, would nullify this part of the statute. It is clear from this statute that DCF is never in a position to act as an IDEA parent in making educational decisions for any exceptional child in Kansas. That would include the decision to consent to the disclosure of personally identifiable information to parties who are not otherwise authorized to have that information without parent consent under FERPA exceptions.

## CONCLUSION

In summary, the only issue addressed in this Appeal Decision is Issue Two from the Complaint Report. The findings and conclusions of Issue One and Issue Three, along with Corrective Actions 1 and 2 stand.

With regard to Issue Two, the Appeal Committee overturns the finding in the Complaint Report that USD ___ shared education records with KVC Hospital. However, the Appeal Committee concludes that whether or not any confidential student information was actually disclosed, it is undisputed that USD ___ accepted the "Authorization to Release Confidential Information" executed by a St. Francis case manager as authority to release "confidential information." This action is inconsistent with the IDEA and the Kansas Special Education for Exceptional Children Act provisions cited in this decision regarding a child who is a ward of the state and whose parents are unknown or unavailable, as is the child who is the subject of this complaint. This is not merely a procedural violation. By taking this action of accepting the release as authority to disclose personally identifiable information derived from the education records of this student, the district substantially interfered with the right of the duly appointed education advocate to make these decisions.

For the reasons stated above and in consideration of the district's first objection to Corrective Action 3 of the Complaint Report, Corrective Action 3 stands with the following correction: The first sentence of Corrective Action 3 shall read, "No later than

February 28, 2020, USD #___ shall review, revise, and create written procedures for obtaining parent consent under the IDEA for all children with IEPs who are in the custody of DCF or any of its contractors; no later than February 28, 2020, USD #___ shall submit the aforementioned written procedures to SETS for review and approval." The remainder of Corrective Action 3 stands as written in the Complaint Report.

As to the district's second objection to Corrective Action 3, the requirement to send a letter to St. Francis and KVC Hospital is not for the purpose of having USD #___ educate a state agency or its contractor. The purpose is to notify those agencies of the revised USD #___ procedures required by Corrective Action 3.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 6th day of February, 2020.

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Mark Ward

_____
Scott Gordon

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON JANUARY 2, 2020

DATE OF REPORT: FEBRUARY 1, 2020

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

The complaint is against USD #___ (_____ Public Schools) who contracts with the _____ _____ Cooperative in Education (__CIE) to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education (KSDE) on January 2, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on February 1, 2020.

The Individuals with Disabilities Education Act (IDEA) allows investigations to address issues occurring within the past 12 months. Because the allegations in this complaint were made on January 2, 2020, the investigation shall only address the period beginning on January 2, 2019 through the present time.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on January 17, 2020 as part of the investigation process.

USD #___ made the following school staff available for a telephone interview on January 24, 2020:

_____ _____, Special Education Coordinator
____ _____, Executive Director of the __CIE
____ _____, Special Education Teacher at _____ Elementary School
____ _____, School Psychologist
____ _____, Principal at _____ Elementary School

In completing this investigation, the Complaint Investigator reviewed the following materials:

- "Student's IEP Concerns Aug 2017 to Dec 2019" written by the parents
- Individualized Education Program (IEP) with five goals dated March 28, 2018
- IEP Goal Progress Report showing goals #1 through #3, dated February 28, 2019
- IEP with four goals dated March 27, 2019
- IEP Goal Progress Report showing goals #1through #4, dated May 15 and May 17, 2019
- DIBELS reading assessment results for the 2018-19 school year
- Email dated August 15, 2019 from the mother to ____ _____, Special Education Teacher, describing summer academic activities
- STAR Math and STAR Reading assessment results from first semester of the 2019-20 school year
- MAP Math and MAP Reading assessment results from first semester of the 2019-20 school year
- DIBELS reading assessment results from first semester of the 2019-20 school year
- IEP Goal Progress Report showing goals #1 through #3 dated October 11, 2019
- IEP Goal Progress Report showing goals #1 through #4, dated October 11 and October 18, 2019

- Draft copy of an IEP Amendment written by Ms. _____ following the October Parent/Teacher Conference proposing to add math goals and services to the student's IEP
- Email dated October 28, 2019 from ____ _____, Principal, to Ms. _____ requesting her to bring data to the October 31, 2019 IEP team meeting
- IEP Amendment Between Annual IEP Meetings dated October 31, 2019
- Prior Written Notice for Identification, Initial Services, Educational Placement, Change of Services, Change of Placement, and Request for Consent (PWN) proposing to add math services showing written parent consent on October 31, 2019
- Conference Summary from the October 31, 2019 IEP team meeting
- Notes from the IEP Review on October 31, 2019 written by Ms. _____
- Email dated November 4, 2019 from _____ _____, Speech/Language Pathologist, to Ms. _____ regarding upcoming meetings scheduled with the parents for December 4, 2019 and April 30, 2020
- Resource Room Schedule before math goal was added
- Resource Room Schedule after math goal was added
- Math work samples dated November 7 through November 18, 2019
- IEP Goal Progress Report showing goals #1 through #3, dated December 4, 2019
- Reevaluation Report dated December 4, 2019
- IEP with eight goals dated December 4, 2019
- Conference Summary from the January 4, 2019 IEP team meeting
- IEP Goal Progress Report showing goals #5 and #6, dated December 20, 2019
- IEP Goal Progress Report showing goals #1 through #8, dated December 20, 2019

- Email dated January 1, 2020 at 4:33 p.m. from Ms. _____ to the mother regarding reading lesson plans for the week of January 6 through January 10, 2020
- Email date January 1, 2020 at 6:35 p.m. from the mother to Ms. _____ requesting the math lesson plans as well
- Email dated January 6, 2020 from Ms. _____ to the mother regarding math lesson plans for the coming week and work samples from the current week
- Written Statement from Ms. _____ dated January 7, 2020
- Copies of reading materials sent home by Ms. _____ during the 2018-19 school year
- Math Assignment Grade Book printout for 2nd grade
- Math Assignment Grade Book printout for 3rd grade
- Confidentiality Training PowerPoint used by __CIE during the annual teacher training for 2019-20 school year
- Ms. _____'s Certificate of Completion of the Annual Training dated October 18, 2019
- IDEA and FERPA Confidentiality Provisions published by the US Department of Education, June 6, 2014
- Email dated January 9, 2020 from the mother to the Complaint Investigator regarding confidentiality
- Written Response to Allegations written by ____ _____, Executive Director of __CIE dated January 15, 2020
- USD #___ School Calendar for the 2018-19 School Year
- USD #___ School Calendar for the 2019-20 School Year
- Policies, Practices, and Procedures document on the __CIE website

## Background Information

This investigation involves a 9-year-old female student who is currently enrolled in the third grade at _____ Elementary School in USD #___. The student has spent her entire school career in USD #___ and has had an IEP since her first year of kindergarten during the 2015-16 school year. The most recent reevaluation of the student was conducted on December 4, 2019 resulting in a

determination that the student continued to be eligible for special education and related services due to the exceptionality of Other Health Impaired.

## Issues

Based upon the written complaint, the complainant raised three issues that were investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with IEP goal progress reports for the past 12 months.

### Parent Position

The parents reported ____ _____, Special Education Teacher, failed to provide them with quarterly IEP Goal Progress Reports during the past 12 months. However, the parents did acknowledge that they did receive the quarterly IEP Goal Progress Reports from _____ _____, Speech/Language Pathologist, as required by the IEPs during this same timeframe.

The parents stated that they never received an IEP Goal Progress Report from Ms. _____ at the end of third quarter of the 2018-19 school year. They also reported that Ms. _____ did not provide the IEP Goal Progress Report for the first quarter of the 2019-20 school year during the October 21, 2019 Parent/Teacher Conferences when the other students received their grade cards. Following their conference, the parents requested an IEP team meeting and a copy of the IEP Goal Progress Report. They indicated they finally received Ms. _____'s IEP Goal Progress Report at the IEP team meeting held on October 31, 2019.

In addition, the parents indicated the IEP goal progress reporting process is confusing because they receive separate IEP Goal Progress Reports from Ms. _____ and Ms. _____. They also noted that the descriptions of the student's progress were not easily understood, often citing test scores but not explaining

what those test scores meant e.g. “QPS Skills 4 7/10, Skill 5 8/10”; “MAPS 173 STAR GE 3.3, 63%ile.”

## School District Position

USD #___ believes the parents were provided information about the student’s progress toward IEP goals through frequent communication from Ms. _____. Documentation was provided reflecting work samples, lesson plans, universal screeners, diagnostic tests, probes, and resources that were provided to the parents during both the 2018-19 and 2019-20 school years.

However, USD #___ did acknowledge that Ms. _____ did not provide the parents with an IEP Goal Progress Report using the online IEP program (Webkidss) every quarter during the past 12 months. Ms. _____ stated, “To rectify this, we have set quarterly meetings with the parents where updates and data will be shared. The dates that we are meeting are Feb. 10 at 2:00 and April 30 at 9:30, where we will invite the three fourth grade teachers.”

____ _____, Executive Director of __CIE, reported that there is not a standard procedure for providing the IEP Goal Progress Reports maintained within the Webkidss online IEP program. Each special education teacher and related service provider decides how to provide IEP Goal Progress Reports to the parents of the students they work with. Ms. _____ reported that she sends copies of the IEP Goal Progress Reports home to parents in the student’s backpack or folder at the end of each quarter. Documentation showed Ms. _____ provided the student’s parents with IEP Goal Progress Reports on the speech/language goals separately from the IEP Goal Progress Reports provided by Ms. _____.

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.320(a)(3)(ii), require that the IEP include a description of when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

In this case, the student's IEPs in effect during the past 12 months did include a statement that the parent would be informed of the student's progress as often as parents of regular education peers are informed of progress. USD #___ reported and documentation showed that general education student progress is reported quarterly to parents through grade cards.

Based upon the school calendar, quarters for the past 12 months ended on February 28, 2019 (third quarter / 2018-19 school year); May 17, 2019 (fourth quarter / 2018-19 school year); October 11, 2019 (first quarter / 2019-20 school year); and December 20, 2019 (second quarter / 2019-20 school year).

Documentation showed the IEP dated March 27, 2018 was in effect at the end of third quarter of the 2018-19 school year. This IEP included five goals; Ms. _____ was responsible for reporting progress for three goals with Ms. _____ reporting progress for the other two goals. The IEP Goal Progress Report includes information written by Ms. _____ on February 28, 2019 for the three goals but does not include any information from Ms. _____ regarding the other two goals.

Documentation showed the IEP dated March 28, 2019 was in effect during fourth quarter of the 2018-19 school year and first quarter of the 2019-20 school year. This IEP included four goals; Ms. _____ was responsible for reporting progress for three goals with Ms. _____ reporting progress for the one other goal. The IEP Goal Progress Report includes information written by Ms. _____ on May 17, 2019 and October 11, 2019 for the three goals as well as information written by Ms. _____ on May 15, 2019 and October 18, 2019 regarding the one other goal.

Documentation showed the IEP dated December 4, 2019 was in effect during at the end of third quarter of the 2019-20 school year. This IEP included eight goals; Ms. _____ was responsible for reporting progress for two goals with Ms. _____ reporting progress for the other six goals. The IEP Goal Progress Report includes information written by Ms. _____ on December 20, 2019 for the two goals as well as information written by Ms. _____ on December 20, 2019 regarding five of the six goals. There was no information provided regarding the student's progress towards meeting IEP Goal #8.

It is noted that the IDEA does not include any requirement for the use of a specific format or a description of the specific data that must be included in the reporting of a student's progress toward their IEP goals. The only requirement is that a timeframe for providing the information is included in the IEP and that the IEP goal progress is reported to the parent following that timeframe. Decisions regarding format and content of the IEP goal progress reporting are left to each public agency's procedures and practices.

While documentation and interviews found the IEPs in effect during the past 12 months all included a statement of when periodic reports of IEP goal progress would be provided, it also showed that these quarterly reports of IEP goal progress were not consistently provided to the parent during the past 12 months. Ms. _____ did not report IEP goal progress for goals #4 and goals #5 during third quarter of the 2018019 school year. In addition, Ms. _____ did not report IEP goal progress for goal #8 during second quarter of the 2019-20 school year. Based on the foregoing, a violation of special education statutes and regulations for failing to provide the parent with IEP goal progress reports for the past 12 months is found.

> ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to develop an appropriate IEP for the student, specifically by not including a goal and specialized instruction for math in the March 27, 2019 IEP.

Parent Position

The parents believe that USD #___ should have included goals and services to address math in the March 27, 2019 IEP. The parents noted a document titled "Policies, Practices, and Procedures" is posted on the __CIE website that states:

> A Draft IEP must be developed for review at the IEP meeting. It is the responsibility of each service provider to develop goals and objectives based on data collected during the evaluation.

The parents contend that Ms. _____ should have included math goals and services in the draft IEP presented at the March 27, 2019 IEP team meeting because of the student's below grade level skills in math.

The Present Level of Performance from the March 27, 2019 IEP included results of the Star Math test from December 2018 as "STAR Math. 12/19/18. 1.5. 11", which the parent later learned, meant the student scored at the 1.5 grade equivalent and at the 11th percentile as compared to her 2.4 grade placement. The Present Level also included results of the NWEA MAP test as "NWEA MAPS-RIT.PR 1/31/19 Math. 155 1" which the parent later learned meant the student scored in the 1st percentile as compared to her second grade peers. The parents noted the IEP included the following statement: "Functional performance has been considered and determined that her math skills may impact her ability to progress at the same rate as her peers."

Based on the math statement written by Ms. _____, the parents stated, "We were under the impression that math would be an area of focus for the student within the IEP such as in the form of a goal but unfortunately no math goal was created." The parents said,

> We are concerned that Ms. _____ chose not to create a math goal for the student based off the math testing data presented. Clearly, the student was not performing in math at the same level as her peers. Ms. _____ led the IEP meeting in March 2019 and therefore we trusted she was presenting us with information we could understand and ensuring the student was going to receive appropriate services for her deficits. Unfortunately, at the end of the March 2019 IEP document, a math goal was NOT created therefore the student did not receive math special education services causing further delay and creating more deficits in her math foundation.

The parents reported they first learned the student was not receiving special education support for math at the October 21, 2019 Parent/Teacher Conference. The parents shared their concerns about the student's math skills with USD #___ staff and acknowledged that USD #___ subsequently amended

the student's IEP to include a math goal and special education for math on October 31, 2019. They reported USD #___ then conducted a reevaluation of the student, and created a new annual IEP that includes additional goals and services addressing math.

School District Position

USD #___ believes that at the time the March 27, 2019 IEP was developed, the IEP team, including the parents and general education teacher of the student, determined the progress being made by the student in the area of math was sufficient and that no goals or services were necessary. The IEP team did choose to include accommodations for testing and assignments as well as preferential seating. USD #___ reported that neither the second grade classroom teacher nor the parent raised any concerns in regards to student's math skills at the IEP team meeting. USD #___ indicated the team determined specialized instruction in math was not required and that math instruction in the general education setting with the use of accommodations was the least restrictive environment (LRE) for the student.

Ms. _____ reported she had no reason to suspect the student would be in need of special education to address math. Neither the classroom teacher nor the paraprofessional working with the student in the general education setting shared any concerns about math skills. In addition, the student's grades in second grade math were 83% for first quarter, 93% for second quarter, and 88% for third quarter when this IEP was developed. Ms. _____ noted that, for third grade, the student's math scores are 97% for first quarter and 94% for second quarter.

USD #___ indicated that once the parents shared their concerns regarding the student's math skills following the October 21, 2019 Parent/Teacher Conference, the IEP team met on October 31, 2019 to amend the student's IEP to include a math goal and 150 minutes per week of special education for math. At that same meeting, the parent provided written consent to conduct a reevaluation of

the student to assist the IEP team in developing an appropriate educational program.

The reevaluation was completed and the IEP team considered the results on December 4, 2019 when the student's IEP was reviewed and revised to include three math goals, two reading goals, one writing goal, and two language goals. These goals are addressed through 375 minutes per week of specialized instruction in the special education setting and 450 minutes per week of special education support in the general education setting along with 60 minutes per week of language therapy.

USD #___ believes they have followed the IEP process as required by the IDEA and provided the student with a free appropriate public education (FAPE) in the least restrictive environment (LRE).

Applicable Regulations and Conclusions

Federal regulations, at 300.324(a)(1), require public agencies to ensure each student's IEP team consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child.

Federal regulations, at 300.324(b)(1), also require public agencies to ensure that each student's IEP is reviewed at least annually to determine whether the annual goals are being achieved and, if appropriate, revise the IEP to address any lack of progress towards the annual goals, any lack of progress in the general education curriculum, the results of any reevaluation, information provided by the parents, the child's anticipated needs, and any other matter.

In this case, the IEP team, including the parent and general education teacher of the student, met on March 27, 2019 and developed an IEP that did not include math goals or services. Although the information about the student's current math skills and abilities in the Present Level of Academic Achievement and

Functional Performance (PLAAFP) was not explained clearly, neither the parent nor the current classroom teacher shared any concerns about the student's math skills. Ms. _____ indicated the student was being successful in the general education math class with quarter grades falling between 83% and 93%.

IDEA does not allow one person to be unilaterally in control of the development of the IEP. Instead, the entire IEP team is ultimately responsible for determining the goals and services as well as accommodations / modifications that will provide the student with a FAPE. It is noted that once USD #___ became aware of parent's concerns about the student's math skills, they responded in a timely and appropriate manner to amend the IEP, conduct a reevaluation of the student, and to review/revise the current IEP.

Based on the foregoing, a violation of special education statutes and regulations for failing to develop an appropriate IEP that included math goals and services at the March 27, 2019 IEP team meeting is not found.

> ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to maintain confidentiality, specifically by sharing personally identifiable information following the December 4, 2019 IEP team meeting.

Parent Position

The parents believe Ms. _____ shared information about what happened during the December 4, 2019 IEP team meeting including the names of the parents with district level staff and other building teachers who are not part of the student's IEP team. The parents stated, "District level staff and other building teachers who are not part of the student's IEP team have reported to us that Mrs. _____ shared her perception of the father's demeanor from our December 4, 2019 IEP meeting." The parents asserted, "This is a clear violation of the student's and our confidentiality of the closed IEP team meeting."

The parents indicated they originally received a text from a school staff member after the December 4, 2019 IEP team meeting alerting them to the statements

made by Ms. _____. The father then spoke to the person who sent the text as well as two other persons employed by USD #___ who reported being aware of this type of statement being made by Ms. _____. However, the parents did not choose to share the names of these three individuals because these staff were not willing to be interviewed as part of this investigation due to their fear of retaliation.

School District Position

USD #___ indicated they could not fully respond to the parent's allegation of a violation of confidentiality because the parent provided no specific information. Therefore USD #___ conducted a review of the actions of Ms. _____ following the December 4, 2019 IEP team meeting in an attempt to identify the alleged breach of confidentiality by Ms. _____. Based upon this review and speculation, USD #___ identified two possible situations that could have led to the parent's perception that personally identifiable information had been shared inappropriately.

First, USD #___ reported the December 4, 2019 IEP meeting "did not go well" and resulted in strong emotions among the IEP team members as they reviewed and revised the student's IEP. Based upon his interview with Ms. _____, Mr. _____ stated, "When the parents left, the remaining IEP team members discussed and debriefed about the meeting itself in an effort to understand what had happened, next steps, etc. Of specific question was the request for the special education teacher, ____ _____, to provide direct math instruction. It is clear that discussing the meeting with the IEP team members was not a violation of confidentiality."

Second, because of the concerns regarding the student's math skills, Ms. _____ spoke to _____ _____, the student's second grade teacher, following the December 4, 2019 IEP team meeting. While Ms. _____ was not a current member of the IEP team, Ms. _____ believed she had valuable information about the student's math skills from the previous school year that would assist her in providing appropriate math instruction. Mr. _____ reported that Ms. _____ "did

not speak about the parent, rather she researched claims made by the parents about the lack of services for the student and previous requests that were or were not made by the parent. Clearly, the 2nd grade teacher knows who the parent of the child is. I believe that confidentiality, therefore, was not violated."

USD #___ indicated that all school staff participate in an annual training that includes a review of the confidentiality requirements under Part B of IDEA and the Family Educational Rights and Privacy Act (FERPA). Documentation showed that Ms. _____ completed this annual training on October 18, 2019.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.622(a), require public agencies to obtain parent consent prior to disclosing or releasing personally identifiable information to third parties unless allowed by specific exceptions. Federal regulations, at 34 C.F.R. 300.622(b), clarifies that parental consent is not required before personally identifiable information is released to officials of the public agency for the purposes of providing a FAPE.

Federal regulations, at 34 C.F.R. 300.32, define "personally identifiable" information as the child's name, the parent's name or the name of another family member, the child's address; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

Federal regulations, at 34 C.F.R. 300.623(c), require that public agencies train all persons collecting or using personally identifiable information regarding confidentiality under Part B of the IDEA and the Family Educational Rights and Privacy Act (FERPA).

In this case, the parents believe Ms. _____ shared the names of the parents and information about what happened during the December 4, 2019 IEP team meeting with district level staff and other building teachers who are not part of the student's IEP team. However, this allegation could not be confirmed through either documentation or interview.

Regardless, USD #___ identified two possible situations that they believe could have been the basis of the parent's allegation. First, Ms. _____ reported the father became emotional during the five-hour IEP team meeting on December 4, 2019 and that following the meeting there was discussion among the meeting participants about the parent's conduct. Although the parents might consider this discussion unprofessional, it would not be a violation of confidentiality because all of these persons were current members of the student's IEP team and privy to personally identifiable information.

Second, Ms. _____ reported speaking to the student's general education teacher from last school year to obtain information about the student's math skills for educational programming purposes following the December 4, 2019 IEP team meeting. This discussion did not result in a breach of confidentiality since the second grade teacher was an employee of USD #___ and had valuable information about the student's math skills that the IEP team had determined required special education services in order to provide FAPE. Federal regulations at 34 C.F.R. 300.622(b)(1) allows the disclosure of personally identifiable information without parent consent to officials of the public agency for the purposes of providing a FAPE.

It is noted that Ms. _____ reports being aware of the requirements associated with confidentiality and that USD #___ provided documentation that demonstrated that Ms. _____ had been trained on confidentiality on October 18, 2019.

Based on the foregoing, a violation of special education statutes and regulations for failing to protect personally identifiable information and maintain the confidentiality of the student is not found.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. A violation has occurred in the following area:

A. Federal regulations, at 34 C.F.R. 300.320(a)(3)(ii), require that the IEP include a description of when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

   In this case, interviews and documentation found that USD #___ did included a statement of when periodic reports of IEP goal progress would be provided to parents in all three IEPs that were in effect during the past 12 months. However, interview and documentation also showed that these reports of IEP goal progress were not consistently provided to the parent as described in the IEP during the past 12 months. Ms. _____ did not report IEP goal progress for goals #4 and goals #5 during third quarter of the 2018019 school year. In addition, Ms. _____ did not report IEP goal progress for goal #8 during second quarter of the 2019-20 school year.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

   a. Comply with federal regulations, at 34 C.F.R. 300.320(a)(3)(ii), requiring the school district to provide periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) to parents as described in the IEP.

2. No later than February 28, 2020, USD #___ shall create written procedures for the provision of IEP Goal Progress Reports to parents including, but not limited to, the format, method of provision, and plan for monitoring the provision of such reporting to the parents. USD #___ shall train special education teachers, related services providers, school psychologists, and special education coordinators on these written

procedures no later than March 13, 2020. USD #___ shall share with SETS a copy of the new written procedure for providing IEP goal progress reporting to parents as well as documentation (including a list of staff who attended and the name of the person who provided the training) showing that the training has been provided to all of the identified school district staff no later than March 20, 2020.

3. Two instances of a failure to provide the parent with IEP goal progress reporting were found. To address the first identified failure, USD #___ shall provide the parent and SETS with progress reporting on goal #8 from the December 20, 2019 IEP for the second quarter of the 2019-20 school year no later than February 28, 2020. No corrective action is ordered to address the second identified failure to provide IEP goal reporting on the two goals from the March 28, 2018 IEP for the third quarter of the 2018-19 school year because the information is moot as those goals were already reviewed and revised at the March 27, 2019 IEP team meeting.

4. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to 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(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, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of

Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
___ _____ PUBLIC SCHOOLS, USD #___
ON JANUARY 14, 2020

DATE OF REPORT: FEBRUARY 13, 2020

This report is in response to a complaint filed with our office by _____ _____ on behalf of her 18-year old son, _____. Ms. _____ has Power of Attorney for _____ who 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 ____ _____, Assistant Superintendent of Special Education for ____ _____ Public Schools, on January 16, 2020. On February 11, 2020, the investigator spoke by telephone with _____ _____, Assistant Director of Secondary Special Education.

In support of her complaint, the parent provided extensive written explanation of her concerns as well as additional supplemental material. Those documents considered most relevant to the issues outlined in this complaint are itemized below.

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

- Section 504 Student Plan for the student dated May 8, 2014
- Email dated January 12, 2017 from the school psychologist to the parent
- Draft Evaluation Report dated March 23, 2017
- Email dated September 22, 2017
- IEP Progress Report – Annual Goal dated December 20, 2018
- Email exchange dated February 1, 2019 between the parent and the school psychologist
- IEP for the student dated March 1, 2019

- Prior Written Notice form dated March 1, 2019
- List of parental concerns dated March 1, 2019
- Email dated April 4, 2019 from the parent to school staff
- Email dated April 12, 2019 from the parent to school staff
- Email dated April 22, 2019 from the parent to school staff
- Email dated August 22, 2019 from the parent to the school psychologist and the head of the Special Education Department for the school
- Email dated August 26, 2019 from the parent to school staff
- Email dated August 28, 2019 from the parent to the IEP Team
- Email dated August 28, 2019 from the student to the IEP Team
- Draft IEP dated September 19, 2019
- Email dated September 26, 2019 from the student to the IEP Team
- Power of Attorney dated September 26, 2019
- Email dated September 27, 2019 from the parent to school staff
- Email dated September 27, 2019 from the parent to the IEP team
- Email dated September 30, 2019 from the school psychologist to the parent
- Emails dated October 1, 2019 from the parent to the school psychologist
- Email dated October 8, 2019 from the parent to the school psychologist
- Email dated October 10, 2019 from the parent to the school psychologist
- Email dated October 10, 2019 from the school psychologist to the parent
- IEP Progress Report – Annual Goal dated October 11, 2019
- Email dated October 23, 2019 from the parent to the counselor
- Email dated October 23, 2019 from the parent to the special education teacher
- Email dated October 25, 2019 from the case manager to the parent
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated October 30, 2019
- Email exchange dated November 6, 2019 between the parent and the student's case manager
- Email exchange dated November 7, 2019 between the parent and the Occupational Therapist for the district
- Email dated November 8, 2019 from the student's case manager to the parent

- Email dated November 8, 2019 from the OT to the parent
- Email dated November 8, 2019 from the parent to the OT
- Email dated November 11, 2019 from the parent to the student's case manager
- Email dated November 13, 2019 from the OT to the parent
- Email exchange dated November 14, 2019 between the parent and the special education teacher
- Email dated November 18, 2019 from the OT to the parent
- Email dated November 20, 2019 from the case manager to the parent
- Email dated November 21, 2019 from the case manager to the parent
- Email dated November 26, 2019 from the Assistive Technology (AT) consultant to the IEP Team
- Independent Educational Evaluation Summary of an evaluation completed on December 10 and 11, 2019
- Emails dated December 20, 2019 between the parent and the student's case manager
- Notice of Meeting dated December 20, 2019
- Letter dated January 5, 2020 from the student's private psychologist to the parent
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated January 13, 2020
- Agenda for January 13, 2020 IEP Team meeting
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated January 13, 2020 regarding the parent's request to end the student's participation in the Study Skills class
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated January 13, 2020 regarding the addition of the Study Skills class
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated January 14, 2020 regarding adding the Connections class
- Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated January 16, 2020 regarding the district's refusal regarding special education services
- Transcript for the student reflecting final course grades for grades 9 through 12

- Private School Orientation agenda
- Special Services Referral Form and Intervention Documentation Worksheet for referrals from private parochial schools

## Background Information

This investigation involves an 18-year-old student who is enrolled in the 12th grade in his neighborhood high school.

According to the Independent Educational Evaluation Summary (IEE) provided by the parent, the student "was born at 25 weeks' gestation, weighing 2 lbs., 3 oz. He spent 97 days in the NICU. He had a documented brain bleed at birth that resolved with treatment…He suffered retinal detachment and had three laser surgeries to correct this, one in the NICU and two after discharge. He was on a ventilator periodically and was discharged home on oxygen for several months."

The student received services through the Children's Center for the Visually Impaired, Parents as Teachers, and Children's Therapy Group when he was an infant and toddler. Motor and language milestones were reported to be delayed.

The student first received special education services in the district as a preschool student. When first identified, services addressed concerns in the area of play, motor development, and language skills. The student was served by an Occupational Therapist (OT) and a Speech/Language Pathologist.

The parents opted to enroll the student in a pre-Kindergarten program rather than enrolling him in Kindergarten in the district at age 5. When he turned 6, the student was enrolled in the private parochial school he would attend through 8th grade. The student was diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD) when he was in first grade. While in elementary school, the resource teacher at the private school expressed concerns about the student's reading and writing as well as his fine motor skills.

The district conducted an evaluation of the student in 2012 when he was in 5th grade but determined he was not eligible for special education services. The evaluation team noted that the student was likely to need accommodations and extra support to make progress in the general education curriculum. Those resources were available through the private school and were meeting his needs at that time. The OT provided accommodation recommendations, and the need for a follow-up with a mental health

professional was discussed.

The student was provided a Section 504 Accommodation Plan to address academic concerns while in 6th grade.

In May of 2015, the student was diagnosed at Children's Mercy Hospital as having dyslexia and dysgraphia. He was evaluated by an OT at Children's Mercy who determined that the student had difficulty with fine motor tasks, particularly handwriting.

The student continued to attend the private parochial school, but during his 8th grade year he became the victim of significant bullying. The parents had noticed that he had begun to struggle with depression but were unaware of the extent of the bullying problem until another student told them about the situation. The student was seen at _____ County Mental Health and participated in a suicide prevention program for the remainder of his 8th grade year.

The school psychologist for the district who was assigned to support students in private school settings contacted the school psychologist for the student's neighborhood high school in the spring of 2016 and asked her to attend a problem-solving meeting regarding the student at the private school. At the meeting, it was decided that the student would participate in general education interventions at his neighborhood public school at the start of his freshman year. Those interventions would include his participation in PASS (SCORE class), which would focus on executive functioning skills and reading strategies utilizing the Scholastic Intervention Read 180 program – a small class led by a teacher with Master's level training in reading.

In April of 2016, the student was diagnosed with Bipolar Disorder. The parents opted to pull the student from the private school in the spring of 2016, and the student was home-schooled for the remainder of that semester.

The student was enrolled in the district at the beginning of his 9th grade year. Data was collected on the reading interventions being provided to the student. The student was enrolled in both a math strategies class and a reading strategies class as well as the SCORE program during the first semester of the 2017-18 school year. At the end of the semester, the math strategies class and SCORE were discontinued. "Limited progress" was noted with these interventions.

Based upon performance in the Read 180 program, the student demonstrated grade

level reading skills in August of 2016 and slightly below grade level skills in November of 2016. His reading strategies teacher noted that he had made steady progress and had developed effective strategies for coping with his dyslexia. According to the teacher, the student's reading comprehension skills did not appear to be significantly impacted. The student's participation in the Reading Strategies class was discontinued at the end of the student's freshman year because of the progress he had made.

The parent requested that the district conduct a special education evaluation of the student. The school psychologist sent a request for consent to conduct the evaluation to the parent on January 12, 2017. The parent gave written consent for the district to conduct an evaluation, and the district moved ahead with the evaluation process.

An eligibility meeting was held on March 23, 2017. According to the Evaluation Report reviewed at that meeting, the student's teachers observed that he rushed through work and did not check it over. Daily work was sometimes incomplete. He had trouble getting started on tasks and required checks for understanding and redirection.

Classroom teachers noted concerns with executive functioning and social skills. The Behavior Rating Inventory of Executive Function (BRIEF) was administered, and the team determined that the student was eligible for and in need of special education services under the category of Emotional Disturbance. An IEP was developed for the student.

The student continued to receive special education support during his ninth, tenth, and eleventh grades. An annual IEP review was conducted on March 1, 2019.

The student turned 18 years of age on June 10, 2019.

On August 22, 2019, the parent sent an email to the school psychologist and the head of the Special Education Department to provide feedback on comments made by the student's special education teacher at "back-to-school night." The parent indicated that she wanted to begin to amend the student's March 1, 2019 IEP. Specifically, the parent stated that she wanted to remove Study Skills from the student's schedule and requested that accommodations included in the student's IEP be clarified. The parent wrote that the student needed to have notes provided ahead of class time in a format that can be "manipulated." For his Algebra class, the parent stated that the student needed a keyboard application with math symbols. "All assignments need to be digitally accessible."

On August 26, 2019, an IEP team meeting was held. The parent sent an email to staff following the meeting providing the following summary of actions agreed upon by the team.

- The student would remain in Study Skills for the first semester.
- The student would not be enrolled in Study Skills for the second semester and would continue to participate in CAPS.
- No "independence" goal would be added to the student's IEP.
- The student would use Study Skill for
    - self-editing written work for current courses;
    - self-advocacy skills such as identifying when to advocate, how to do it, and why;
    - work on a self-advocacy "elevator speech" that explains what dysgraphia is, what accommodations he needs and why he needs them; and
    - role play of his elevator speech with the IEP team to build confidence.
- OT minutes would be used for
    - investigating possible technology solutions that support his learning needs (periodic table, large graph paper);
    - continuing to explore best practices for note-taking;
    - downloading an application for his phone that scans documents; and
    - investigating helpful phone applications that support his needs.
- The special education teacher would partner with the student and assist with Algebra II accommodations. The student must be held accountable for note-taking and paying attention to details in class. The parent did not agree to "exemptions" noting the student "needs all possible points."
- The student would handle all future communications with his teachers on his own with support from the special education teacher.

On August 27, 2019, the school psychologist sent an email to the parent stating that because the student was 18 years of age, the district was required to request his consent for any changes to his IEP, and the student would be asked to sign all forms related to prior written notice.

On August 28, 2019, the parent sent an email to the IEP Team indicating that the student would be emailing the members of the team to request another meeting since he would be the one to sign his own IEP. The student sent a subsequent email to staff requesting a meeting to make changes to his IEP and noting that he understood that his signature was needed in order for changes to be made to the document.

The district provided the student with a copy of a draft amended IEP dated September

19, 2019.

On September 26, 2019, the student sent an email to staff stating that "due to the anxiety of turning 18 and handling all educational decisions without my parents, I have decided to appoint a power of attorney. My mother…will be allowed to make decisions and speak on my behalf. She understands what I need. This will allow me to focus on my classes, ACT test and making college decisions. Please contact my mom with any questions. Attached is the POA. The original copy was given to [the school psychologist]."

On September 27, 2019, the parent sent an email to the IEP Team in which she provided notice that she had power of attorney for the 18-year-old student. The parent outlined concerns she had with the draft of an amended IEP and requested a re-evaluation of the student in specific areas. Because the student was last evaluated March 23, 2017, his triennial re-evaluation was scheduled to be completed later in the school year.

In an email dated September 30, 2019, the school psychologist assured the parent that the district was willing to move up the date for the re-evaluation and asked to speak with the parent about her specific concerns. On October 1, 2019, the parent responded via email to the school psychologist indicating her willingness to speak further with the counselor. The parent stated that the student's "mental state is the main concern. In order to reduce anxiety, he needs parental support and a substantial IEP document to ensure accommodations in college."

In a second email on October 1, 2019, the parent contacted the school psychologist regarding information she had received regarding accommodations from each of the universities the student was considering. The parent stated that documentation would be needed to establish the presence of a disability and support the reasonableness of requested accommodations. The parent also stated that universities would want information regarding the degree of limitations the student was exhibiting in several major areas.

The parent and the school psychologist met and discussed the student's re-evaluation. According to an email sent by the parent to the school psychologist, the two parties agreed that the student would be tested in the areas of reading, writing, spelling, math reasoning, math calculation, and executive functioning. The parent expressed interest in having the testing completed by the end of the first semester of the 2019-20 school year.

The school psychologist sent the parent a re-evaluation consent form on October 9, 2019. The parent responded via email on October 10, 2019 stating that in addition to the other areas previously agreed upon, the re-evaluation should include fine motor skills, general intelligence, and communication skills. The school psychologist responded to the parent on October 10, 2019 stating that the district did "not believe that [the student's] general intelligence [IQ] and his ability to communicate through language [both receptively and expressively] impede his learning. There is no suspicion of a cognitive disability/limitation or Speech/Language disability."

The parent sent an email to the school psychologist on October 11, 2019 asserting that the student had "a right to a comprehensive evaluation that includes intellectual and academic achievement testing, as well as assessment of the critical underlying language skills that are closely linked to dyslexia." The parent stated that at the time the student was first identified as exceptional by the district, "his emotional needs trumped the academics."

The school psychologist responded via email to the parent noting that she had sent a consent form for re-evaluation to the parent on October 9, 2019. The school psychologist noted that the district had agreed to conduct a re-evaluation of the student prior to the deadline for that action on March 23, 2020. The school psychologist stated that the district was "required to assess [the student] in all areas related to his disability" and noted that a prior written notice form was attached to the email regarding the areas of assessment agreed to by the district as well as providing an explanation of why additional areas of testing were denied by the district.

On October 30, 2019, the district provided the parent with prior written notice of a proposed re-evaluation of the student. The notice stated that the district would assess the student's skills in the areas of reading, written language, math, executive function, and anxiety as those skills related to his current educational setting. According to the prior written notice form, the district would address the parent's request for assessment of the student's skills in the areas of phonological and phonemic awareness and rapid automatic naming through an assessment of the student's academic skills.

The district gave notice that it would not be assessing the student's receptive and expressive language skills as requested by the parent because those skills were evaluated in May of 2015 and found to be within normal limits. According to the district, "There has been no indication in [the student's] performance to negate these

results."

The district also refused to conduct an assessment of the student's intellectual skills because "there was no suspicion of intellectual impairment." Additionally, the district noted that the team was concerned that the results of an intellectual assessment could be skewed because of the student's anxiety level.

In an email to the counselor dated October 23, 2019, the parent indicated that she and the student felt he should apply for the TIPS (Transition into Post-Secondary) program at the local community college in lieu of continuing with the CAPS (Center for Advanced Professional Studies) program offered by the district which allows students to earn college credits through concurrent enrollment while completing their high school requirements. On November 8, 2019, the special education teacher notified the parent that the student had been accepted into the TIPS program. On November 14, 2019, the special education teacher sent an email to the parent stating that she would complete an amendment to the student's IEP after the first of the year, moving the student to indirect special education services. The parent responded stating that such a change would require a "formal meeting." The parent stated that since an IEE was scheduled for December, she felt the team should wait for evaluation results before making a change to the student's service plan.

On October 29, 2019, the parent filed a formal complaint against the district with the Kansas State Department of Education (KSDE). The district offered a proposal to resolve the issues of that complaint related to the district's proposed re-evaluation of the student by paying for an Independent Educational Evaluation (IEE). The Special Education and Title Services (SETS) Team at KSDE accepted the district's proposed resolution.

An Independent Educational Evaluation (IEE) of the student was completed on December 10 and 11, 2019.

The draft IEP amendment was never implemented. The student continued to receive services under his March 1, 2019 IEP.

An IEP Team meeting was originally scheduled for January 8, 2020, but because the parent had not received a copy of the IEE report as of December 20, 2019 – the last day of school before the district's winter break – the meeting was rescheduled for January 13, 2020. A copy of the IEE report was made available to district IEP Team members on January 3, 2020.

As shown by the date next to the parent's signature on the Formal Complaint form, the parent completed this complaint on January 7, 2020; KSDE received it on January 14, 2020.

At the January 13, 2020 IEP meeting, the IEP team discussed changes to the student's IEP based upon the findings of the IEE as well as changes to the student's daily school schedule. The parent was provided with prior written notice of changes to the IEP that were proposed by the district.

At the January 13, 2020 IEP team meeting, the district proposed a number of changes to the student's IEP based upon the results of the IEE. In addition to adding eleven accommodations to the student's IEP, the district provided the parent with prior written notice regarding the parental request to end the student's participation in the Study Skills class (50 minutes, 3 times a week, and 90 minutes, one time a week) and returned him to the general education setting.

On January 13, 2020, the district also provided the parent with prior written notice proposing that the student's participation in the Study Skills class be reinstated in order to be in compliance with the student's March 2019 IEP. (The student's schedule had previously been changed to remove the student from Study Skills at the parent's request so that he could participate in general education classes.)

On January 13, 2020, the district also provided prior written notice of a proposal for the student to participate in the TIPS program at the community college as a part of his transition services. The district also proposed adding to the student's IEP 120 minutes per semester of direct transition services and 30 minutes per semester of indirect transition services.

The district provided a second prior written notice dated January 14, 2020 proposing to add 50 minutes of special education services 3 times a week and 90 minutes of special education services once a week in order for the student to participate in the Connections program. The Connections class is a specialized course that focuses on building social skills and "the hidden curriculum of relationships." The student's time in the program would provide him with the opportunity to work on deficits in the areas of social cues and micro expression. The district proposed to collect baseline data during the early stages of the student's participation in the class and to develop an annual IEP goal related to these skills by March 2, 2020.

On January 21, 2020, the Assistant Director of Special Education sent the parent four prior written notice forms. A prior written notice form dated January 16, 2020 spelled out the district's refusal to grant a parental request that all special education services/supports be conducted outside of the district at the expense of the district, noting that it was the district's position that the student's needs could be met through services and accommodations delivered in the neighborhood high school.

Issues

In her complaint filed January 14, 2020, the parent raised eight issues:

> Issue One: The Individuals with Disabilities Act guarantees the right to a Free and Appropriate Public Education (FAPE). The district has violated the student's rights by not providing an individualized educational program (IEP) to meet his unique needs, not providing specialized instruction or related services, and not providing accommodations and modifications that support the student in the general education curriculum. The student's IEP does not include appropriate services.
>
> Issue Two: The district failed to support the student's emotional and academic needs. The learning environment has directly impacted the student's emotional stability and self-confidence. The student's parents are concerned that he is not in a safe learning environment and will not make progress with the current IEP team.
>
> Issue Three: The IEP team failed to write appropriate IEP goals based on state grade-level standards or present levels of performance.
>
> Issue Four: The IEP team failed to write appropriate IEP goals related to the primary exceptionality of Emotional Disorder which was the qualifying factor for eligibility.
>
> Issue Five: The district failed to provide an appropriate special education setting, specialized instruction, appropriate accommodations and modifications for a child with Autism.
>
> Issue Six: The district failed to provide appropriate personnel who understand the student's diagnosed disabilities and was responsible for IEP implementation that included measurable goals with specialized instruction to address the

student's unique needs. As a result, the student was unable to advance appropriately towards attaining his IEP goals or appropriately access the general education curriculum.

Issue Seven: The district failed to provide and document appropriate instructional, environmental, and assessment strategies for the student to meet expectations in the general education setting.

Issue Eight: The district failed to obtain informed consent prior to removing direct services.

## Preliminary Statement

As stated by the Dispute Resolution Coordinator for Special Education and Title Services (SETS) at KSDE in a January 14, 2020 letter to the parent and the district, SETS has authority to investigate only complaints alleging a violation of special education statutes and regulations that occurred not more than one year from the date the complaint is filed (K.A.R. 91-40-51). Any issue that does not relate to special education laws, or that occurred more than one year prior to the filing will not be investigated.

In her complaint, the parent has included facts which refer to actions of the district during periods of time that fall well outside the 12-month window of this investigation (prior to January 14, 2019). While some of those facts are included in the background section of this report, they were not considered by the investigator when determining violations of special education statutes and regulations.

On October 28, 2019, the parent filed a complaint, 20FC___-001, which alleged violations regarding the evaluation and re-evaluation of the student. Federal regulations, at 34 C.F.R. 300.152 (a)(3), provide school districts with the right to propose a resolution to a special education complaint. Unified School District ___ exercised that right and submitted a proposed resolution to KSDE. Under the authority granted by federal regulations, at 34 C.F.R. 300.151(a)(1) and 34 C.F.R. 300 152 (a)(3)(i), KSDE accepted the proposed resolution of the allegations related to evaluation and re-evaluation. Therefore, in completing her investigation of complaint 20FC___-001, the investigator did not consider any facts related to the district's initial evaluation or re-evaluation of the student since those issues were resolved by the district's proposed resolution accepted by KSDE.

Since issues related to the evaluation/reevaluation of the student were resolved under the previous complaint, evaluation/reevaluation issues presented by the parent in this current complaint were not investigated.

Further, as stated in a January 14, 2020 letter from the Dispute Resolution Coordinator for SETS to the parent and the district, "the issue of personnel qualifications has already been fully investigated and appealed" in response to the parent's previous complaint (20FC___-001). Therefore, no investigation of the qualifications of personnel was conducted with regard to this current complaint.

As noted above, federal regulations provide school districts with the right to propose a resolution to a special education complaint. The district exercised that right and submitted a proposed resolution to the Kansas State Department of Education (KSDE) with regard to several of the issues of this current complaint.

On January 28, 2020, the Dispute Resolution Coordinator for Special Education and Title Services notified the parent and the district that KSDE had accepted the district's proposal for the resolution of Issue Eight.

The resolution proposed by the district includes the provision of 900 minutes of compensatory services in the area of Study Skills in addition to the Study Skills services specified in the student's March 1, 2019 IEP (50 minutes 3 days per week and 90 minutes 1 day a week). A schedule for the provision of compensatory services was included in the district's proposal accepted by KSDE.

On January 28 and 29, 2020, the parent and the district exchanged emails with the Dispute Resolution Coordinator regarding the schedule for the provision of these compensatory services. On January 29, 2020, the Dispute Resolution Coordinator sent a letter to the parties amending the schedule for the provision of compensatory services and again noted that the district's proposed resolution for this issue had been accepted.

Therefore, no further investigation of Issue Eight was conducted by this investigator.

## Discussion of Remaining Issues

Issue One: The Individuals with Disabilities Act guarantees the right to a Free and Appropriate Public Education (FAPE). The district has violated the student's rights by not providing an individualized educational program (IEP) to meet his unique needs,

not providing specialized instruction or related services, and not providing accommodations and modifications that support the student in the general education curriculum. The student's IEP does not include appropriate services.

Parent's Position

The parent asserts that the draft of an amended IEP dated September 19, 2019 was flawed in a number of ways. Specifically, the parent contends that:

- The IEP does not include evaluations in all areas of suspected disability or need.
- The IEP does not contain concrete and measurable baselines that can be used to develop IEP goals.
- The IEP does not include basic reading, encoding, decoding, reading comprehension, reading fluency, or written language when determining eligibility or as the result of ongoing progress monitoring.
- The IEP does not provide data in the area of fine motor, math reasoning, math calculating, processing speed, memorization, executive function, social, emotional regulation, and communicative status.
- The summary of current assessments only includes the CITE Learning Styles Inventory which is not an academic assessment.
- The summary of present levels states that "alternative note-taking methods and accommodations have been explored," but none are listed as environmental supports.
- The summary of present levels in the area of written expression includes "current writing samples" and the student is currently averaging 13 convention errors per paragraph.
- In the "Evaluation Results" section of the IEP, the team checked "Yes" to indicate that they had considered the results of the initial or most recent evaluation of the student, but no evaluation results are documented in the IEP.
- In the "Other Considerations" section of the IEP, the team checked "No" to indicate that special training for staff was required.
- The IEP contains only one annual goal. That goal is related to convention errors in writing.
- Specially designed instruction is not listed on the IEP.
- Although present levels indicate a need for reading, note-taking, and mathematics, services and goals are diminishing.
- Only minimal accommodations are listed.

Additionally, as part of the facts supporting issue one in the parent's complaint, the parent asserts that the student has not had access to or support for the assistive technology he needs.

It is the position of the parent that the district has failed in its obligations under Child Find and has failed to provide an appropriate special education setting, specialized instruction, appropriate accommodations and modifications for a child with Autism, Dyslexia, Dysgraphia, Dyscalculia, ADHD, and Anxiety.

Concerns Related to the September 19, 2019 IEP

Investigative Findings and Conclusions:
The parent has identified what she believes to be a number of flaws with this IEP. This IEP has never been implemented but was a proposed amendment to the student's March 1, 2019 IEP. After the parent received the draft document, she requested a re-evaluation of the student and, in October of 2019, filed a formal complaint with regard to the district's proposed re-evaluation and the qualifications of school staff. As a resolution to the three issues in the complaint regarding evaluation and re-evaluation, an IEE was conducted and an IEP meeting was held on January 13, 2020 for the purpose of developing a new IEP for the student based upon the new information provided by that evaluation. According to the district, the decision was made to continue to provide services to the student under the March 1, 2019 IEP until the formal completion of a triennial evaluation of the student later this school year.

The draft September 19, 2019 IEP was never finalized or implemented. Under these circumstances, a violation of special education statutes and regulations related to the document is not substantiated on this aspect of this issue.

Concerns Related to the Provision of Assistive Technology

Applicable Statutes and Regulations:
Federal regulations, at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulations at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The federal regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

At 34 C.F.R. 300.105(a) and 34 C.F.R. 300.324(a)(2)(v), federal regulations require that assistive technology devices or assistive technology services, or both, are made available to a child with a disability if required in the student's IEP.

Investigative Findings:
The student was introduced to the MacBook and the Read & Write program during his junior year.

The student's March 1, 2019 IEP states that the student needs Assistive Technology, specifically "word processing." According to the "Long Range Vision" portion of the "Transition Services" section of the document, the student feels technology is his greatest strength. Under the Occupational Therapy portion of the "Current Academic Achievement and Functional Performance" section of the IEP, is the following statement:

> "[The student] continues to grow in his technology problem solving skills alongside his general education peers in his academic classes. He demonstrates independence with utilizing speech-to-text tools, but should continue to work on increasing his advocacy and decision making with selecting speech-to-text tools during the school day and for homework. Due to [the student's] dysgraphia, the notes he takes within class can be difficult for him to utilize for studying. Alternative note taking methods and accommodations have been explored over the past IEP year, including audio recording notes with teacher permission."

On November 7, 2019, the parent and the Intensive Resource and Occupational Therapist (OT) for the district discussed the student's needs via email. The parent told the OT that while the student had access to Read & Write tools, he was not using them independently. According to the parent, the student was struggling with written language and not making progress. The parent expressed interest in pursuing the use of Co-Writer as a tool to assist the student with his writing. The OT told the parent that she was familiar with Co-Writer and stated that the program could be installed on the student's Mac desktop and Chromebook but indicated that she felt "it would be wise" to focus on the Read & Write program first since the student had some previous experience with that program. The OT had consulted with the district's Assistive Technology Specialist about the two programs and believed that Read & Write could be used by the student at the university level. The OT offered to meet with the student to further explore Read & Write and suggested that he could reach out to the student services department of the college he planned to attend to ask about the types of

supports and technology they offered students. The parent responded, indicating that she wanted the OT to teach the student how to use Co-Writer. The parent stated that she wanted to download the free trial program and wanted the student to be taught how to use it.

Also on November 7, 2019, the parent sent an email to the case manager stating that while the student wants to be free to work alone, "his written work is not improving." The parent noted that the student "needs to embrace tech tools that support his need for independence [but] first he needs to be taught how to use these supports." The parent told the case manager that she had contacted the OT about the Co-Writer program.

On November 8, 2019, the OT sent an email to the parent stating the district's preference for the student's use of the Read & Write system. The OT outlined the reasons the district believed that program to be the best option. The OT also stated that the student had been making progress in his writing skills. The OT noted that the student did not always elect to use technology tools available to him and sometimes declines assistance and supports that are offered him. The OT reported that the Read & Write program had been added to the student's desktop and told the parent that the student had previously disabled Read & Write on his Chromebook. The program was reinstalled on November 8, 2019, and the OT had worked with the student using it to work on an assignment. The student was quickly able to use the tools for prediction as well as checking grammar and spelling. By report of the OT, the student "absolutely loved it and was impressed with the extensive features the program has beyond what he was expecting: Tools for citations & bibliographical information, screenshot readers, text to speech, a talking dictionary, editing tools, vocabulary support with a vocabulary list builder, word prediction, writing assistance, voice notes, and assistance with annotations. I could see a sense of relief and excitement as he used the tools to support completing the writing assignment. He really liked them and kept saying, 'This is amazing!' and 'These are going to really help me.'"

On November 13, 2019, the OT sent an email to the parent stating that she had added a variety of resources to the shared assistive technology drive she shared with the student including a few technology assignments related to using the tools, a tool tracking checklist, and a writing process checklist as well as some simple support videos. The OT indicated that she would continue to check in with the student during "Husky Halftime A" as it was a time she and the student were both available to meet and would reach out to the student to set up a time to review the new resources and tools. She stated that she felt that the most effective use of the student's time would

be to use the tools to complete assignments within Study Skills (his special education time) and other classes. The OT noted that the student had "already found them helpful so far and learns quickly."

On November 18, 2019, the parent sent an email to the IEP team stating that the "writing process checklist (using read and write) supports his writing goal. The tech checklist is a great way to keep track of what skills [the student] is using and what works best for him. This will help determine what AT should be documented on his IEP."

On November 26, 2019, the Occupational Therapist/Assistive Technology Consultant for the district wrote an email to the student's IEP team to provide information on a meeting she had with the student and the special education teacher. The AT consultant noted that the student was very knowledgeable about tools and how to apply them. Using the Mac version of the Read & Write program, the student was able to create a custom word bank for a science topic he was studying. The student and the AT consultant reviewed built-in tools for annotation although the student stated that he already knew how to use those tools. The accuracy of speech-to-text was discussed, and the consultant offered suggestions to improve accuracy. She and the student also talked about how to problem solve issues related to technology in an effective and time efficient way. They discussed the use of the technology checklist to help the student have a better idea of the specific types of tools that work for him.

A follow-up visit by the AT consultant was scheduled for December 12, 2019.

Summary and Conclusions:
The student's March 1, 2019 IEP indicates that he needs assistive technology for word processing. The student has had access to a Chromebook and Mac computer with programs that provide him assistance in that area. Staff promptly responded to the parents expressed concerns, ensuring that the necessary programs were in fact on the student's equipment and providing additional support to enhance his use of the available technology. Under these circumstances, a violation of special education statutes and regulations is not established on this aspect of Issue One.

## Concerns Related to Child Find

Applicable Statutes and Regulations:
Schools must have policies and procedures in effect to ensure that all children with exceptionalities and who are in need of special education and related services are

identified, located, and evaluated. This includes children who attend public or private schools (34 C.F.R. 300.111(a)(c)).

Districts are not required to determine a clinical diagnosis such as those given to this student by outside agencies for every child served. In William V. et al v. Copperas Cove Indep. Sch. Dist., No. 19-50051 (5th Cir. 2019), the court ruled that the IDEA does not compel a school district to provide a student with an IEP unless and until a student qualifies as a "child with a disability."

> "[T]he Child Find provision itself suggests that diagnostic labels alone should not be determinative when considering whether a remedy furthers IDEA's purposes. The position that the diagnostic label affixed to a child should determine whether she has prevailed under the IDEA "reflects a preoccupation with labels that [IDEA] do[es] not share."

Additionally, in Marshall Joint Sch. Dist. No. 2 v. C.D., 54 IDELR 307, the 7th circuit ruled in 2010 that "a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs. But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency"

Investigative Findings:
The district has a process in place and collaborative arrangement with private parochial schools in the district allowing for students believed to be in need of special education services to be referred. Parents who are residents of the district may also refer their child for evaluation by district staff even if the student is not attending a public school.

The student was first evaluated by the school district in November 2012 while he was enrolled in 5th grade. While significant anxiety was observed by evaluators and reported by parents, the student was not determined to be eligible for or in need of special education services at that time.

Subsequently, according to the report of an IEE completed in December of 2019, the student was evaluated at Children's Mercy Hospital in May of 2015 and was given diagnoses of dyslexia and dysgraphia.

During the student's 2015-16 school year, the student was bullied by classmates at his private parochial school and was seen by a psychiatrist to address resulting emotional issues. He was diagnosed with Bipolar disorder in April of 2016.

The IEE report also states that in May and June of 2017, the student was again evaluated at Children's Mercy Hospital and at that time was diagnosed as having dyslexia and dysgraphia.

The student enrolled in the public schools for 9th grade. Records indicate that a 504 Accommodation Plan was put in place. There is no record of the student having been referred for special education evaluation by the school district between his 5th and 9th grade years.

The student was again referred for special education evaluation by the district in January of 2017 and was subsequently identified as a student with a disability due to emotional factors.

Summary and Conclusions:
The student was referred for evaluation by the district twice, and the district paid for a third outside evaluation (the IEE). The first of the two district evaluations was conducted while the student was enrolled in 5th grade at a private parochial school. The student was not determined to be in need of special education services at that time. After the initial district evaluation, the student was seen by a number of health care professionals who gave multiple diagnoses to the student. The district again referred the student for special education evaluation when he was in 9th grade and was determined to be eligible for and in need of special education services. He has been receiving special education and related services under an IEP since March of 2017, the first year the student was enrolled in the district.

There is no evidence to support the parent's contention that the district failed in its Child Find obligation to the student. A violation of special education statutes and regulations is not substantiated on this aspect of
Issue One.

## Concerns Related to the Provision of FAPE

Applicable Statutes and Regulations:
Federal regulations, at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is made available to all children with disabilities

residing within the state. Accordingly, Kansas regulations at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

Additionally, in Endrew F. v. Douglas County School District, the 10th circuit in 2017 defined FAPE as "an IEP reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances.

Investigative Findings:
In determining whether or not the student has received FAPE, the investigator looked at a number of indicators of student progress.

Course Grades

The district provided the investigator with a copy of the student's course transcript showing semester grades for the student for his first three years of high school. The transcript includes CAPS (Center for Advanced Professional Studies) courses and one "Summer- Supplemental" course. Of the 47 grades shown on the transcript, 60% were A's, slightly less than 26% were B's, and slightly less than 15% were C's.

The student is on a regular graduation track, taking several Kansas Regents courses that meet precollege curriculum requirements. All of the student's grades during his junior year were A's. Courses included the following:

- Design Fundamentals
- English Language Arts 11
- Study Skills
- Introduction to Algebra II
- Meteorology
- Sociology
- United States History
- Filmmaking
- CAPS Technology Project

For the first semester of the student's senior year (fall of 2019), the student has earned the following grades:

- Contemporary Communications: B

- Study Skills: A
- Algebra II: C
- Chemistry: B
- Technology Solutions: A
- CAPS Technology Project: A

By the end of the first semester of the 2019-20 school year, the student had earned 24.50 credits toward graduation. A student in the district must earn 24 credits to graduate.

In an email to the parent dated November 8, 2019, the Occupational Therapist stated, "As shared earlier this week via email, [the student] is making progress and the team has seen growth in his writing. He does not always elect to use technology tools and he has shared in previous meetings that he does not always see the value. In the same fashion, sometimes [the student] declines support and assistance that are offered to him."

On January 13, 2020, the district provided the parent with prior written notice proposing that the student participate in Study Skills. In explaining why the Study Skills class was being proposed, the district referenced the recent Independent Educational Evaluation (IEE) and stated that the Study Skills class would "provide the opportunity for direct instruction from a Special Education Teacher in order to address areas of concern including writing, math, and reading." Additionally, the prior written notice stated "Per the IEE and the new diagnosis of Dyscalculia, the IEP team will collect data in regards to [the student's] skills in the area of math and also updated data in reading and writing. This data will be used for baseline data and a goal will be written by March 2nd, 2020."

## Practice ACT Scores/ACT Scores

The ACT (American College Testing) is an entrance exam used by most colleges and universities to make admissions decisions. It is a multiple-choice, pencil and paper test that measures a student's skills in English, Math, Reading, and Science.
Beginning in his 9th grade year, the student completed practice testing for the ACT in order to be prepared to take the actual ACT test in the spring of his junior year and the fall of this senior year.

The chart below summarizes the student's performance on two practice ACTs and on the actual ACT which was taken twice by the student.

| Test | Grade | English | Math | Reading | Science | Composite |
|---|---|---|---|---|---|---|
| Practice ACT | 9th | 13 | 15 | 22 | 12 | 16 |
| Practice ACT | 10th | 15 | 17 | 27 | 12 | 16 |
| ACT | 11th (Feb 19) | 20 | 21 | 23 | 22 | 22 |
| Oct 19 | 12th (Oct 19) | 20 | 19 | 22 | 21 | 21 |
| ACT SuperScore | | 20 | 21 | 23 | 22 | 22 |
| ACT National Average* | 2019-20 | 20.2 | 20.5 | 21.3 | 20.8 | 20.8 |

**Sources: National Norms 2019-2020 , CCCR 2019*

An ACT "Composite" score is the average of the student's scores on each area test. An "ACT Superscore" is a final composite score that is made up of a student's best individual section scores across all the actual ACT tests taken by the student. The best individual section scores are averaged to create a new composite ACT score.

ACT national average scores for each area for 2019 are shown in the last row of the table. A Composite ACT score of 22 places a student at the 64th percentile. The student scores were above the national average in all areas except for English where his score placed him only slightly below average.

## IEP Progress Reports

The student's March 5, 2018 IEP included two annual goals. The first, in the area of Executive Functioning, was as follows:

> In 36 instructional weeks, when rated with a rubric that measures executive functioning skills, [the student] will maintain a score of 35.5/44 (80%) or above within each given quarter.

"Executive functioning" refers to the application of a set of mental skills that includes working memory, flexible thinking, and self-control. Individuals use these skills every day to learn, work, and manage daily life. Trouble with executive functioning can make it hard to focus, follow directions, and handle emotions, among other things.

The student's progress toward meeting this goal was monitored four times. When the student's progress was monitored on March 9, 2018, he was scoring an average of 83% on the rubric. When monitored on May 25, 2018, he was maintaining a score of 83%. At the time of October 12, 2018 monitoring, the student was averaging 91.36% on the rubric. On December 20, 2018, the student was averaging scores of 88.6% on the rubric. All scores were above the target established in the IEP.

The student's second annual goal was as follows:

> In 36 instructional weeks, given necessary modeling and assistance, [the student] will improve his score on the Writing Skills Checklist to 75% of points possible as monitored by [the student's] special education teacher rating his work samples using the checklist.

By March 9, 2018, the student was scoring 60% on the checklist (his baseline level of performance). On May 25, 2018, the student's score continued to be at 60%. By October 12, 2018, the student's score had improved to 62.5% and continued at that level at the December 20, 2018 monitoring. By the time progress was monitored in preparation for the development of the next year's IEP, the student was averaging 70.8% on the Writing Skills Checklist.

The student's executive functioning goal was discontinued when the student's IEP was reviewed and revised on March 1, 2019. Under the section of the student's March 1, 2019 IEP entitled "Parent Concerns for Enhancing the Student's Education," it was noted that the "parents were extremely pleased with [the student's] academic progress over the last year and with his completion of his executive functioning goal."

The goal for writing from the March 5, 2018 IEP was continued in the March 1, 2019 IEP. Progress was again monitored. Two scores were reported on May 24, 2019, one at 79% and the other at 83.3%. At the time of IEP monitoring on October 11, 2019, the student had an average of 72.5% on the checklist.

While the student did not achieve his writing goal by March 1, 2019, he had made progress over the IEP period. He has not yet achieved the writing goal established in his March 1, 2019 IEP but has scored above the baseline level of performance demonstrated at that time.

In an October 25, 2019 email to the parent, the student's case manager stated that the student scored an 87.5% on a final draft document.

Summary and Conclusions

No evidence was presented to show that the district has failed to implement the student's March 5, 2018 or March 1, 2019 IEPs. Progress reports show that the student met the executive functioning goal established in his March 5, 2018 IEP.

While the student had not yet meet the writing goal established in the March 5, 2018 IEP, there was evidence of progress on that goal. By March 1, 2019, the student was 12.5% above the baseline established on March 5, 2018. The goal was carried over into the March 1, 2019 IEP, and by the second monitoring period in the 2019-20 school year, the student was only 2.5% below his goal. At the last monitoring period of the 2018-19 school year the student was performing above goal level.

The student has participated in and made progress in an unmodified general education curriculum, making A grades in all classes during his junior year and grades of A or B to date in all but one of his classes during his senior year. The student has already completed all the credits needed in order to graduate. ACT testing results in the areas of English, Math, Reading, and Science show that the student has the skills needed for college acceptance. The student's scores were above the national average in all areas except for English where his score placed him only slightly below average compared to his peers.

Under the circumstances outlined above, the student has been provided a FAPE. A violation of special education statutes and regulations is not substantiated on this aspect of Issue One.

Issue Two: The district failed to support the student's emotional and academic needs. The learning environment has directly impacted the student's emotional stability and self-confidence. The student's parents are concerned that he is not in a safe learning environment and will not make progress with the current IEP team.

Parent's Position

The parent asserts that the district's failure to appropriately address the student's needs have greatly contributed to the stress, anxiety, and depression he has experienced.

Investigative Findings

The student has been seen by a licensed psychologist since 2018 for treatment of generalized anxiety disorder and social anxiety disorder as well as some symptoms of obsessive compulsive disorder. In a letter to the parent dated January 5, 2020, the psychologist stated that he, the parent, and the student had reviewed the effect that the student's learning disabilities have had on his anxiety disorders. The psychologist noted that the student's struggles with his academic performance had a profound effect on his mental health. The psychologist wrote, "Of course, the stress did not cause him to have anxiety disorders, but it certainly exacerbated the severity of his disorders."

The psychologist stated that he and the student have addressed and attempted to remediate the stress the student has felt because of the student's belief that he was not meeting expectations in the classroom and notes that some of the student's stress was "due to his awareness that he was having to work much harder than most of his classmates to achieve the expected results." The psychologist opined he was hopeful that accommodations provided by the evaluator after the December 2019 IEE would be put in place that would make the remainder of the student's high school career less stressful, "which could have a demonstrative positive impact on [the student's] mental health."

The student's March 1, 2019 IEP includes both special education services and accommodations designed to address his emotional needs. Page 11 of the IEP under "Description of Specially Designed Instruction and Related Services" states "[The student] benefits from being able to access social/emotional support for processing emotions in the school setting. He should be allowed access to his School Counselor/School Psychologist/School Social Worker when he requests." On page 13 of the IEP in the Assessment Accommodations section of the March 1, 2019 IEP, the following accommodations are listed:

- "Take test in a quiet, non-competitive setting: Luke requires minimal opportunities for distraction and a place that is not competitive with his peers, in order to measure his true comprehension of the content being measured."
- "Extended time: [The student] tends to rush through assignments and assessments which cause a great deal of stress and anxiety. [The student] would benefit from extended time in order to relax and show his true comprehension of material."

## Summary and Conclusions

As reported by the private psychologist, who has treated the student since 2018, the student's stress over struggles with his academic performance resulting from his learning disabilities did not cause the anxiety disorders for which he has been treated, but have exacerbated the severity of those disorders.

The investigator in no way minimizes the stress the student has experienced but has been presented with no evidence to support the parent's contention of causative factors stemming from the district's provision of special education services to the student. As noted above under Issue One, districts are required to provide a FAPE to students, and evidence shows that, in the case of this student, a FAPE was provided and the student has made progress. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Three: The IEP team failed to write appropriate IEP goals based on state grade-level standards or present levels of performance.

## Parent's Position

The parents assert that the September 19, 2019 IEP that was proposed by the district does not include present levels of performance in all areas of suspected need. Specifically, the parent contends that the IEP team failed to evaluate the student with regard to fine motor skills and notes that there is no IEP goal to justify the inclusion of an OT (Occupational Therapy) service plan. According to the parent, the district failed to evaluate the student with regard to basic reading, encoding, decoding, reading comprehension, reading fluency, or written language when determining eligibility or as a result of progress monitoring even though the student has a diagnosis of dyslexia.

The parent asserts that documentation of the student's progress is unavailable.

Additionally, the parent contends that the IEP does not provide data in the area of math reasoning, math calculating, processing speed, memorization, executive function, social/emotional regulation, and communicative status. The parent objects to the inclusion of CITE Learning Style Inventory information, stating that the measure is not an academic assessment. Further, the parent contends that the student's IEP goal

- does not reference the student's present level of performance,
- is not standards-based, and

- is not based on grade-level or academic standards, and does not include measures of progress that include standardized tests or curriculum-based measures.

Investigative Findings and Conclusions

The September 19, 2019 draft IEP specified by the parent has never been implemented. The draft of the IEP was sent to the parent and was reviewed at an IEP team meeting in August 2019. The parent voiced objections to the proposed document and requested that the student be re-evaluated. As noted in the Background Information portion of this report, the district funded an IEE of the student in December 2019. The proposed September 19, 2019 IEP was never implemented, and services to the student continued to be provided under the provisions of the student's March 1, 2019 IEP.

Because the September 19, 2019 draft IEP for the student was never implemented, no investigation of the assertions of the parent associated with this issue was conducted. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Four: The IEP team failed to write appropriate IEP goals related to the primary exceptionality of Emotional Disorder which was the qualifying factor for eligibility.

Parent's Position

The parent contends that, although the social worker for the district had worked with the student to address his emotional needs, a goal related to those needs had never been included in the student's IEP and the parents were concerned that the service would not continue without proper documentation.

The parent contends that she sent an email to the student's case manager, social worker, and the head of the special education department asking that an emotional regulation goal be included in the student's IEP. The parent further asserts that she sent a follow up email asking to have additional supports "considered" in the IEP. The parent acknowledges that the social worker met with the student but failed to provide the parent with documentation of the conference as the parent had requested.

It is the assertion of the parent that the input of the parents has continuously been ignored by the IEP team.

## Applicable Statutes and Regulations

The IEP for a student must include "a statement of measurable annual goals, including academic and functional goals designed to

A. meet the child's needs that result from the child's disability or giftedness, to enable the child to be involved in and make progress in the general education or advanced curriculum; and
B. meet each of the child's other educational needs that result from the child's disability or giftedness" (K.S.A. 72-3429(2); 34 C.F.R. 300.320(a)(2)(i)).

A student's IEP must reflect a consideration of the student's needs in order to ensure that he or she receives educational benefit. The goals included in a child's IEP should be individually selected to meet the unique needs of the individual child and should not be determined based on the category of the child's exceptionality or on commonly exhibited traits of children in a category of exceptionality.

When developing an IEP, "the team must consider the concerns of the parents for enhancing the education of their child." (34 C.F.R. 300.324(a)(1)(ii)). The parents' concerns must be considered by the team but do not obligate the IEP team.

## Investigative Findings

On September 22, 2017, the parent sent an email to case manager, the head of the special education department, and the social worker alerting them to concerns she had regarding the student's emotional state. According to that email, the parent had contacted the student's teachers "to try and get some support in place." The parent reports that the social worker began addressing the student's emotional needs but this service was never documented in the student's IEP, and the parents were concerned that the service would not continue without proper documentation.

In preparation for an annual IEP meeting scheduled for March 1, 2019, the parent developed a list of her concerns. Under a section of that list entitled "Social Emotional Behavior," the parent wrote the following:

> [The student's] severe anxiety is by far the most debilitating and must be addressed. He is not comfortable working with others and does not

> connect with peers outside of school. He struggles to trust others and believes no one wants to work with him. His anxiety causes him to stutter and he avoids participating. [The student's] lack of emotional control triggers anger, anxiety, and frustration. If something goes wrong, it sets him off and this affects his entire day. [The student] needs to work on identifying challenging situations that may lead to anxiety and learn strategies that help him respond appropriately. [The student] believes others are against him and he needs to learn how to distinguish between fact, rational belief and irrational belief. He needs to control his temper and identify ways to cope with stress using self-controlled behaviors. Progress can be measured by teacher observation, behavior checklists, and self-evaluation.

In the student's March 1, 2019 IEP, under the section entitled "Parent Concerns for Enhancing the Student's Education," is the following statement:

> Parent continue to be concerned with the internal frustration [the student] reports to them he is experiencing and the outward expression of stress and anxiety they see from [the student] in the home environment. [The student] will continue to have access to the school social worker on an as needed basis to address any internal anxiety and to continue to develop coping skills. Data will be collected at school during Study Skills (via [the student's] self-report) and at home in order to make a determination of how best to address [the student's] needs in this area.

Under the section of the student's March 1, 2019 IEP entitled "Description of Specially Designed Instruction and Related Services" is the following statement:

> [The student] benefits from being able to access social/emotional support for processing emotions in the school setting. He should be allowed access to his School Counselor/School Psychologist/School Social Worker when he requests.

Additionally, the student's March 1, 2019 IEP includes both special education services and accommodations designed to address his emotional needs. Page 11 of the IEP under "Description of Specially Designed Instruction and Related Services" states "[The student] benefits from being able to access social/emotional support for processing emotions in the school setting. He should be allowed access to his School Counselor/School Psychologist/School Social Worker when he requests." On page 13

of the IEP in the Assessment Accommodations section of the March 1, 2019 IEP, the following accommodations are listed:

- "Take test in a quiet, non-competitive setting: Luke requires minimal opportunities for distraction and a place that is not competitive with his peers, in order to measure his true comprehension of the content being measured."
- "Extended time: [The student] tends to rush through assignments and assessments which cause a great deal of stress and anxiety. [The student] would benefit from extended time in order to relax and show his true comprehension of material."

On April 4, 2019, the parent sent an email to school staff following up on the team's March 1, 2019 discussion regarding the student's emotional needs. The parent provided baseline data developed by the parent and the student in the month of March. By report of the parent, the student had "counted how many times he felt out of sorts and struggled with getting back on track. [The parent] kept track of when [she] noticed [the student] struggling with emotional regulation at home and documented the estimated time it took him to settle his emotions." The parent noted that once the student had started consistently participating in track practices, the frequency and duration of his outbursts reduced. She also noted that he appeared more angry or frustrated if hungry. The parent identified the following: "[The student] needs to figure out how to regulate his emotions and what strategies work to handle his emotional needs." The parent asked staff what steps should follow in the process of implementing this goal on the student's IEP.

The parent sent another email to staff on April 12, 2019 noting that the student was struggling with anxiety and negative talk about the upcoming school year, feeling that he was unprepared. The parent stated, "As we look at additional IEP goals, can we consider ways that will reduce [the student's] stress in the areas of study skills, test preparation, and note taking."

On April 22, 2019, the parent sent an email to staff noting that the social worker had started working with the student to manage his anxiety and determine skills that work to reduce frustration. The parent stated that she appreciated the support and wanted it to be documented in the student's IEP.

The student turned 18 years-of-age over the summer. In preparation for an IEP team meeting at the beginning of the school year, the student's case manager met with the

student to determine the concerns that he – as his own educational decision maker – had regarding his education. According to the September 19, 2019 draft IEP, the student's primary concern was in regard to accommodations as he prepared for post-secondary education.

The parent was granted power of attorney for the student on September 26, 2019. As described previously, the parent had requested a re-evaluation of the student before any changes were made to the March 1, 2019 IEP. No annual goals related to emotionality were added to the document.

Summary and Conclusions

The district considered the concerns of the parent related to the student's emotional needs when developing the student's March 1, 2019 IEP and noted those concerns in the IEP. The review of the student's IEP originally planned for the fall of the 2019-20 school year was delayed to allow for the completion of an IEE. An IEP team meeting was conducted on January 13, 2020, but the decision was made by the team not to amend the student's March 1, 2019 IEP. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Five: The district failed to provide an appropriate special education setting, specialized instruction, appropriate accommodations and modifications for a child with Autism.

Parent's Position

The parent asserts that on December 27, 2019, an independent educational evaluation (IEE) of the student resulted in a diagnosis of Autism. It is the positon of the parent that the district failed in its Child Find obligation to the student by not identifying the student as a child with Autism and not providing an appropriate educational setting, specialized instruction, and appropriate accommodations for a child with Autism.

Applicable Statutes and Regulations

Schools must have policies and procedures in effect to ensure that all children with exceptionalities and who are in need of special education and related services are identified, located, and evaluated. This includes children who attend public or private schools (34 C.F.R. 300.111(a)(c)).

Additionally, as noted above under Issue One, in Marshall Joint Sch. Dist. No. 2 v. C.D., 54 IDELR 307, the 7th circuit ruled in 2010 that "a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs. But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency"

Investigative Findings

According to the report of the IEE, the student was evaluated at the University of Kansas Childhood Autism Referral and Evaluation Clinic in 2009. While the evaluators noted that the student demonstrated some symptoms of autism, such as difficulties with socialization and repetitive behaviors, they determined that he did not meet the criteria for autism.

The student was evaluated by the school district in November 2012. While significant anxiety was observed by evaluators and reported by parents, the student was not determined to be eligible for special education services.

A May 2015 evaluation of the student at Children's Mercy Hospital resulted in diagnoses of dyslexia and dysgraphia. There is no record to suggest that a diagnosis of Autism was considered at that time.

During the student's 2015-16 school year, the student was bullied by classmates and was seen by a psychiatrist to address resulting emotional issues. He was diagnosed with Bipolar disorder in April of 2016. There is no record to suggest that the psychiatrist considered a possible diagnosis of Autism at that time.
The IEE report also states that in May and June of 2017, the student was evaluated at Children's Mercy Hospital. Because the evaluator determined at that time that the student did not demonstrate a qualitative impairment of social interactions, he was not given a diagnosis of Autism. The evaluator did observe that the student demonstrated problems with higher order social functioning, affect recognition, making inferences about what others are thinking and feeling based on facial expressions, working in a group, and adaptive behavior.

No evidence was provided to show that there were possible concerns associated with Autism when the student was referred for evaluation by the district in January of 2017 and subsequently identified as a student with a disability.

According to the IEE report, "intensive early intervention" may have impacted "earlier interventions." According to the evaluator, "With the benefit of being able to view [the student's] full history and development now through age 18, in addition to parent reports and current testing results, it is determined that [the student] does meet the diagnostic criteria for Autism Spectrum Disorder."

Summary and Conclusions

The student has been seen by a number of professionals. Beginning in 2009, outside evaluations of the student were conducted for the specific purpose of determining whether the student should be diagnosed with Autism. At the time the district determined that the student was eligible for and in need of special education intervention, the student's demonstrable needs were related to his emotionality. It was not until an IEE was conducted at district expense in December 2019 that an evaluator determined that the student met the criteria for Autism Spectrum Disorder.

The district has evaluated the student twice and paid for a third evaluation. The first of those evaluations was conducted while the student was enrolled in a private parochial school. The student has been receiving special education services since March of 2017, the first year the student was enrolled in the district.

Special education services and placement are not driven by diagnosis. Rather those determinations are made by a student's IEP team. The parent secured a number of outside evaluations for the student. While a diagnosis of Autism was considered during at least two of those outside evaluations, none of the professionals who evaluated the student gave him that diagnosis. The district has evaluated and provided special education services to the student based on his identified needs, not his diagnoses. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Six: The district failed to provide appropriate personnel who understand the student's diagnosed disabilities and was responsible for IEP implementation that included measurable goals with specialized instruction to address the student's unique needs. As a result, the student was unable to advance appropriately towards attaining his IEP goals or appropriately access the general education curriculum.

Parent's Position

The parent makes the following assertions with regard to this issue:

- The district has refused to review existing data, including documentation of the student's diagnoses, in determining services for the student.
- The student was not progressing when the parent sent an email to the head of the special education department on February 1, 2019.
- At the August 21, 2019 "Back to School Night," the student's case manager indicated that she would be reducing services and developing an independence goal, decisions that were not individualized for the student.
- On November 20, 2019, the student's case manager told the parent she was unfamiliar with the assistive technology tool being used by the student.

## Investigative Findings

As noted in the Preliminary Statement section of this report, the investigator did not address issues related to the qualifications of staff in this investigation. Issues related to the provision of a FAPE to the student were covered under Issue One.

District refusal to review diagnostic data:

No specific evidence was provided to show that the district had refused to review existing data. The student's March 1, 2019 IEP includes a number of statements regarding diagnoses in place for the student at the time the IEP was developed. In the "Relevant Medical Information" section of the document, under "Health Issues," is the following statement:

> [The student] has a medical diagnosis of Dyslexia and Dysgraphia. In 2009 [the student] was diagnosed with ADHD. In 2016, [the student] was diagnosed with Bipolar Disorder, Type 1.

These diagnoses are also listed under the "Current Academic Achievement and Functional Performance" portion of the document. His dyslexia is referenced in the discussion of the student's reading needs. Dysgraphia is referred to in the "Occupational Therapy" section.

The student's dysgraphia diagnosis is also referenced under the assessment accommodations portion of the student's March 1, 2019 IEP.

Lack of student progress:
In her February 1, 2019 email, the parent states, "[The student] is not making much growth towards his writing goal, and I believe we need to look deeper into the direct instruction provided in Study Skills. The data is not showing significant growth."

Reports of student progress were discussed above under Issue One. While the student had not met the writing goal established in his March 5, 2018 IEP at the time the parent sent her email, the student was achieving above his baseline level by 12.5% The writing goal was continued for 36 more weeks. By May of 2019, the student had exceeded his goal. At the time skills were monitored on October 11, 2019, the student was performing only slightly below goal level. In an October 25, 2019 email to the parent, the student's case manager stated that the student had just earned a score of 87.5% on a final draft document, above the end goal level of 75%.

"Back to School Night" goal comment:
The district acknowledges that the student's case manager had shared her thoughts with attending parents regarding goals for graduating students. However, the annual goal for the student established in his March 1, 2019 IEP and the level of service outlined in that IEP were not reduced. No additional goals were added to the student's IEP.

Case manager familiarity with the student's assistive technology:
According to the student's March 1, 2019 IEP, the responsibility for providing support to the student with regard to assistive technology fell to the Occupational Therapist. As outlined in the "Description of Specially Designed Instruction and Related Services" section of the document, "[The student] will receive indirect Occupational Therapy services for at least 15 minutes a month. Indirect service may include but is not limited to: technology check-ins with the case manager or student, consultation on technology supports and resources, or providing support materials or programming for technology access and efficiency."

As noted above, under Issue One, the OT (who also is an Assistive Technology Consultant for the district) provided support to the student with regard to assistive technology. As noted in a November 21, 2019 email from the case manager to the parent, the OT provided joint instruction to the student and case manager on the Read & Write program on November 26 and December 12, 2019.

## Summary and Conclusions

Statements in the student's March 1, 2019 IEP show that the district was aware of and considered the student's diagnoses in the development of the IEP. Progress monitoring reports and other documentation show that the student did make meaningful progress with regard to his writing goal, having exceeded the standard set for the goal by the end of the 2018-19 school year and demonstrating skills only slightly (2.5%) below the goal level at the time of the first monitoring period of the 2019-20 school year. No changes had been made to the goals or services outlined in the student's March 1, 2019 IEP at the time this complaint was filed. The OT/assistive technology consultant designated in the student's March 1, 2019 IEP with responsibility for the student's assistive technology needs provided training to the student and the case manager. Under these circumstances, a violation of special education statutes and regulations is not established on this issue.

Issue Seven: The district failed to provide and document appropriate instructional, environmental, and assessment strategies for the student to meet expectations in the general education setting.

## Parent's Position

The parent asserts that several of the accommodations that are available to the student are not included in his March 1, 2019 IEP. Specifically, the parent lists the following:

- word banks
- Adobe Scanner
- calculator
- audiobooks
- electronic assignments
- test-taking supplements (color coding and math formulas

In her complaint, the parent states that the student ***was provided*** the accommodations she listed even though they were not reflected in the student's March 1, 2019 IEP.

The parent also contends that, on November 8, 2019, the occupational therapist admitted that technology supports previously provided to the student had been turned off and the student did not have access to technical support for the majority of the semester.

The parent also alleges failures in the IEP dated September 19, 2019. As established earlier in this report, the September 19, 2019 draft IEP was never implemented. Allegations in this issue related to the draft document were not investigated.

## Applicable Laws and Regulations

A student's IEP must include, among other things, "a statement of the special education and related services and supplementary aids…to be provided to the child, or on behalf of the child" so that the child can

- advance appropriately toward attaining the annual goals;
- be involved in and make progress in the general education curriculum…and…participate in extracurricular and other non-academic activities; and
- be educated and participate with other exceptional and nonexceptional children in school activities (K.S.A. 72-3429(c)(4); 34 C.F.R. 300.320(a)(4)(i)-(iii)).

## Investigative Findings Regarding Accommodations

The student's March 1, 2019 IEP section entitled "Supplementary Aids and Services (Accommodations and Modifications)" includes, under the subheading of "Classroom Instruction/Assignment," the following:

- Extended time: Extended time on larger assignments or projects, when requested one day or more in advance, and agreed upon mutually between teacher and student;
- Word Processor: Option to use technology for note-taking and completing assignments;
- Speech-to-text tool: Option to use speech-to-text tool for lengthy writing assignments;
- Extra set of books for home use;
- Copies of notes; and
- Graphic organizers for lengthier assignments.

The IEP states that the student requires the following accommodations/modifications for assessments:

- Take test in a quiet, non-competitive setting;
- Extended time; and

- Scribe.

The IEP also states that the student needs "organizational supports."

When given assessments, the IEP indicates that the student "requires minimal opportunities for distraction and a place that is not competitive with his peers in order to measure his true comprehension of the content being measured…Due to diagnosis of Dysgraphia, [the student] would benefit from the option of using a scribe for longer writing assignments, or when writing in smaller spaces…[The student] tends to rush through assignments and assessments which causes a great deal of stress and anxiety. [He] would benefit from extended time in order to relax and show his true comprehension of material."

On January 13, 2020, an IEP team meeting was held. Following the meeting, the district provided the parent with prior written notice of a number of proposed changes to the student's IEP. Among the changes proposed was the addition of the following accommodations to the student's March 1, 2019 IEP:

- Permission to use notecards on tests that require the student to recall formulas or sequencing, with prior approval by the instructor;
- the ability to use a calculator on math tests;
- preferential seating to minimize distractions;
- flexibility on work deadlines and due dates as needed;
- scribe, speech to text;
- audiobooks;
- ability to record lectures;
- copies of any notes given in class (before the lecture if possible);
- use of calculator on assessments;
- word banks; and
- color coded charts/diagrams.

Summary and Conclusions Regarding Accommodations

The student's March 1, 2019 IEP specified a number of accommodations/modifications that were needed by the student. In addition to those listed, the student was, according to the parent, being provided with other accommodations that were not included in the IEP. Two of those accommodations (use of a calculator and electronic assignments) are available to all district students and do not represent a unique need

of the student. The student's case manager for the 2018-19 school year does not recall that the student ever used a word bank during that school year.

An IEP team meeting was held on January 13, 2020. Following that meeting, the parent was provided with prior written notice of the district's proposal to include additional accommodations in the student's IEP.

The parent did not assert that the student was ***denied*** the accommodations she listed in her complaint or that the student was denied a FAPE because those accommodations were not documented in the student's IEP. Rather, the parent has asserted that accommodations that he was being given did not appear in his March 1, 2019 IEP.

The IEP team is responsible for determining the accommodations (supplementary aids and services) that should be included in a student's IEP. The fact that other accommodations were available to the student does not mean that they must be added to the IEP. No evidence was provided to the investigator to show that the parent had, prior to the filing of her complaint, requested that the accommodations specified in this complaint be included in the student's IEP.

Under these circumstances, a violation of special education statutes and regulations is not substantiated on this aspect of Issue Seven.

Access to technology supports:

As noted above under Issue One, the student had disabled the Read & Write program on his computer. While the parent asserts that the student had not had access to technical support for the majority of the semester, no evidence was provided by the parent to indicate when the student had disabled the program. The program was re-installed on November 8, 2019. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this aspect of Issue Seven.

Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education, within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ _____ UNIFIED SCHOOL DISTRICT #_____
ON JANUARY 15, 2020

DATE OF REPORT: FEBRUARY 13, 2020

This report is in response to a complaint filed with our office by _____ and _____ _____ on behalf of their grandson, _____. _____ has been adopted by the _____ and has lived with them since infancy. _____ will be referred to as "the student" in the remainder of this report. Mr. and Mrs. _____ will be referred to as "the parents." Mrs. _____ will be referred to as "the parent" or "the student's mother." Mr. _____ will be referred to as "the student's father."

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with ___ _____, Director of Special Education for the _____ Special Education Cooperative, on January 25 and February 5, 2020. On February 6, 2020, the investigator spoke in a conference call with the director of special education as well as with

- _____ _____, principal of the student's elementary school;
- ____ ____, the current Curriculum Director for the district, who was the principal of the student's elementary school during the 2018-19 school year; and
- _____ _____, Superintendent.

The investigator spoke briefly by telephone with the student's father on January 23, 2020 and subsequently spoke by telephone with the student's mother on that same date. The investigator spoke again with the student's father on February 6, 2020.

The investigator spoke by telephone with the student's therapist from the Family Service and Guidance Center (FSGC) on February 10, 2020.

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

- IEP for the student dated March 7, 2018
- IEP for the student dated February 4, 2019
- Email dated October 12, 2018 from the principal to the parents
- Email exchange dated December 3, 2018 between the parents and the principal
- Email exchange dated December 10, 2018 between the principal and the parents
- Email dated December 18, 2018 from the principal to the parents
- Email exchange dated January 12, 2019 between the student's father and the principal
- Email dated January 13, 2019 from the principal to the parents
- Email exchange dated February 25, 2019 between the parents and the principal
- Email dated February 28, 2019 from the parent to the principal
- Email exchange dated February 28, 2019 between the parents and the principal
- Email exchange dated March 1, 2019 between the parents and the principal
- Short Term Suspension Notice dated September 10, 2019
- Email dated September 23, 2019 from the student's father to the principal
- Email dated September 24, 2019 from the parents to the principal
- Email dated September 25, 2019 from the principal to the parents
- Email exchange dated September 26, 2019 between the parents and the principal
- Email dated October 1, 2019 from the principal to the parents
- Email exchange dated October 11, 2019 between the principal and the parents
- Email dated October 13, 2019 from the parent to the principal
- Email exchanges dated October 14, 2019 between the parent and the principal
- Behavior Intervention Plan dated October 16, 2019
- Great Job charts covering the period of October 16 through October 22, 2019
- Email exchange dated October 23, 2019 between the parents and the principal

- Email dated October 25, 2019 from the parent to the principal
- Email dated November 1, 2019 from the principal to the parent
- Email dated November 7, 2019 from the student's father to the superintendent, director of curriculum and instruction, and principal
- Email exchange dated November 8, 2019 between the principal and the parents
- Email dated November 3, 2019 from the principal to the parents
- Bus incident report dated November 6, 2019
- Short Term Suspension Notice dated November 8, 2019
- Email dated November 13, 2019 from the director of curriculum and instruction to the parent
- Behavior Intervention Plan amendment dated November 13, 2019
- Email exchange dated November 18, 2019 between the parents and the principal
- Incident Report dated November 18, 2019
- Email dated November 20, 2019 from the parent to the principal
- Discharge Patient Passport dated November 29, 2019
- Email to the parent dated December 2, 2019 from the student's Kindergarten teacher in Nebraska
- Evaluation/Eligibility Report dated January 29, 2020
- IEP Progress Report dated February 5, 2020
- Attendance record for the student for the 2019-20 school year
- Grade Cards for the student covering the 2018-19 and 2019-20 school years
- Summary of visits by mentor teacher

The parent provided the investigator with nearly 200 pages of documents and emails in support of her complaint. Those considered most relevant to the concerns outlined in this report were specified in the above listing.

## Background Information

This investigation involves a nine-year-old boy who was, until November 18, 2019, enrolled in the 4th grade in his neighborhood elementary school.

The student attended Kindergarten in Nebraska. According to an email from his Kindergarten teacher, the student initially demonstrated both withdrawal and aggression in her classroom, but positive reinforcement and positive attention strategies were helpful in encouraging the student.

During the student's second- grade year in Nebraska, he was referred to the Student Assistance Team due to concerns with inappropriate attention-seeking behaviors. The team set targets for respectful behavior and taking turns. No referral for special education services related to these behaviors was made. The student was, however, determined to be in need of special education services in the area of Speech and Language in March of his second-grade year. The student was seen for articulation-related services for 40 minutes per month. The student's March 19, 2018 IEP shows that the student's behavior was considered, and the team deemed intervention in that area was "unnecessary."

The student and his family moved into the _____ _____ district at the beginning of the 2018-19 school year. Upon his transfer to the current district, the student's Nebraska IEP reflecting his need for speech and language services was adopted. On February 4, 2019, an IEP team meeting was held and the student's IEP was revised. No parental concerns were noted in the February 4, 2019 IEP. No academic concerns were documented. No concerns were identified with regard to expressive and receptive language. The student's voice was considered normal. The IEP shows that the IEP team did not believe that the student's behavior impeded his learning or that of others. The decision was made to provide twice weekly 20-minute speech support in a speech room for 3 out of 4 weeks each month.

The parents report that in the fall of 2019, a contentious relationship developed between the student and his family and a neighboring family. Many of the conflicts/behavior incidents shown in this report involved the children of the neighboring family. The neighbor filed a restraining order against the student in November 2019, and law enforcement officials have come to the student's home to talk with the student about issues related to that order.

The student and his family have been involved in individual and family therapy through FSGC since July of 2019. The student has also been under the care of an FSGC psychiatrist. Medications have been prescribed for the student to address depression.

On November 22, 2019, the student was admitted as an inpatient at KVC psychiatric hospital having been referred by FSGC staff because of concerns

regarding suicidal ideation. The student remained in the hospital for 7 days. On exit, the student was given a diagnosis of Unspecified Depressive Disorder.

After exploring a number of other options outside the school district, the parents opted to transfer the student to the __ _____ school district where the parents of the student's mother reside. Upon his enrollment in the new district, a paraeducator was assigned to assist the student. A behavior plan was developed, and the student has been evaluated to assess his need for special education services with regard to his behavior.

## Issue

In her complaint, the parent presented the following concern:

> The student was denied an IEP after numerous requests by the parents. In spite of numerous meetings and after the parents were advised by the student's therapist and outside agencies to seek a modification to the student's IEP to include positive interventions, worse consequences were initiated.

## Parent's Position

According to the parent, the student was made to feel singled out for ridicule by staff and peers. The parent contends that district staff created a toxic environment wherein the student was punished for behaviors that were triggered by the unsupervised or uncontrolled actions of other students. The parent maintains that the district failed to recognize the problems the student was experiencing and states that the student's inappropriate actions were a direct result of the actions of other students. The parent contends that the district refused to consider either her input or that of the student's father when determining positive interventions or consequences for the student's actions.

Both in her written complaint and during conversations with the investigator, the parent has asserted that the district failed to address the needs of the student in three ways:

1) The district failed to respond to the parent's request for an IEP for the student;

2) the district failed to develop a behavior plan that contained positive intervention; and

3) the district failed to appropriately intervene regarding the traumatic mistreatment and physical abuse of the student by staff. As a result, the student was teased and bullied by other students.

With regard to Item 3 above, bullying, teasing, and abuse are not addressed in special education statutes and regulations and, thus, cannot be investigated through a special education formal complaint. State and federal regulations at K.A.R. 91-40-51(a) and 34 C.F.R. 300.153(b)(1) give the Kansas State Department of Education authority to investigate only alleged violations of state and federal special education laws. Therefore, this investigator did not attempt to determine whether bullying, teasing, or abuse occurred, and this investigation will not result in any conclusions regarding bullying, teasing, or abuse. If the parent wants to pursue investigation of those specific allegations, she may do so by filing a complaint with the Office of Civil Rights (OCR). The Kansas City Branch of OCR (serving Kansas, Missouri, Nebraska, Oklahoma, and South Dakota) can be reached at (816) 268-0550 or OCR.KansasCity@ed.gov.

Because the parent alleges that the student's learning and his self-esteem were being affected by the actions of staff and students, however, a possible violation of FAPE (free appropriate pubic education) was investigated to determine whether or not the student was making adequate educational progress.

## District's Position

It is the position of the district/cooperative that while the student engaged in some behaviors that required disciplinary consequences during his 3rd grade year, those behaviors did not rise to a level that suggested that special education intervention might be warranted. Additionally, according to the district, none of the incidents that occurred in August or September 2019 suggested a need for special education intervention.

It is the position of the district that, after the frequency and intensity of behavioral incidents involving the student escalated rapidly in the month of October 2019 and after the parent's reported that the student had threatened suicide at the home, efforts were made to work with the family to address the needs of the student. Because behavioral concerns had not been identified in

the student's current or previous IEPs, the district felt that general education interventions should be developed and monitored as a first step toward determining whether special education intervention in the area of behavior was warranted with regard to the student.

The district contends that on numerous occasions staff offered to evaluate the student to determine whether additional special education services were needed in order to address his behavioral needs. According to the district, the parents were opposed to having the student evaluated because they were concerned that the student would be "labeled" and preferred that a behavior plan be put in place instead of pursuing further special education action.

The district and cooperative assert that staff were responsive to the parents' request for a behavior intervention plan and had several meetings and telephone conferences with the parents to attempt to address their concerns and to incorporate the input of the parents into a proposed behavior plan. According to the district, the parents were, however, resistive to any suggestion that the student's behaviors should be the focus of such plans and felt that there was too little effort to provide positive interventions in lieu of consequences.

The district asserts that a general education behavior plan was put in place for the student on October 16, 2019, but due to parent-teacher conferences, doctor appointments, and the parents' decision to keep the student out of school to avoid disciplinary consequences, the student was in school for only 7 full days during the 3-week period after a General Education Intervention behavior plan was developed and implemented. After a significant behavioral incident involving the student occurred on November 8, 2019, the district contends that modifications were being made to the October 16, 2019 behavior plan in order to better prepare for the student's return to school following 5 days of out-of- school suspension. These changes were never implemented because the student was withdrawn from the district on November 18, 2019.

The district asserts that staff members attempted to work with the parents to meet the needs of the student but often found themselves in contentious or confrontational situations, several of which arose while the student was present.

According to the district, the parents did not at any time prior to withdrawing the student from the district share any information with the school regarding

any medical or psychological diagnoses of the student by outside agencies.

## Timeline for Events Associated with the Complaint

KSDE only has the authority to investigate special education formal complaints alleging violations that occurred not more than one year prior to the date the complaint is received 34 C.F.R. 300.153(c). Incidents which occurred outside the 12-month period covered by this complaint are included for the purpose of establishing the history of behavioral incidents involving the student for both the 2018-19 and 2019-20 school years.

On October 12, 2018, the building principal (now the director of curriculum and instruction) contacted the parents to let them know that the student had been caught cheating on a multiplication test and had torn up a second test that the teacher had given him. After calling the teacher "rude" and responding inappropriately to the teacher, the student was sent to the office where he knocked down chairs. When confronted by the principal, the student immediately stopped behaving inappropriately, but the principal opted to keep the student in the office for a few hours.

On December 3, 2018, the student was sent to the office for jumping on a desk.

On December 10, 2018, the student was sent to the office for conducting an inappropriate web search. As a consequence of his actions, the student was banned from using school devices for any purpose other than assessment for the remainder of the week.

After an incident in early January 2019, the student's father sent an email on January 12, 2019 to the principal to request a meeting. According to the student's father, the student had reacted to the efforts of a group of students to single the student out and isolate him from their group.

On February 25, 2019, the student was involved in an incident in his PE class. According to an email from the parent to the principal, another child threatened to shoot the student. The principal responded to the parent on February 25, 2019 stating that the student had not appeared to be as frightened by the other child's threat as he had reported to his parents, but the principal told the parents he would meet with the student the following day. The principal

assured the parents that the other student faced consequences for his actions. The parents responded that they wanted to be present when the principal spoke with their student about the incident and indicated that they would not allow their student to return to school unless they could be present when the principal spoke with him.

The principal stated in a February 25, 2019 email to the parents that the student was observed to be making fun of another student who had been brought to the principal's office.

On February 28, 2019, there was an incident on the bus. The parents sent an email to the principal stating that another student had slapped the student after he teased her about liking a boy. The parents sent the principal a picture of the student showing the mark on his face from being slapped.

On March 1, 2019, the student was sent to the office after he lost the privilege of watching a movie due to an incident earlier in the day. The student had not consistently followed the directions of a paraeducator and a substitute teacher. After he and another student had fallen to the ground in a hallway incident, the student was sent to the office where he screamed and blocked the door to the time-out room, stating he wished he could die. Later that same day, the student was involved in an incident on the bus.

No behavioral incidents were reported by either the parents or the district during the months of April or May 2019.

On August 29, 2019, the student pushed another student when, by report of the parent, she failed to stop talking about him to other students at his lunch table.

On September 10, 2019, the student pushed another student into a softball pitching machine, leaving marks on her arms. As a consequence for his actions, the student was given a half day of ISS (in-school suspension) and lost 3 days of lunch period recess.

On September 18, 2019, another child kicked this student's feet while in the stall of the bathroom. The student pushed the other child into the wall. Both boys lost recess for the remainder of the day.

On September 20, 2019, the student punched another student (one of the

neighbors referenced above under the Background section of this report) in the arm in the breakfast line. The student spent the morning in the office as a consequence for his actions.

On September 23, 2019, an incident occurred on the playground wherein the student and other boys organized a game that involved asking girls out on a "date" and then attempting to hug and kiss the girls. The parents contacted the principal to ask for a meeting with school staff and the student's therapist to develop a plan to address the student's "attitude and behavior, staff response, consequences and communication."

On September 24, 2019, the parents sent an email to the principal requesting that an IEP or behavior plan be put in place for the student.

On September 25, 2019, the student's father contacted the principal to ask that the student's "buddy" teacher be included in the requested team meeting or in a separate meeting to discuss her relationship with the student.

On October 1, 2019, a meeting was conducted via telephone conference call. Participants included FSGC staff, the principal, elementary counselor, the parents, and the student. The parent expressed an interest in developing a behavior plan in lieu of an IEP because she did not want the student to be "labeled." The parent confirmed in a telephone conversation with the investigator on January 23, 2020 that she had been resistive to having the student stigmatized by a special education label and preferred that a behavior plan be put in place instead.

On October 1, 2019, the student did not have appropriate shoes for his gym class. The class was playing kickball, and when the student kicked the ball, his shoes would come off. The physical education (PE) teacher required the student to sit out for the rest of the class and assigned the student a consequence of missing 2 days of PE. The parents refused to allow the consequence to be implemented and indicated that they would pick up the student from school during his "specials."

The principal and the curriculum director placed a telephone call to the parent at 10:15 AM on October 2, 2019 to discuss the parent's voicemail wherein she stated her decision to remove the student from school during his "special" classes. The parent reported that she was on her way to the school to pick up

the student. She arrived at the school and took the student with her, returning him to the school after the specials period was over. The parent walked the student to his classroom and told the student and teacher that the student was not to talk to adults in the building nor was he to go outside for recess.

On October 3, 2019, the student was sent to the office and the parent was notified. The parent came to the school to pick up the student and was visibly angry. The student was present in the parent's vehicle for portions of a 30-minute conversation with the director of curriculum and instruction and the principal. The student then returned to the building for lunch with his peers and continued with the rest of the school day.

On October 8, 2019, the principal had a second telephone conference with FSGC staff regarding the student.

On October 11, 2019, the student walked by another student and called that student "stupid." When, by the report of the parent, the other student (his neighbor) rolled her eyes at the student, he threw a ball, hitting the other student in the head. As a consequence, six days of recess were to be missed. The parents opted to remove the student from school for two days.

On that same day, the parent told the principal that she wanted the student to have a behavior plan and sent an email to the director of curriculum and instruction indicating that the student was expressing thoughts of suicide. The director of curriculum and instruction sent an email to the parent on October 11, 2019, stating that he would be happy to refer the student to the school counselor or the social worker to address the student's depression. The director also provided the parent with the number for the National Suicide Prevention Lifeline and suggested she could also call the crisis hotline at FSGC.

On October 13, 2019, the parents sent an email to the director of curriculum and instruction indicating that there had been a second incident where the student had threatened suicide. The parents requested a meeting to discuss their concerns regarding the student's needs prior to his returning to school. The parents indicated that they could present a video of the student threatening self-harm. On October 14, 2019, the director of curriculum and instruction responded by email indicating he would be happy to schedule and facilitate a meeting. The parents again asked to have the student's "buddy teacher" present at the meeting, but the director stated he did not "believe it to be

beneficial to invite [her]" and the parents agreed that she did not need to attend the requested meeting.

A meeting was held on October 15, 2019. The parents, principal, and school counselor were present. The intent of the meeting was to solicit parent input regarding the development of a positive behavior intervention plan for the student that would increase positive experiences and interactions for the student. At the meeting, the parent once again told school staff that she did not want to have the student labeled.

A General Education Behavior Intervention Plan was developed by the principal, the director of curriculum and instruction, and the school counselor on October 16, 2019. Prior to the meeting, the counselor had sought input from the student's teachers and the bus driver regarding the student's behavior. Parents were provided a copy of the plan.

On October 22, 2019, school staff spoke with the special education director for the cooperative regarding the student. The school team told the director that they were concerned about the student. The director suggested that the counselor and social worker coordinate with the student's FSGC therapist and meet with the student to establish a relationship with him in order to address his fears. The director asked the team if they wanted to pursue special education services to address the issue and was told that the parent preferred to have only the general education behavior plan in place, fearing labeling.

On October 23, 2019, the student's two front teeth were injured when he fell into another student on a trampoline. As a result of the injury, the student was not able to participate in gym class or engage in active play at recess.

The parent sent an email to the principal on October 25, 2019 stating that classmates were "nasty" to the student.

A meeting was held on October 28, 2019. The principal, both parents, and the school counselor discussed claims made by the parents against teachers and students. The parents reported that the student had told them he liked his classroom teacher but felt that his "buddy room" teacher did not like him because she would not let him sit with other students when he came to her classroom for a "break" from his regular classroom. The principal told the student that when students are sent to a "buddy room," it is common practice

for them to sit away from other students in order to "calm down." The parents indicated that they wanted to speak with the buddy room teacher directly but were told by the principal that they could not meet one-on-one with that teacher. The parents became angry and left the meeting.

On October 31, 2019, a substitute teacher asked the student to remove a jacket he had worn to school that day. According to the parent, the student tried to explain that the jacket wasn't a part of a Halloween costume but the teacher insisted that he remove the jacket. The student threw his jacket in the trash, and, by report of the parent, the situation escalated. The student was sent to the office where the student continued to exhibit inappropriate behavior. The parent was called. Both the parent and the student were asked to leave the school after tempers flared during a discussion between the parent and the principal.

On November 1, 2019, the principal sent the parent a copy of the student's October 16, 2019 behavior plan after the parent had indicated to him that she could not locate her copy.

On November 6, 2019, the student confronted another student (a neighbor) when lining up to exit the bus after, by report of the parent, he heard the other student say, "There's [the student], the bad kid. He's the worst kid on earth. He's always in the principal's office." The student threatened to punch the other student in the face, and, as a consequence for his actions, the student was suspended from the bus for 13 days. The parents report that they decided they would provide transportation for the student from that point forward.

On November 7, 2019, the student's father sent an email to the superintendent, the curriculum and instruction director, and building principal expressing his frustration regarding the management of issues related to the student. The student's father stated that meetings the parents had requested had not been scheduled. Specifically, the student's father noted that requests had been made for a meeting to discuss setting up positive interactions with designated staff, a meeting with the buddy teacher, recess and PE behavioral interventions, and punishment for bus problems.

The director of curriculum and instruction responded to the parents the following day via email. He noted that he had spoken to the student's therapist to solicit her recommendations for staff, noting that the therapist had suggested

that staff should try to increase positive interactions with the student and ignore as much of the minor behaviors as possible.

In his November 8, 2019 email to the parents, the director of curriculum and instruction indicated that he wanted to contact the BaSES (Behavioral and Social Emotional Supports) consortium to request their assistance with regard to the student. The director stated that the parents would need to give permission for a behavior specialist to observe the student and provide feedback to the school. According to the email, the director of curriculum and instruction was unsure whether the program would accept the student since he did not have an IEP but wanted to make contact to inquire. The director provided the parents with a link to the BaSES program.

A number of events took place on November 8, 2019. On that date, the school implemented a plan to replace the student's morning PE time with an opportunity for him to work with younger students in another classroom – a suggestion that had been offered by the parent.

There was a substitute teacher in the student's classroom. The student ran from his classroom saying he did not feel safe in the room because the social worker – who was present to collect observational data – was in the classroom.

The student was sent to the office for a "break" from his classroom. The superintendent had opted to go to the school to work with the student (as he had done on other recent days). When the superintendent arrived at the building, he sat down with the student in the cool down room. The student was very active, throwing the bean bag chair and putting his feet on the wall. The student told the superintendent that he wanted to apologize to the PE teacher for things that had happened in previous days, and when the student had calmed down, the student and the superintendent went to the gym, but the PE teacher wasn't there. The student engaged with items in the gym but complied with the directions of the superintendent and the two headed back to the cool down room. On the way, the superintendent asked the student if the student would instead allow the superintendent to accompany the student to class. The student agreed, and the superintendent remained in the student's classroom for 20-30 minutes prior to lunch.

Once in the lunchroom, the student refused to sit in his seat, attempted to walk on the table benches. The superintendent was called to the lunchroom and

decided to stay to shadow the student when the class went outside for recess. The student played appropriately for a while, then began running around the playground, bumping into other students, and engaging in activities that were not acceptable in view of recent injuries to his front teeth. The student did not respond to the superintendent's requests for him to "calm down."

Upon returning to the building, the student made inappropriate comments to his buddy room teacher. The superintendent did not feel the student was ready to return to his classroom, so the superintendent and the student went back to the cool down room. After 30 minutes, the superintendent asked the student to work appropriately in his classroom for 30 minutes, at which time the superintendent would return to check on him. Though the student struggled to behave appropriately on his way back to class, he was able to work without incident for 30 minutes once there. At the end of that 30 minutes, the student again asked the superintendent if he could go see the PE teacher to apologize. After talking with the PE teacher, the student asked if he could then go see his buddy room teacher. The superintendent told the student that he might have an opportunity for that later in the day but asked the student to return to class for 60 minutes. As they walked towards the classroom, the student attempted to enter the buddy classroom. The buddy room teacher was called to the door by the superintendent, and the student told her that he did not feel she liked him anymore. The student and the buddy room teacher spoke about the situation, and the student then went on to class with the superintendent telling him that he would return at 3:00 to see how his next 60 minutes had gone.

During afternoon recess, the student had, by report of the parent, heard three other students singing a song that included the words, "[The student] is constipated, overrated, ugly, gay, a loser." The student asked the students to stop but they did not. The student "went after" the other student (his neighbor). He was taken to the office. The situation escalated with the student banging his head against a wall. The student was given 5 days of OSS (out-of-school) suspension as a consequence for his recess behavior.

On November 11, 2019, the superintendent contacted the director of special education for the cooperative to report that the student had been suspended from school. The director told the superintendent to ask the parents whether they felt that the student was in need of special education and whether they would consent to an evaluation. By report of the director, she believed that while school staff did not believe special education support was warranted, she

thought it would be best to once again seek input from the parents.

On November 12, 2019, the director of curriculum and instruction called the parent. According to the director of curriculum and instruction, the parent stated that she wasn't sure she wanted an evaluation because labels are placed on kids, but she was being encouraged by a parent advocate to pursue an evaluation.

On November 13, 2019, after speaking again with the director of special education, the director of curriculum and instruction sent an email to the parent regarding a special education evaluation of the student. According to the email, "once [the parents] had signed the request for evaluation document, one of our school psychologists will contact you to review the special education evaluation timeline."

On November 13, 2019, the behavior coach for the cooperative met with the director of curriculum and instruction to revise the behavior plan which would then be presented to the parent.

During the week of November 11, 2019, the superintendent contacted the Kansas Technical Assistance Support Network (TASN) with regard to a consultation regarding the student.

On November 18, 2019, the parent sent an email to the director of curriculum and instruction regarding the student's move to the __ ____ district.

Between the time the first behavior plan was developed for the student on October 16, 2019 and November 18, 2019 (the day the student was withdrawn from the district), the student was in school for 7 full days. The parents did not return a signed consent for an evaluation of the student with regard to behavioral concerns.

## Discussion of Parent's Concerns

Concern 1: The district failed to respond to the parent's request for an IEP for the student.

## Applicable Statutes and Regulations

Although the public agency is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time.... 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." (see Federal Register, Vol. 64, March 12, 1999, pp. 12476-12477).

Districts must respond in a "reasonable time" to such requests (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.503(a)). In a January 8, 2002 memo, posted at https://www.ksde.org/Default.aspx?tabid=614, the team leader for the Student Support Services Team (now the Special Education and Title Services team) at the Kansas State Department of Education, offered guidance as to what would be considered a "reasonable time" for a district to provided notice to parents regarding certain special education actions, stating that "unless there is some unusual circumstance, a reasonable time...is 15 school days." That same definition of "reasonable time" will be used in the investigation of this case.

## Investigative Findings

The student has been receiving special education services under an IEP since second grade, although the parents either did not recall that the student had an IEP or did not realize that the student had already been identified as a "special education" student because of speech delays.

The student's February 4, 2019, IEP shows that, at the time the IEP was developed, the student's behavior was not impeding his learning or that of others. No behavior plan was included in the student's February 2019 IEP.

On September 24, 2019, the parents sent an email to the principal stating that they had been "advised to request in writing, an IEP or behavior plan to be put in place for [the student]."

At the time the email was written, an IEP was already in place for the student. That document, developed on February 4, 2019, provided the student with speech and language services.

The principal responded to the parents on September 26, 2019, stating that he would like them to sign a release of information form that would allow the district to include Family Service and Guidance Center (FSGC) staff in the meeting.

On October 1, 2019, a meeting was conducted via telephone conference call. Participants included FSGC staff, the principal, elementary counselor, parents, and the student. The parent expressed an interest in developing a behavior plan in lieu of an IEP because she did not want the student to be "labeled." The parent confirmed in a telephone conversation with the investigator on January 23, 2020 that she had been resistive to having the student stigmatized by a special education label and preferred that a behavior plan be put in place instead.

Based upon the input of the parents, the district moved ahead with plans to develop a behavior plan in lieu of conducting further assessment to determine the student's needs in the area of behavior or making any modifications to the student's existing IEP.

On October 11, 2019, the parent again told the principal that she wanted the student to have a behavior plan.

Another meeting was held with the parents on October 15, 2019 to discuss a behavior plan for the student. The parents, principal, and school counselor were present. At the meeting, the parent once again told school staff that she did not want to have the student labeled and did not want to have the district conduct any assessments related to special education interventions related to behavior.

On November 12, 2019, the director of curriculum and instruction called the parent. According to the director of curriculum and instruction, the parent stated that she wasn't sure she wanted an evaluation because labels are placed on kids, but she was being encouraged by a parent advocate to pursue an evaluation.

On November 13, 2019, after speaking again with the director of special

education, the director of curriculum and instruction sent an email to the parent regarding behavior-related assessment of the student. According to the email, "once [the parents] had signed the request for evaluation document, one of our school psychologists will contact you to review the special education evaluation timeline."

The parent withdrew the student from the school district on November 18, 2019 and did not return the evaluation consent forms. In an email dated January 29, 2020, the speech-language pathologist who had provided services to the student while he was enrolled in the district stated that she had reached out to the parent through Facebook after the student was withdrawn. The speech-language pathologist stated that she wanted to be sure that the parent told the new district that the student had been receiving services. According to the email, the parent had indicated that she had "forgotten" that the student had speech support.

## Summary and Conclusions

At the time of the parents' September 24, 2019 email to the principal asking that an IEP or behavior plan be put in place for the student, the student already had an IEP for speech and language services. That IEP, developed on February 4, 2019, did not indicate that the student had any identified needs in the area of behavior.

The parents had not specifically requested that an IEP team meeting be convened to discuss modifying the student's existing IEP. The principal sent an email to the parent asking for a release of information that would allow the student's FSGC therapist to participate in a meeting to discuss the student.

A telephone conference was conducted 5 days after the September 24th email. District staff, the therapist, the parent and the student participated in the conference call. During the phone call, the parent indicated that she wanted to have a behavior plan developed for the student in lieu of exploring other special education actions, indicating that she was fearing that the student would be given a "label." The parent subsequently reiterated her concerns regarding special education labeling during a telephone call with the director of curriculum and instruction on November 12, 2019. Prior written notice of evaluation and request for consent which would have allowed the district to evaluate the student in areas related to behavior was provided to the parent on November

13, 2019. The parent did not provide signed consent before withdrawing the student from the district on November 18, 2019.

No evidence was provided to show that the parents specifically requested an IEP meeting for the student, but the principal responded in a timely manner to the parents' request for "an IEP or behavior plan." While the parents had told district staff they didn't want to have the student labeled and preferred that their concerns for the student be addressed through a behavior plan, the district did request the parents' consent to conduct additional assessment of the student in the area of behavior. The parents did not consent to any additional evaluation prior to withdrawing the student from the district. Under these circumstances, a violation of special education statutes and regulations related to this aspect of the parent's complaint is not substantiated.

Concern 2: The district failed to develop a behavior plan that contained positive interventions.

Applicable Statutes and Regulations

When developing an IEP for a student, the IEP team must, among other things, consider whether the student's behavior impedes the child's learning or the learning of other students. Additionally, in the case of a child whose behavior impedes learning of self or others, the team must consider the use of positive behavior interventions and supports and other strategies to address the student's behavior. (K.S.A. 72-3429(d)(4); 34 C.F.R. 300.324(a)(2)(i))

Investigative Findings

On September 23, 2019, the parents contacted the principal to ask for a meeting with school staff and the student's therapist to develop a plan to address the student's "attitude and behavior, staff response, consequences and communication."

On September 24, 2019, the parents sent an email to the principal requesting that an IEP or behavior plan be put in place for the student.

As noted above under Concern 1, a meeting was conducted via telephone conference call on October 1, 2019. The purpose of that meeting was for the district to solicit input in preparation for the development of a behavior intervention plan. In preparation for developing a behavior plan, the principal

spoke again by telephone with the student's therapist on October 8, 2019.

A meeting was held on October 15, 2019 for the purpose of again soliciting parent input regarding the development of a positive behavior intervention plan for the student. The parents, principal, and school counselor were present.

A *General Education* Behavior Intervention Plan was developed by the principal, the director of curriculum and instruction, and the school counselor on October 16, 2019 as the first step toward determining whether or not special education intervention to address behavior was warranted.

The behavior plan targeted "negative comments towards others and negative self-talk" including "shouting out," "negative comments towards students," and "negative comments towards adults." According to the plan, the team hypothesized that when the student was in a group of students, he sought attention from peers and adults using negative self-talk and behaviors. The team noted that he also struggled to focus at school and could be overstimulated in large groups.

Five preventative interventions were suggested.

- 5 positive interactions in the first 10 minutes of the day
- Daily use of Acrostic Great Job goal setting sheet
- Implementation of a Safe Place (the Library or the room with the blue chair in the office)
- Zones of Regulation Instruction with the counselor or social worker
- Teacher mentor from the high school JAG program

Replacement behaviors were specified and strategies developed to teach those behaviors to the student. The plan included strategies for reinforcing the replacement behaviors as well as strategies for reducing target behaviors were also developed. A Crisis Plan was specified. Parents were provided a copy of the plan.

The mentor teacher met with the student five times between September and November 2019.

The counselor met with the student on October 17, 2019 to review the "zones of regulation." The counselor and student spoke about behavior triggers and identified strategies that the student could use if he felt he was getting

frustrated or needed a break. Safe places were identified for the student's use if he needed a "cool down" place. The counselor helped prepare cool down settings and walked the student to the different locations to be sure he was familiar with them. On October 17, 2019, the counselor spoke with other staff members about making a point of acknowledging and speaking with the student each morning and stressing positives with the student throughout the school day. The counselor herself also made a point of making a morning contact with the student.

After the behavior plan was put in place, the student attended 7 full days of school before he was placed on a 5-day out-of-school suspension. While the student was out of school on disciplinary removal, the district began drafting an amendment to the October 16, 2019 behavior plan, but that amendment was never completed. The student was withdrawn from school on November 18, 2019.

Summary and Conclusions

The student's February 4, 2019 IEP shows that the team had considered the student's behavior and did not feel that his behavior was impeding the student's learning or that of other students. The February 4, 2019 IEP did not contain a behavior plan.

In response to the parents' request for a behavior plan for the student, meetings were held to solicit input from parents and the student's therapist to aid in the development of a general education behavior plan. That general education behavior plan would be a first step in determining whether or not special education services were warranted for the student in the area of behavior.

The plan was completed on October 16, 2019, fifteen school days after the parent's request for such a plan on September 24, 2019. The plan reflected input from the parents and student in addition to the student's therapist and district staff and included positive behavior supports, antecedent modifications, and strategies for reinforcing replacement behaviors. Modifications to the plan were initiated while the student was out of school on a 5-day suspension, but those modifications were not finalized and no amended plan was implemented because the student was withdrawn from the district on November 18, 2019.

The IEP team had considered the student's behavior when developing his

February 4, 2019 IEP. The district responded in a timely manner to the parents' request for a behavior plan by completing a general education behavior plan with input from the parents, student, and therapist on October 15, 2019. The parent did not, as noted previously, provide the district with written consent to conduct any further special education evaluation of the student in the area of behavior. By the time the student was withdrawn from the district on November 18, 2019, no determination had yet been made as to whether the student's IEP should have been modified to include a behavior plan. Under these circumstances, a violation of special education statutes and regulations is not substantiated on this concern.

Concern 3: The district failed to appropriately intervene regarding the traumatic mistreatment and physical abuse of the student by staff. As a result, the student was teased and bullied by other students.

Applicable Statutes and Regulations

As noted above on page 5 and 6, bullying, teasing, and abuse are not addressed in special education statutes or regulations and cannot be investigated through a special education formal complaint (K.A.R. 91-40-51(a); 34 C.F.R. 300.153(b)(1)). Therefore, this investigator did not attempt to determine whether bullying, teasing, or abuse occurred.

However, because the parent alleges that the student's learning and his self-esteem were being affected by the actions of staff and students, an investigation was conducted in order to determine whether or not the student was making appropriate educational progress.

Every child with an exceptionality is entitled to receive a FAPE. FAPE is defined as "special education and related services" that meet the following criteria:

1. Are provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the state board of education;
3. include an appropriate preschool, elementary, or secondary school education; and
4. are provided in conformity with an individualized education program (IEP). (K.A.R. 91-40-1(z); 34 C.F.R. 300.17).

Additionally, in Endrew F. v. Douglas County School District, the 10th circuit in 2017 defined FAPE as "an IEP reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances.

## Investigative Findings

The student is an exceptional child. At the time this complaint was filed, the student was receiving special education services related to a speech and language disability.

In order to determine whether the student was making appropriate progress with regard to both the general education curriculum and his IEP goals, the investigator looked at a number of indicators.

MAP Testing:
Testing of the student has been conducted at periodic intervals using the Measurement of Academic Performance (MAP) Test. In the fall of 2018, the student's score on the Reading portion of the test placed him at the 35th percentile. By the fall of 2019, his reading score had increased to the 74th percentile.

MAP testing in the area of mathematics placed the student at the 58th percentile in the fall of 2018 and at the 62nd percentile in the fall of 2019.

Grade Reports:
End of year grades for the 2018-19 school year show that the student was "on target" with regard to mastering state standards in the areas of reading, language arts, PE, math, social studies, and science. His end-of-year grade in music showed him to be in need of improvement although he was shown to be "progressing" at the end of the first semester.

During the first quarter of the 2019-20 school year, the student was "on target" with regard to meeting state standards in the areas of reading and science according to his grade report. He was considered to be "progressing" in language arts and math.

The student was withdrawn from the district as of November 18, 2019. At the time he left, the student was "passing" in reading but in need of improvement in math and social studies. No other quarter grades were recorded.

IEP Progress Monitoring

A report of the student's progress with regard to his February 2019 IEP Annual Goal for articulation was provided by the district. Progress was reported on March 8, May 17, and October 11, 2019. At each monitoring period, the student was making progress sufficient to have him meet his annual goal of 80% accuracy in sound production. By October 11, 2019, the student was producing all targeted sounds except a medial /z/ with 80% accuracy or above. The medial /z/ sound was being produced at a 75% accuracy level, up from a baseline level of 65%.

Standardized Academic Assessment

The Woodcock Johnson IV Tests of Achievement were administered on January 9, 2020 by the __ ____ school district to which the student had transferred. All scores in the areas of basic word reading, reading comprehension, and phoneme-grapheme knowledge placed the student within the average range. Reading fluency scores were in the average or high average range as were all of the student's scores in the areas of math calculation and math problem solving. Basic writing scores were in the low average range while written expression scores were in the average range.

## Summary and Conclusions

While in no way disregarding the parental concerns regarding alleged bullying and harassment, this investigation uncovered no evidence to support the parent's contention that the alleged behavior of another student has kept this student from making appropriate academic progress or from achieving the goals and objectives established in his March 7, 2018 or February 4, 2019 IEPs. IEP Progress reporting shows that the student was achieving the goals established in his February 2019 IEP with regard to articulation skills.

Additionally, the student demonstrated year-over-year progress on MAP testing in the areas of reading and math. He earned grades that placed him on target or progressing in all core content areas at the end of third grade and for the first quarter of the 2019-20 school year. Standardized achievement testing completed in January of 2020 by the __ ____ school district showed the student's

skills to be in the average to high average range in reading and math. Basic writing skills were in the low average range, but his written expression scores were in the average range.

Based on these findings, there has been no denial of FAPE. A violation of special education statutes and regulations is not substantiated regarding this concern.

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, Early Childhood, Special Education and Title Services, 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 Regulations 91-40-51 (f), outlined below.

_____

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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON FEBRUARY 6, 2020

DATE OF REPORT: MARCH 7, 2020

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

The complaint is against USD #___ (_____ Public Schools). In the remainder of this report, USD #___ may also be referred to as the "school district" or the "local education agency (LEA)."

The complaint was received by the Kansas State Department of Education on February 6, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on March 7, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on February 28, 2020 as part of the investigation process.

USD #___ made the following school district staff available for an interview on February 27, 2020:

- _____ _____, Director of Special Education
- _____ _____, Associate Principal at _____ ____ High School
- _____ _____, Consulting Teacher / Special Education Department Chair at _____ ____ High School
- ____ ____, General Counsel for USD #___

In completing this investigation, the Complaint Investigator also reviewed the following materials:

- Formal Complaint Request Form dated February 6 and February 10, 2020
- Child Complaint Investigation Report 20FC___-001 dated January 8, 2020
- Parent request for an appeal to Child Complaint Investigation Report 20FC___-001 dated January 17, 2020
- Timeline dated November 18 through November 26, 2019 written by the parent
- IEP for the student dated December 20, 2018 and amended on March 27, 2019
- Email dated August 29, 2019 at 8:51 a.m. to the parent from Mr. _____
- Email dated November 21, 2019 at 3:27 p.m. to the parent from Mr. _____
- Email dated November 21, 2019 at 10:54 a.m. to Mr. _____ from the parent
- Email dated November 21, 2019 at 3:27 p.m. to the parent from Mr. _____
- Email dated November 22, 2019 at 8:48 a.m. to the parent from Dr. _____
- Email dated November 22, 2019 at 9:15 a.m. to Dr. _____ from the parent
- Email dated November 22, 2019 at 9:33 a.m. to Dr. _____ from the parent
- Email dated November 22, 2019 at 12:20 p.m. to the parent from Mr. _____
- Email dated November 22, 2019 at 12:45 p.m. to Mr. _____ from the parent
- Email dated November 26, 2019 at 4:47 p.m. to Dr. _____ from the parent
- Notification of Meeting dated August 12, 2019 scheduling an IEP team meeting for August 23, 2019 with a handwritten note that the parent requested the meeting be rescheduled for August 22, 2019

- Notification of Meeting dated November 21, 2019 scheduling an IEP team meeting for December 5, 2019
- Notification of Meeting dated December 6, 2019 scheduling an IEP team meeting for December 19, 2019
- Notification of Meeting dated December 19, 2019 scheduling an IEP team meeting for January 9, 2020
- Notification of Meeting dated February 14, 2020 scheduling an IEP team meeting for February 17, 2020
- IEP team meeting notes from August 22, 2019 handwritten by the parent
- IEP team meeting notes from the October 17, 2019 handwritten by the parent
- IEP team meeting notes from January 9, 2020 handwritten by the parent
- Meeting Summary IEP Team Considerations for IEP team meetings on December 5, 2019; December 19, 2019; January 9, 2020; and February 17, 2020
- Post try out meeting statement written by Mr. _____ dated February 19, 2020
- Statement written by ____ _____, Special Education Case Manager, on February 19, 2020
- Response to the Allegations written by ____ _____, General Counsel for USD #___, dated February 21, 2020

## Background Information

This investigation involves a 14-year-old male who is currently enrolled in the ninth grade at _____ ____ High School in USD #___ for the 2019-2020 school year. Records and interviews found the student was originally found eligible for special education under the eligibility category of emotional disturbance on November 2, 2017. The student has received special education services since the beginning of the second semester of seventh grade at _____ Middle School in USD #___.

A previous child complaint was filed by the parent in regards to the student trying out for the basketball team in November 2019. The parent alleged that USD #___ did not provide the student with an equal opportunity to participate in extracurricular and

other nonacademic activities during the 2019-2020 school year, specifically participation in the school's basketball program. The findings of the investigation of child complaint 20FC___-001 concluded:

> The student's IEP in effect during the first semester of the 2019-2020 school year does not include any supplementary aids and services in order for the student to participate in extracurricular activities. However, the IEP does include accommodations for extended time, breaks when the student feels overwhelmed, and a BIP that outlines the steps to take to redirect the student when inappropriate language or behaviors occur because of frustration.
>
> Interviews and documentation shows USD #___ did take steps to allow the student an equal opportunity to participate in the _____ ____ High School's basketball program. First, the _____ ____ High School's academic requirement was waived which allowed the student the opportunity to participate in the basketball tryouts and would have allowed him to practice and play if he made the team and met the Kansas State High School Athletic Association (KSHSAA) eligibility requirements. Second, the student was provided additional days to participate in the basketball tryouts. The student became overwhelmed during the first day of basketball tryouts and left the practice; however, despite missing the first day of tryouts and the first round of cuts, the student was allowed to participate in the second and third day of tryouts.

## Issues

Based upon the written complaint, the complainant raised five issues that were investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to convene an IEP team meeting to discuss the parent's request for accommodations for the student in extracurricular and other nonacademic activities during the 2019-20 school year.

Parent Position

When the student failed to make the basketball team at the end of November 2019, the parent reported that she contacted staff in USD #___ seeking basketball accommodations and giving several suggestions for these accommodations. The parent stated, "I requested a meeting several times because I wanted to convene the IEP team to discuss adding nonacademic and extracurricular services and activities to the student's IEP."

The parent stated, "USD #___ refused to hold a meeting, consider any accommodations, and refused all my requests to have the coach attend the IEP team meeting and provide feedback. When I requested further consideration then Mr. _____ called me and said the decision had already been made, and I said I wanted accommodations added to his IEP, but he said _____ ___ High School had never provided accommodations to allow students to play and they aren't about to start doing it now." The parent stated that she "went to the Special Education Director and _____ ___ Principal, but they still REFUSED to hold a meeting or provide any accommodations."

The parent indicated she made USD #___ aware of her request for an IEP team meeting to discuss accommodations for extracurricular and other nonacademic activities in three separate emails as noted below.

The first email was sent to Mr. _____ on November 21, 2019 at 10:54 a.m. and stated:

> I just want to get an understanding of why the student didn't make the basketball team? First there was no proper transition plan and now he doesn't make the team when I know he has made every other outside team, but he doesn't make the basketball team? Please let me know why he didn't make the team. I will go to the highest authority, beyond the school to ensure he has equal rights to participate in sports. At the middle level the school ensured he couldn't play and then today he is told he didn't make the team. Please let me know who I need to speak with. Thank you

The second email was sent to Dr. _____ on November 22, 2019 at 9:33 a.m. and stated:

> Furthermore with this issue it goes back to the student not being allowed the opportunity to interact with his peers because he spent 80% of his day at Ms. _____ [sic] office because that's what _____ wanted to do without my consent. You also have that evidence based on the complaints that I filed. _____ deprived him of his rights to qualify for basketball when they pulled him out of class. Additionally he never had the opportunity to play middle school basketball so he isn't use to the large crowd of a team. Due to _____ [sic] actions and his disability, it impacts him being able to perform. He needs more than 2 days to try out for a basketball team. I'm not sure why ___ doesn't feel that they have to be compliant with the law but he should be allowed the accommodation because of his disability. [The student] doesn't go to gym so I know the school has knowledge that his disability impacts his skills, when it comes to a large crowd. Is it still ___ [sic] position not to allow him an accommodation because of his disability and _____ [sic] wrong doings?

The third email was sent to Dr. _____ on November 26, 2019 at 4:46 p.m. and stated:

> He needs to have basketball accommodations that would allow him to participate in sports due to his disability. I understand the selection process is left to the coach, but in my opinion the coach isn't considering the impact that his disability has on his skills and abilities as it relates to basketball. Therefore he shouldn't be excluded from sports just because he has a disability. IDEA allows him the opportunity to participate with his peers and if he [sic] disability, hinders that participation then he should be accommodated for it. I ask for additional try out times for [the student] as he already struggles with adapting in a larger environment, which is evident by him not going to gym and his medical team supports this.

<u>School District Position</u>

USD #___ staff reported the parent never requested the IEP team be reconvened to address accommodations for extracurricular and other nonacademic activities in the numerous emails sent to Mr. _____ and Dr. _____ after the parent learned the student did not make the basketball team. In these emails, the parent asked several

questions inquiring why the student did not make the basketball team, requesting accommodations because of his disability to allow the student to continue to try out for the basketball team, and accusing the district of not allowing a disabled student to participate but never requested the IEP team to reconvene.

Regardless, USD #___ staff indicated and documentation shows that a Notice of Meeting was sent to the parent on November 21, 2019 scheduling an IEP team meeting for December 5, 2019. The purpose of the meeting was to conduct an annual review of the student's IEP, discuss possible changes to the student's IEP, and to consider post-secondary transition. USD #___ staff noted that the first email from the parent regarding the student not making the basketball team and participation in extracurricular and other nonacademic activities was dated November 21, 2019.

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.324(b)(1)(ii), require school districts to review and revise the student's IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, any information provided by the parent, the student's anticipated needs, or other matters.

In this case, the parent shared concerns with USD #___ staff via numerous emails regarding the student's disability and the need for accommodations in order to participate in extracurricular and other nonacademic activities beginning on November 21, 2019. Although the parent never specifically requested an IEP team meeting, there was sufficient information provided in these emails to alert USD #___ staff that the student's IEP team should be reconvened in order to discuss the student's anticipated needs in regards to future participation in extracurricular and other nonacademic activities. Documentation shows an IEP team meeting was already scheduled for December 5, 2019 for the purpose of conducting an annual review of the student's IEP, discussing possible changes to the student's IEP, and considering post-secondary transition. As such, there was no need for USD #___ to schedule a separate IEP team meeting to discuss the parent's concerns related to the need for accommodations to participate in extracurricular and other nonacademic activities.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to convene an IEP team meeting to discuss the parent's request for accommodations for the student in extracurricular and other nonacademic activities during the 2019-20 school year is not substantiated.

> ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with a meaningful opportunity to participate in discussions regarding accommodations before they were determined during the 2019-20 school year.

Parent Position:

The parent reported she sent multiple emails to Mr. _____ and Dr. _____ requesting reconsideration of the accommodations she had requested for the basketball tryouts after the student did not make the basketball team; however, all of these requests were denied. The parent stated, "Mr. _____ informed me that the decision was above him and there was nothing that I could do to change the decision that had been made. Mr. _____ informed me that he had already discussed the accommodations with _____ ___ principal, Mr. ___ and the only accommodation USD #___ would provide was to waive the academic requirements."

The parent reported that "these accommodations should not have been discussed outside of an IEP team meeting nor predetermined by non IEP team members, such as the _____ ___ Basketball Coach _____ and _____ ___ principal _____ ___. USD #___ should've convened the IEP team to discuss any appropriate supplementary aids and services needed in the student's IEP to allow the student to participate in these activities."

School District Position

USD #___ reported that the IEP in effect during the 2019-2020 school year was developed on December 20, 2018 and amended on March 27, 2019. Documentation shows the parent participated in these IEP team meetings. This IEP does not include

any supplementary aids and services or accommodations in order for the student to participate in extracurricular or nonacademic activities.

USD #___ staff reported and documentation showed the student's IEP team at _____ ____ High School, including the parent, met again on August 22, 2019 to discuss possible changes to the student's IEP, to consider post-secondary transition, to review the student's Behavior Intervention Plan (BIP) and revise as appropriate, and to plan for the transition to high school. USD #___ staff noted that no changes were made to the student's IEP in regards to participation in extracurricular or nonacademic activities as a result of this IEP team meeting.

USD #___ staff noted that the IEP team met again on October 17, 2019 to review the BIP but, again, no changes were made to the student's IEP in regards to participation in extracurricular or nonacademic activities as a result of this IEP team meeting.

USD #___ staff reported that prior to the basketball tryouts, the student's grades did not meet the _____ ____ High School academic eligibility requirement to participate in the tryouts for the basketball team. However, Mr. _____ waived the academic eligibility requirement for the student in order to allow him to participate in the basketball tryouts on November 18 -20, 2019 so that, if he made the team and met the Kansas State High School Athletic Association (KSHSAA) eligibility requirements, the student would have been able to practice and play with the basketball team.

Mr. _____ sent an email to the parent on November 21, 2019 at 3:27 p.m. explaining this decision as follows:

> As for making the basketball team, that is a decision that is left to the coaching staff based upon an athlete's ability. As his administrator I waived our schools in-season academic eligibility policy stating that we are continuing to implement his transition to _____ ____ from middle school (which is different than KSHSAA semester eligibility policy).

USD #___ staff indicated this action was taken in an effort to ensure the student had an equal opportunity to participate if the student was determined otherwise qualified to participate in the basketball team as required by Section 504 of the Rehabilitation Act.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 320(a)(4)(ii), require IEPs to include a statement of supplementary aids and services, to be provided to the child, or on behalf of the child, to participate in extracurricular and other nonacademic activities. Federal regulations, at 34 C.F.R. 300.107(b), state that nonacademic and extracurricular services and activities includes athletics sponsored by the school district. Federal regulations, at 34 C.F.R. 321(a)(1) require school districts to ensure that the parent is a member of each student's IEP team.

The findings in Issue One are incorporated herein by reference.

In this case, the parent was specifically concerned about accommodations to allow the student to participate in extracurricular and nonacademic activities. Interviews and documentation show that IEP team meetings were held on December 20, 2018, March 27, 2019, August 22, 2019, and October 17, 2019 and that the parent was a participant in each of those meetings. The IEPs resulting from those IEP team meetings did not include any supplementary aids and services or accommodations needed in order for the student to participate in extra-curricular or nonacademic activities. It is noted that USD #___ did waive the academic requirement to allow the student to participate in the basketball tryouts without conducting an IEP team meeting; however, there is nothing in the IDEA that prohibits school districts from providing more accommodations than are required by a student's IEP.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to provide the parent with a meaningful opportunity to participate in discussions regarding accommodations before they were determined during the 2019-20 school year is not substantiated.

> ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with prior written notice (PWN) refusing to include sports accommodations in the student's IEP during the 2019-20 school year.

Parent Position:

The parent reported that USD #___ refused her request for basketball accommodations and to convene the IEP team to even consider her requested accommodations. She believes USD #___ was required to provide her with an explanation of why the accommodations were not considered appropriate and why the school staff refused to meet with her to discuss the issue.

The parent stated,

> On November 21, 2019, Mr. _____ called me, and I told him that I wanted to have the student's IEP team meet because I wanted him to have basketball accommodations. I also had email communications with Dr. _____ on 11/22/2019 and requested basketball accommodations and she subsequently advised me that _____ ___ and myself disagreed on if this was a reasonable accommodation. When I spoke to Mr. _____ and questioned him on why this wasn't reasonable, he said the decision was above him. Additionally, I sent an email on 11/26/2019, again asking for accommodations to be added in his IEP, but those requests were denied, and the school failed to send me a PWN. I questioned why the school didn't think the accommodation was reasonable and all I was told is that they disagreed with me that it was reasonable and wouldn't tell me what would be reasonable or offer any other options. Given the fact that he has accommodations for gym class, he has always shown interest in basketball and Mr. _____ knows of his intent to play basketball since last school year then I felt the request was reasonable. To date I have still not received a PWN nor been told why my requests weren't reasonable. IDEA doesn't say when a request has to be done, but IDEA does say if a school is going to deny a parent request then a PWN has to be sent, which wasn't done.

School District Position

USD #___ staff reported that an IEP team meeting was already scheduled for December 5, 2019 when the parent began sending the numerous emails regarding the student not making the basketball team and her requested basketball accommodations on

November 21, 2019. For this reason, there was no need to provide the parent with PWN refusing to meet with her because an IEP team meeting was already scheduled.

USD #___ also believes that PWN was not required to be provided to the parent based on her email correspondence requesting basketball accommodation because the IEP team had not yet had the opportunity to discuss and consider the requested accommodations. USD #___ reported the IEP team was given the opportunity to discuss specific parent requests for basketball accommodations through the IEP team process at two IEP team meetings held with the parent in attendance subsequent to the student not making the basketball team. School staff reported and the Meeting Summary IEP Team Considerations for the January 9, 2020 and the February 17, 2020 IEP team meetings indicated that the parent never made a request for supplementary aids and services or accommodations related to the student's participation in extracurricular and nonacademic activities and, therefore, the IEP team never discussed any sports accommodations. For this reason, USD #___ believes a PWN was not required to be provided to the parent as a result of either of the IEP team meetings as no parent request related to sports accommodations was ever refused.

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.503(a), require that prior written notice must be given to parents a reasonable time before the responsible public agency proposes or refuse to change the provision of a free appropriate public education (FAPE) of the student. Federal regulations, at 34 C.F.R. 300.17, define FAPE in part as special education and related services that are provided to students with disabilities in conformity with an individualized education program (IEP). Federal regulations, at 34 C.F.R. 300.320(a), define an individualized education program or IEP as a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 C.F.R. 300.320 through 34 C.F.R. 300.324 which describe the membership of the IEP team and the requirement to consider supplementary aids and services necessary for the student to have an equal opportunity to participate in extracurricular and nonacademic activities.

The findings of Issue One and Issue Two are incorporated herein by reference.

In this case, USD #___ did respond to the parent's request for an IEP team meeting to discuss basketball accommodations and/or any supplementary aids and services or accommodations needed to provide the student with an equal opportunity to participate in extracurricular and nonacademic activities. Interviews and documentation showed that at least two IEP team meetings were held subsequent to the student not making the basketball team. For this reason, there was no reason for USD #___ to provide the parent with PWN refusing to convene the student's IEP team.

Interviews and documentation showed the parent was then afforded opportunities at these two IEP meetings to request sports accommodations and/or supplementary aids and services or accommodations she believed were necessary for the student to have an equal opportunity to participate in extracurricular and nonacademic activities. However, the parent made no such requests for the IEP team to discuss and consider.

It is noted that any IEP team member, not only the parent, can initiate a discussion related to the provision of FAPE to a student. Under the circumstances, it would have been expected that the discussion of basketball accommodations and/or supplementary aids and services or accommodations necessary to provide the student with an equal opportunity to participate in extracurricular and nonacademic activities would have been discussed at one or both of the subsequent IEP team meetings. However, the IEP team meeting notes from neither the parent nor USD #___ reflect any such discussion. Because there is no documentation of any such requests being considered by the IEP team and then denied, there is no requirement for USD #___ to provide the parent with PWN refusing a nonexistent request for sports accommodations and/or supplementary aids and services needed to enable to the student an equal opportunity to participate in extracurricular and nonacademic activities.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to provide the parent with prior written notice (PWN) refusing to include sports accommodations in the student's IEP during the 2019-20 school year is not substantiated.

ISSUE FOUR: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically by not providing positive feedback by offering support when he didn't make the basketball team in November 2019.

Parent Position:

The parent reported that the student's BIP requires school staff to provide positive feedback to the student and she believes the _____ ___ High School staff did not offer the student support when he failed to make the basketball team. Documentation shows the BIP dated October 17, 2019 states "Staff will provide supportive feedback that does not consist of threats of consequences or inflammatory statements."

The parent explained, "When he went to school on November 21, 2019 he self-assigned himself to ISS [In School Suspension] because he said he didn't know how to deal with the social environment. As you can see in the email communication when he went to school he went to ISS and Mr. _____ emailed me. I sent [the student] a message on Facebook and he told me that he felt alone and didn't want to see anyone which is why he went to ISS. I informed Mr. _____ that he went looking for him because he didn't make the basketball team and you will see Mr. _____ [sic] response."

The parent provided the following emails to support her allegation:

An email written by Mr. _____ to the parent on November 21, 2019 at 10:02 a.m. which stated:

> This morning the student placed himself in ISS during 1st hour. I am going to speak to him later as to why he did that.

An email written by the parent to Mr. _____ on November 21, 2019 at 11:16 a.m. which stated:

> And he went looking for you because he didn't make the basketball team and they told him to sign in.

An email written by Mr. _____ to the parent on November 21, 2019 at 3:27 p.m. which stated:

> As for making the basketball team, that is a decision that is left to the coaching staff based upon an athlete's ability. As his administrator I waived our schools' in-season academic eligibility policy stating that we are continuing to implement his transition to _____ ___ from middle school (which is different than KSHSAA semester eligibility policy).

An email written by Mr. _____ to the parent on November 22, 2019 at 12:20 p.m. which stated:

> While we can see your point of view, we are going to have to agree to disagree on this situation. It is our belief that the student was given a fair and equitable opportunity to try out for the _____ ___ Basketball team, and our position has not changed. We will continue to support the student's academic needs and push his successes in the classroom. Please let me know what we can do to help him through the final 4 weeks of the semester.

<u>School District Position</u>

USD #___ disputes the parent's allegation that the district did not implement the student's IEP which includes the BIP in regards to providing positive support and feedback when the student did not make the basketball team on November 21, 2019. USD #___ reported and documentation shows the BIP in effect on November 21, 2019 was developed in meetings held on August 22, 2019 and October 17, 2019 with the parent in attendance.

The BIP includes a section titled "Emergency Plan: What is our plan when the behavior gets out of control?" The following statement is included in that section:

> Staff will provide supportive feedback that does not consist of threats of consequences or inflammatory statements.

Even though an emergency situation never occurred when the student did not make the basketball team, Mr. _____ and ____ _____, Special Education Case Manager, reported they met with the student on November 21, 2019. Mr. _____ stated, "The student came into 3rd hour upset about not being chosen for the _____ ___ basketball

team.  I took him to Mr. _____'s office where the both of us spoke with him and let him process his thoughts and feelings.

Mr. _____ stated, "Mr. _____ and the student came to my office to talk after the student found out he did not make the team.  The student appeared to be saddened by the news.  At this time we discussed him focusing on his classes, building good academic habits.  In addition, once the season is over, we encouraged him to attend the workouts in the spring and summer to develop his strength in the weight room and improve his skill development to help him increase his chances of making the team next year."

## Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The findings of Issue One, Issue Two, and Issue Three are incorporated herein by reference.

In this case, interviews and documentation showed the IEP in effect on November 21, 2019 included a BIP which was developed in meetings held on August 22, 2019 and October 17, 2019 with the parent in attendance.  This BIP does include a requirement for staff to provide supportive feedback that does not consist of threats of consequences or inflammatory statements when the student's behavior gets out of control.  Interviews and documentation showed that even though the student's behavior was not out of control, USD #___ staff met with the student to provide supportive feedback related to the outcome of the basketball tryouts.

Based on the foregoing, the allegation of a violation of special education statutes and regulations of failing to implement the student's IEP, specifically by not providing positive feedback by offering support when he didn't make the basketball team in November 2019, is not substantiated.

ISSUE FIVE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to consider the student's interest in playing basketball, failed to include structured workouts, and failed to consider the impact of the student's disability on his participation in the physical education class when reviewing the IEP during the 2019-20 school year.

Parent Position:

The parent reported the district refuses to make accommodations for basketball even though school staff are aware of the student's interest in the sport and the impact of his disability on his participation in the gym class. The parent believes the reward of structured workouts should be held in the gym so the student can play basketball and can become more comfortable with larger groups of students.

The parent's notes from the IEP team meeting reflect discussions about participation in the gym class, the structured workouts. She stated, "On August 29, 2019, Mr. _____ took the student to meet with Coach _____ and to discuss the student playing basketball for _____ ___ High School. The opportunity to play basketball for the high school was a motivating factor and Mr. _____ was also going to work on getting after school structured basketball workouts added to the student's IEP. This was told to me on 8/29/19. The school fully knew that the student was intending to try out for basketball."

The parent reported that the student's therapy team attended the October 17, 2019 IEP team meeting and we all discussed his IEP / BIP and the issue with gym. The parent stated,

[The student's] therapy team informed _____ ___ that [the student] attends sports group and he has a strong interest in basketball. Furthermore, [the student] has a basketball reward that is given to him, but _____ ___ hadn't been giving it to him, as they said they couldn't find an open gym and the student was struggling with being around a large group of kids. _____ ___ High School advised me in writing and on the phone that the student functions better in the gym playing basketball when he was alone or at least knew the kids. As a result of [the student] struggling because of his disability in gym, the school had allowed the student to be in the office and only take

the health portion of gym. The school was fully aware that the student had interest in playing basketball and we discussed how his disability was impacting the school giving him gym time; the BIP reward was being impacted by his disability. Mr. _____ sent me another email and said I know [the student] wants to play basketball, but he wants to do it when others aren't around and that's hard to find in the school. When [the student] told me that he didn't make the basketball team and he had to leave a basketball tryout practice because he was overwhelmed and shut down, then I asked for a sports accommodation for basketball.

School District Position

USD #___ disputes the parent's allegation that the district failed to consider the student's interest in playing basketball, failed to include structured workouts, and failed to consider the impact of the student's disability on his participation in the physical education class when reviewing the IEPs and the BIPs during the 2019-20 school year. Staff reported and documentation shows that the IEPs and the BIPs in place during the 2019-20 school year reference the student's interest in basketball.

School staff also reported responding to the parent's concerns in regards to the student playing basketball as a reward described in the BIP. Mr. _____ sent an email to the parent on August 29, 2019 at 8:15 a.m. regarding the parent's questions and concerns which stated,

> As for basketball, currently we do not have any open gyms during the day with over 1100 students and 5 PE teachers the gyms are in use every hour, and [the student] has stated that he will not and does not want to go to the gym if there is a class in there. We will have open gym after school starting in September along with structured workouts which we can work into the plan. Currently I would recommend that we use the quad area and walking sidewalks for the physical de-stressor and talking during this time . . . school personnel will help identify additional positive self-calming strategies for him to utilize as he develops on campus.

USD #___ staff reported that the student was initially scheduled into a PE class at the beginning of the student's freshman year of high school during the 2019-20 school year; however, the student refused to attend the class because he was overwhelmed

with the large space and the large number of students. Because Health is also a required class in order to graduate, the student's schedule was changed for first semester from PE to Health to allow the student to complete the health credit and stay on track to graduate. Staff indicated the student only needs one PE credit to graduate during the four years of high school and believes this class can be scheduled later to allow the student time to become acclimated to _____ ___ High School.

Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.324(b)(1)(ii), require school districts to review and revise the student's IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, any information provided by the parent, the student's anticipated needs, or other matters. Federal regulations, at 34 C.F.R. 321(a)(1) require school districts to ensure that the parent is a member of each student's IEP team.

The findings of Issues One, Issue Two, Issue Three, and Issue Four are incorporated herein by reference.

In this case, interviews and documentation show that the IEP team members, including the parent, met on August 22, 2019; October 17, 2019; January 9, 2020; and February 17, 2020. IEP team meeting notes provided by the parent and USD #___ reflect discussion regarding the student's interest in basketball and participation in the gym class. Structured workouts and movement breaks are also reflected as being discussed.

The IEP and BIP list the student's strengths as "The student can be pleasant and charming one on one. He demonstrates interests in basketball and cooking. When talking about these topics he is engaging, enthusiastic, and eager to learn more."

The transition plan included in the IEP states, "He would like to be an NBA player but knows there are very few students who make it to that level of play. While attending college he would like to play basketball." The course of study reflects the student will earn one unit of PE in order to graduate with anticipated date of May 2023.

The BIP developed for implementation at the middle school level during the 2018-19 school year does specifically describe a reward for turning in science assignments as "he will have 10 minutes to shoot basketballs in the gym on Fridays. Time will be arranged by the IEP case manager to be at a time there are not students in the gym." This BIP also describes a check-in process with special education staff which is to occur in the gym where the student can shoot baskets; however, the student may chose not to participate in the check-in times.

USD #___ began updating the BIP for implementation at the high school level on August 22, 2019 but the BIP was not completed until October 17, 2019. IEP team meeting notes reflect the student's anxiety in the large gym setting and with large groups of unfamiliar students. The resulting BIP describes movement breaks which can occur in the classroom by standing by desk, handing out papers, or outside of the classroom by getting a drink, using the restroom, running something to the office, or a walk around the quad.

Based on the foregoing, it is clear that the IEP teams convened by USD #___ did consider the student's interest in playing basketball, did consider structured workouts and movement breaks, and did consider the impact of the student's disability on his participation in the physical education class when reviewing the IEPs and the BIPs during the 2019-20 school year. As such the allegation is not substantiated.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, _____, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___
_____ Public Schools: 20FC___-003

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on February 6, 2020, by _____ on behalf of her son, _____. In the remainder of this decision, Ms. _____ will be referred to as "the parent," and _____ will be referred to as "the student." An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report, addressing the allegations, was issued on March 7, 2020. That Complaint Report concluded that there were no violations of special education statutes and regulations .

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the original complaint filed by the parent, the Complaint Report, the parent's notice of appeal and submitted documents, and the district's written response to the appeal and submitted documents. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

## PRELIMINARY MATTERS

A copy of the regulation regarding the filing of an appeal [K.A.R. 91-40-51(f)] was attached to the Complaint Report. That regulation states, in part, that: "Each notice shall provide a detailed statement of the basis for alleging that the report is incorrect." Accordingly, the burden for supplying a sufficient basis for appeal is on the party submitting the appeal. When a party submits an appeal and makes statements in the notice of appeal without support, the Committee does not attempt to locate the missing support.

No new issues will be decided by the Appeal Committee. The appeal process is a review of the Complaint Report. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function will be to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

In a special education complaint to a State Education Agency, such as this one, the KSDE is limited in jurisdiction to allegations of a violation of special education statutes and regulations [See 34 C.F.R. 153(b)(1); and K.A.R. 91-40-51(a)].

## DISCUSSION OF ISSUES ON APPEAL

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to convene an IEP team meeting to discuss the parent's request for accommodations for the student in extracurricular and other nonacademic activities during the 2019-20 school year.

An underlying and documented fact related to this issue is that an IEP meeting was scheduled for the student. On page 7 of the report the investigator stated:

> Regardless, USD #___ staff indicated and documentation shows that a Notice of Meeting was sent to the parent on November 21, 2019 scheduling an IEP team meeting for December 5, 2019. The purpose of the meeting was to conduct an annual review of the student's IEP, discuss possible changes to the student's IEP, and to consider post-secondary transition. USD #___ staff noted that the first email from the parent regarding the student not making the basketball team and participation in extracurricular and other nonacademic activities was dated November 21, 2019 [emphasis added].

In her conclusions regarding this issue, the investigator stated that there was a sufficient basis for the district to conduct an IEP meeting to address the parent's concern regarding whether there was a need for accommodations to enable the student to have an equal opportunity to participate in in extracurricular activities.

The investigator concluded:

> In this case, the parent shared concerns with USD #___ staff via numerous emails regarding the student's disability and the need for accommodations in order to participate in extracurricular and other nonacademic activities beginning on November 21, 2019. Although the parent never specifically requested an IEP team meeting, there was sufficient information provided

> in these emails to alert USD #___ staff that the student's IEP team should be reconvened in order to discuss the student's anticipated needs in regards to future participation in extracurricular and other nonacademic activities. Documentation shows an IEP team meeting was already scheduled for December 5, 2019 for the purpose of conducting an annual review of the student's IEP, discussing possible changes to the student's IEP, and considering post-secondary transition. As such, there was no need for USD #___ to schedule a separate IEP team meeting to discuss the parent's concerns related to the need for accommodations to participate in extracurricular and other nonacademic activities" (Complaint Report: Issue 1, p. 7).

In her appeal, the parent stated that the purpose of the meeting scheduled for December 5 was changed to use the meeting as a resolution session for a due process complaint that the parent had requested. However, that position is not supported by the evidence.

The evidence shows that Dr. H sent an e-mail to the parent on November 26, 2019, stating: "We need to schedule a resolution meeting for the due process by December 6th. I know there is currently an IEP scheduled for the 5th. Do you want to do the Resolution Meeting at 1:00 that day and then go into the 2:00 IEP." It is clear from this message that Dr. H was proposing to conduct the resolution session before the IEP meeting, not to replace the IEP meeting with the resolution meeting. No evidence was presented in the appeal to support the allegation that the purpose of the meeting had changed to eliminate discussion of the student's IEP, including the need for accommodations for extra-curricular activities.

In the attachment the parent provided as part of her appeal titled "N19 IEP MEETING WITHOUT ME", there is an email from Cathy Kerns dated December 6th stating "Sorry you were not able to attend the scheduled IEP meeting, yesterday. I know you mentioned that you have a busy schedule but as Mr. C explained our IEP annual date is 12/20/19. We are proposing an IEP meeting on 12/19/2019 at 2:00pm in A105 at TWHS. We hope you are able to attend, if another day before the 19th would work for you, please let us know."

On December 13, 2019, Cathy Kerns sent another e-mail to the parent stating:

> [The student's] annual IEP due date is coming due 12/20/2019, we are required by the State to meet by this date and that is the reason we have rescheduled his IEP meeting for Thursday 12/19/2019 at 2:00pm. It would be great if you could by chance meet with us but I understand you are very busy. We would be glad to reschedule an IEP meeting in January with you. If you could please check your calendar for a few dates you are available toward the end of January and send those to me that would be appreciated.

These communications are further evidence that the district was willing, and even concurrently proposing, an IEP meeting to discuss the parent's concerns.

In the District's written response to the appeal on page 6, they explain that the resolution meeting was held in place of the IEP meeting because the parent did not want to participate in an IEP meeting following the resolution meeting:

> There were multiple discussions regarding the timing of the resolution meeting and the IEP meeting, but ultimately, due to Complainant's unavailability, the resolution meeting was held in place of the IEP meeting. For her own reasons, Complainant refused to actively participate in the meeting, which led to the resolution meeting being short and unsuccessful. While this was unfortunate in terms of resolving the due process complaint, it provided ample time for the IEP meeting to be held. Yet, for whatever reason, Complainant did not want to continue with the IEP meeting.

The district submitted in response to the appeal an exhibit titled "Request 3 Case Notes." That document supports the District's statement in their written response and explains how and why each meeting was scheduled and cancelled, as well as the topics discussed in each meeting.

In her appeal (page 1), the parent asserts that USD ___ told her that they would not discuss the accommodation request in an IEP meeting because they were waiting on the results of the formal complaint. However, no evidence was provided to support this statement.

For the reasons stated above and based on the documentation referenced above, the findings and conclusions of the complaint report should be, and are, upheld on issue one.

> ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with a meaningful opportunity to participate in discussions regarding accommodations before they were determined during the 2019-20 school year.

On this issue, on page 10 of the complaint report, the investigator concluded as follows:

> In this case, the parent was specifically concerned about accommodations to allow the student to participate in extracurricular and nonacademic activities. Interviews and documentation show that IEP team meetings were held on December 20, 2018, March 27, 2019, August 22, 2019, and October 17, 2019 and that the parent was a participant in each of those meetings.

The investigator then concluded that the allegation; "of failing to provide the parent with a meaningful opportunity to participate in discussions regarding accommodations before they were determined during the 2019-20 school year is not substantiated."

However, it is clear from the evidence that the parent's complaint did not involve only the meetings prior to November 21, 2019, when she first e-mailed Mr. C to ask why the student did not make the basketball team.

She appears to be saying that when she asked for basketball accommodations in November of 2019 she was told what accommodations had been made and that no more would be forthcoming and that she did not participate in the making of those decisions. But, during this time she was talking directly to school administrators, had not requested an IEP meeting, and an IEP meeting to review the IEP was already scheduled for December 5, 2019.

The evidence shows IEP meetings occurred on December 20, 2018, March 27, 2019, August 22, 2019, October 17, 2019, January 9, 2020, and February 17, 2020, and that the parent never brought up basketball accommodations at any of these meetings. Nevertheless, the parent's appeal says the district denied the parent an opportunity to

make a request for basketball accommodations or to participate in the development of the student's IEP.

In her appeal (page 4), the parent refers to requests she made for accommodations in gym class during IEP meetings held in August and October to revise the student's BIP. Those requests regarding gym class during BIP discussions do not appear to have any relevance to the investigator's finding that the parent never requested accommodations for basketball tryouts or any other extracurricular activity to be added to the IEP.

On page 5 of the parent's appeal, she is asserting that Mr. C (assistant principal) should have brought up basketball accommodations in an IEP meeting prior to deciding on the accommodations that would be provided during try-outs. The parent appears to be arguing that the onus is not on her as the parent to request the IEP accommodation, but it is entirely on Mr. C to anticipate that need. That argument is inconsistent with the collaborative nature of IEP teams, which include both school personnel and parents. While it is correct that IEP teams have a duty to consider the suspected needs of a child with a disability, in this case no member of the student's IEP team had previously indicated a suspicion that this student needed additional supports to participate in extra-curricular activities. More importantly to this precise issue, there is no evidence to show that Mr. C, the basketball coaches, or any other school staff member predetermined any accommodations to be included in the IEP. On page 6 of the appeal, the parent states, "For me to be told that this USD No. ___ would waive the academics and deny all my request, were their determinations of what [the student] should have in his IEP and not mine." However, there is no evidence to show that the district determined that any accommodations for basketball try outs would, or would not, be added to the IEP.

The accommodations that were provided to the student at the try-outs were intended to be 504 accommodations. As the investigator stated on page 10 in the complaint report, "there is nothing in the IDEA that prohibits school districts from providing more accommodations than are required by a student's IEP."

For the reasons stated above and based on the documentation referenced above, the findings and conclusions of the complaint report should be, and are, upheld on issue two.

ISSUE THREE: The USD # ___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with prior written notice (PWN) refusing to include sports accommodations in the student's IEP during the 2019-20 school year.

The complaint investigator concluded that the district did respond to the parent's request for an IEP meeting to discuss basketball accommodations. At least two IEP meetings were held after the student failed to make the basketball team, one on January 9 and another on February 17, where the parent had an opportunity to make a request for accommodations, but the parent never made a request for accommodations regarding participation in extracurricular activities and the team did not discuss the issue. IEP notes were taken but there is no documentation in those notes that the parent requested accommodations related to extracurricular activities and, accordingly, there was no requirement to provide a PWN refusing a non-existent request.

In short, PWN is required whenever the IEP team refuses a parents proposal regarding identification, evaluation, placement, and the provision of FAPE. But, the evidence shows IEP meetings occurred on December 20, 2018, March 27, 2019, August 22, 2019, October 17, 2019, January 9, 2020, and February 17, 2020, and that the parent never brought up basketball accommodations at any of these meetings. The district's position is that It can hardly be said the district failed to provide a PWN denying a request that was never made at any of these meetings (or outside these meetings).

The parent alleges that school staff members, specifically Mr. C, said the school had provided reasonable accommodations and Dr. H told the parent they disagreed with the parent. The context for these discussions is that the parent went directly to Mr. C and to Dr. H, by e-mail, to discuss the issue of reasonable accommodations. At that point there had been no request for an IEP meeting and no request to add any accommodations related to extracurricular activities to the IEP. Mr. C and Dr. H were simply responding to the parent's inquiries made directly to them. Nothing in these conversations even suggests that the parent was asking the IEP team to address this issue or that the district was denying the parent an opportunity to bring these issues up at the IEP meeting scheduled for December 5.

The parent made requests for accommodations at basketball tryouts in emails to district administration; these emails were in evidence submitted by the district in response to the appeal labeled "Request 7b." However, the parent appeared to be making those requests based on the Americans with Disabilities Act (ADA) or Section

504 of the Rehabilitation Act (504). In a November 21 email at 10:56 a.m., the parent writes in part, "Please let me know why he didn't make the team. I will go to the highest authority, beyond the school to ensure he has equal rights to participate in sports." In another November 21 email at 4:40 p.m., the parent stated, "I would like to know why they are not allowing a disabled child to play? His disability impacts him interacting within a group and impacts his skills. However, I thought [the student] was protected under ADA? Please let me know what I need to do for disability reconsideration." There is no evidence to show the parent ever asked for basketball tryout accommodations to be added to the IEP, and the district staff cannot be expected to assume that the parent was proposing a change to the IEP when such a statement was never made..

The parent included an email dated November 26, 4:46 p.m., on page 8 of her appeal where the parent says in part "IDEA allows him the opportunity to participate with his peers and if his disability, hinders that participation then he should be accommodated for it." However, this email was a communication between Dr. H and the parent about scheduling a resolution meeting to discuss a due process notice that the parent had filed around the same time the first complaint concerning basketball tryouts was filed. The parent's email was in response to an email from Dr. H, dated November 26, 4:41 p.m., with the subject line "Resolution Meeting." In that email, Dr. H asked, "What would you need to see in a resolution to address the issue?" This email exchange about the due process resolution was an attempt between the parties to negotiate a settlement to a due process claim, and is irrelevant to the appeal of Issue Three in this formal complaint.

It does not appear by the language of the relevant emails that the parent was requesting IEP accommodations or proposing changes to the provision of a FAPE (changes to the IEP).

It also does not appear by the language in the relevant emails that the school was proposing to initiate or change the provision of a FAPE when it provided accommodations to the student at basketball tryouts. It appears that the accommodations they provided were intended to be 504 accommodations. Since the school neither made a proposal nor refused a proposal to change the provision of a FAPE to the student, there was no requirement to provide the parent with a PWN.

Based on the documentation referenced above and the reasons stated above, the complaint report should be, and is, sustained on Issue Three.

ISSUE FOUR: The USD # ___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's IEP, specifically by not providing positive feedback by offering support when he didn't make the basketball team in November 2019.

The investigator noted that the pertinent part of the behavior intervention plan (BIP) in the IEP was titled "Emergency Plan: What is our plan when the behavior gets out of control?"

The investigator said that the following statement was included in that section "Staff will provide supportive feedback that does not consist of threats of consequences or inflammatory statements." The investigator concluded that there was no failure with regard to this portion of the IEP for two reasons: (1) there was no emergency situation; and (2) the staff provided supportive feedback related to the outcome of the basketball tryouts.

In her appeal, the parent disputes the testimony of school officials that they provided supportive feedback to the student. However, even if that is correct, that is not enough to show a failure to implement this provision in the BIP because there is no evidence showing that when staff members met with the student on November 21 there was any emergency situation or that the student's behavior was out of control. The Appeal Committee finds that, absent an emergency situation where the student's behavior is out of control, this portion of the BIP has no application.

Based on the documentation referenced above and the reasons stated above, the complaint report should be, and is, sustained on Issue Four.

ISSUE FIVE: The USD # ___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to consider the student's interest in playing basketball, failed to include structured workouts, and failed to consider the impact of the student's disability on his participation in the physical education class when reviewing the IEP during the 2019-20 school year.

The investigator found that both interviews and IEP meeting notes from both the parent and the school district documented that the student's IEP team did consider the student's interest in playing basketball, in having structured workouts, and the impact of the student's disability on his participation in physical education when

reviewing the IEP on August 22, 2019, October 17, 2019, January 9, 2020, and February 17, 2020. The student's interests and the impact of the student's disability are discussed in the IEP sections regarding strengths and weaknesses, the transition plan, and the BIP.

The parent's appeal does not appear to contest these findings, but, rather, focuses on an alleged failure of the district to provide necessary accommodations for the student's participation in extracurricular activities in violation of 34 C.F.R. 300.107. To the extent the parent's appeal refers to any obligation of the district under 34 C.F.R. 300.107, the Appeal Committee has no jurisdiction to rule because that issue was the subject of a complaint and appeal in a previous formal complaint (20FC___-001). In the final appeal of that complaint, the Appeal Committee concluded:

> The evidence presented convinces the Appeal Committee that even the student's parent did not indicate to anyone that there was a need for an accommodation of any kind in order for the student to have an equal opportunity to participate in the basketball program until, on November 21, the parent contacted school officials to inquire why the student did not make the basketball team. At that point, the school officials had already taken steps to provide the student with accommodations by waiving its academic eligibility requirements and by allowing the student an additional tryout session. The Appeal Committee finds these steps meet the substantive requirements of 34 C.F.R. 300.107. Therefore, the Appeal Committee concludes that there is sufficient evidence to support the findings and conclusions of the investigator. The Complaint Report is sustained.

In this appeal, it appears that the parent is not addressing the findings and conclusions of Issue 5; rather, it appears she is attempting to readdress the findings and conclusions of 20FC___-001 and the corresponding appeal decision. The decision in 20FC___-001, and the corresponding appeal decision, are final and cannot be addressed by the Appeal Committee.

The documentation (IEP meeting notes and the IEP) shows that the investigator had sufficient evidence to find that the district did consider and discuss the parent's input regarding the student's interest in playing basketball, including structured workouts in the IEP, and the student's participation in PE.

Based on the documentation referenced above and the reasons stated above, the complaint report should be, and is, sustained on Issue Five.

## CONCLUSION

The Appeal Committee concludes that there is sufficient evidence to support the findings and conclusions of the investigator in each of the five issues appealed. The Complaint Report is sustained in its entirety.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 3rd day of April, 2020.

APPEAL COMMITTEE:

_____
Laura Jurgensen

_____
Brian Dempsey

_____
Tiffany Hester

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ ___ SCHOOL DISTRICT #___
ON FEBRUARY 20, 2020

DATE OF REPORT: MARCH 13, 2020

This report is in response to a complaint filed with our office by _____ _____ on behalf of his granddaughter, _____ _____. Mr. _____ was appointed the unpaid relative foster parent for _____ following the death of her mother, Mr. _____'s daughter. _____ will be referred to as "the student" in the remainder of this report. Mr. _____ will be referred to as "the complainant."

The student is under state custody. Case worker ____ _____ of KVC has been designated as the guardian for the student. For the remainder of this report, Ms. _____ will be referred to as "the guardian."

The legal rights of the student's father, _____ _____, Jr., have not been severed. For reasons explained below, he is the designated educational decision-maker for the student. For the remainder of this report, Mr. _____ 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 February 18 and 26, 2020. On February 19, 21, and 24, 2020, the investigator spoke with _____ _____, Special Programs Manager for the _____ School of Kansas, the virtual school in which the student is enrolled.

The investigator spoke by telephone with the complainant on February 18, 2020. On February 24, 2020, the investigator spoke by telephone with the guardian. The investigator spoke by telephone with the parent on February 25 and March 3, 2020.
In completing this investigation, the complaint investigator reviewed the following material:

- Letter dated November 13, 2019 from Children's Mercy Division of Child Neurology to whom it may concern
- Email dated November 20, 2019 from the complainant to the academic administrator for _____ School
- Email dated November 25, 2019 from the complainant to the academic administrator for _____ School
- Email dated December 3, 2019 from the parent to the academic administrator for _____ School
- Email dated December 12, 2019 from the parent to the head of the school
- Email dated January 13, 2020 from the parent to the special programs coordinator
- Email dated January 14, 2020 from the academic administrator for _____ School to the parent
- Email dated January 21, 2020 from the special programs manager to the complainant
- Authorization to Release Information dated January 22, 2020
- Authorization to Release Information dated January 24, 2020
- Email exchange dated January 27, 2020 between the guardian and the head of the school
- Email exchange dated January 29, 2020 between the guardian and the head of the school
- Email dated February 4, 2020 from the school psychologist contracted by the school to the complainant
- Email dated February 9, 2020 from the school psychologist to the complainant
- Email dated February 11, 2020 from the complainant to the school psychologist
- Letter dated February 18, 2020 from Minds Matter to whom it may concern
- 2019-20 school year calendar for _____ School

## Background Information

This investigation involves a seventeen-year-old girl who has, since the beginning of the 2019-20 school year, been enrolled in the _____ School of Kansas, an online program administered by USD #___ _____ ___ serving students in grades 7-12.

The student currently resides in the home of the complainant. The complainant held durable power of attorney for his daughter (the student's mother) until her death in the summer of 2018.

The student and her father had, for a period of time, participated in family therapy, but those sessions have been discontinued. The student has indicated that she does not want any contact with the parent, and the parent has decided to accept the student's decision. However, parental rights have not been severed, and the parent continues to exercise his right to make education and medical decisions on behalf of the student.

In January of 2018, the student was assaulted while at school and suffered a traumatic brain injury. The student has attempted suicide on several occasions and spent much of the 2018-19 school year in a residential psychiatric facility.

By report of the complainant, the student is seen by a psychotherapist on a weekly basis and participates in additional mental health therapy sessions three times each week. She participates in twice weekly cognitive behavioral therapy.

On November 13, 2019, a representative from the Division of Child Neurology of Children's Mercy Hospital wrote a letter stating that the student had been "seen in the Neurology Clinic for management of headaches and cognitive changes since an anoxic event resulting in a very mild traumatic brain injury. Since this event [the student] has been struggling with reading and focusing. She also experiences fatigue from prolonged focusing. These symptoms may make it difficult for her to keep up with the expectations in mainstream education." The writer stated that consideration should be given to evaluating the student for an individualized education plan (IEP) because accommodations such as modifications to homework or extended time to take tests or complete work could help the student to be more successful in school.

On February 18, 2020, the rehabilitation director of the agency providing cognitive therapy to the student wrote a general letter to whom it may concern regarding the services being provided to the student. According to the letter, the student began receiving cognitive therapy in October 2019. Observations by the agency as well as the completion of the BRIEF (Behavior Rating Inventory of Executive Function) assessment had identified the following problem areas:

- Adjusting to changes in routine or task demands;
- sustaining working memory;
- initiation and follow through with tasks requiring sustained attention, concentration, and focus;
- modulating emotions;
- problem solving; and
- difficulty with completing task-oriented output.

The letter went on to say that the student requires extra time and verbal cueing to stay on task when working on activities requiring cognitive attention as well as environmental modifications to include

- additional structure in the environment;
- limited visual and auditory distractions;
- redirection;
- visual and verbal reminders; and
- external prompting to shift attention/focus.

Strategies that may benefit the student include

- verbal support to initiate a task;
- repeating information/instructions;
- breaking down complex tasks into smaller parts with a timeline for completion;
- provision of a checklist of materials needed on a daily basis prior to beginning a task;
- consistency from support staff including teachers and therapists;
- a behavior program to include controlling stimuli that lead to impulsivity rather than one that focuses on consequences following an impulsive reaction; and
- ongoing adjustment opportunities to address new situations or challenges.

The agency recommended that the student be granted the request for an IEP and any other needed support for success with online schooling.

The student failed both of the _____ School courses in which she was enrolled during the first semester of the 2019-20 school year. During the second semester, the student has not consistently met the required participation goal of 30 hours per week.

## Issue

The complainant presented the following concern:

> There was an unnecessary delay in the processing of his request for an IEP for the student.

## Complainant's Position

The complainant has told the school psychologist employed to conduct the initial evaluation of the student that she must read the student's medical records including her mental health history before he would give his written consent for the evaluation. The complainant asserts that the school failed to obtain the student's medical records in a timely manner, and, as a result, the evaluation of the student has been unnecessarily delayed.

## Applicable Statutes and Regulations

### Filing a Formal Complaint

Any individual or organization may file a formal complaint if they believe that a school district is not complying with federal or state statutes or regulations relating to special education (K.A.R. 91-40-51(a); 34 C.F.R. 300.153(a),(b)).

### Educational Decision Maker

School personnel must determine the appropriate person(s) to make educational decisions on behalf of a child with a disability. Those individuals have a right to receive notice, participate in IDEA eligibility determination, participate in IEP meetings and placement decisions, and give or revoke consent. Under the Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act, "parent" is defined as

- a natural (biological) parent;
- an adoptive parent;
- a person acting as a parent;
- a legal guardian;
- an officially appointed education advocate; or
- a foster parent, if the foster parent has been appointed the education advocate of an exceptional child (K.S.A. 72-3404(m); 34 C.F.R.

300.30(a)).

"Person acting as a parent" means a person such as a grandparent, stepparent or other relative with whom the child lives, or a person other than the parent who is legally responsible for the welfare of a child (K.S.A. 72-3404(n); 34 C.F.R. 300.30(a)(4)).

If there is more than one party qualified to act as a parent, and the biological or adoptive parents attempt to act as the parent, the biological or adoptive parents must be presumed to be the parents and legal educational decision makers, unless the biological or adoptive parents do not have legal authority to make educational decisions for the child (34 C.F.R. 300.30(b)(1); K.A.R. 91-40-27(c)). The Office of Special Education Programs (OSEP), the office in the United States Department of Education that writes and enforces the federal regulations implementing the IDEA, has interpreted this requirement to mean:

> The biological or adoptive parent would be presumed to be the parent under these regulations, unless a question was raised about their legal authority. There is nothing in the Act [IDEA] that requires the biological or adoptive parent to affirmatively assert their rights to be presumed to be the parent.... Section 300.30(b) was added to assist schools and public agencies in determining the appropriate person to serve as the parent under Part B of the Act [IDEA] in those difficult situations in which more than one individual is "attempting to act as a parent" and make educational decisions for a child. It recognizes the priority of the biological or adoptive parent and the authority of the courts to make decision, and does not leave these decisions to school administrators.... An individual may "attempt to act as a parent" under the Act in may situations; for example, if an individual provides consent for an evaluation or a reevaluation, or attends an IEP Team meeting as the child's parent. (Federal Register, Vol. 71, August 14, 2006, pp. 46566, 46567).

<u>Referral for Initial Special Education Evaluation</u>

A school district may refer a child for an initial special education evaluation if one of the following conditions is met:

- School personnel have data-based documentation indicating that general education interventions and strategies would be inadequate to address the areas of concern for the child; or

- School personnel have data-based documentation that general education interventions and repeated assessment of the student's progress indicate that an evaluation is appropriate; or
- The parent of the child (or adult student) requests an evaluation and the school district agrees that an evaluation is appropriate. (K.A.R. 91-40-7(c)(1)-(3)).

Prior Written Notice and Notice of Procedural Safeguards

Upon referral for an initial special education evaluation, regardless of the source, the first action the school must take is to provide the parent with a copy of the Parent Rights Notice (procedural safeguards available to them) (K.A.R. 91-40-26(d)(1); 34 C.F.R. 300.504(a)(1)).

One of the procedural safeguards afforded to parents is that the school district is required to provide the parent with prior written notice a reasonable time before the date the school proposes to initiate the evaluation of their child. Such notice must describe any evaluation procedures the school proposes to conduct. (34 C.F.R. 300.304(a), 300.503(a)(1)).

Timeline for response to a request for an evaluation

Districts must respond in a "reasonable time" to a parental request for evaluation (K.S.A. 72-3430(b)(2); 34 C.F.R. 300.503(a)). In a January 8, 2002 memo, posted at https://www.ksde.org/Default.aspx?tabid=614, the team leader for the Student Support Services Team (now the Special Education and Title Services team) at the Kansas State Department of Education, offered guidance as to what would be considered a "reasonable time" for a district to provide notice to parents regarding certain special education actions, stating that unless there is some unusual circumstance, 15 school days is a reasonable time for providing parents with a prior written notice of the proposal to conduct an evaluation or of refusal to conduct an evaluation.

Timeline for completion of a special education evaluation

In Kansas, a school district must complete a special education evaluation within 60 school days of the date the school district receives written parental consent for evaluation of the child (K.A.R. 91-40-8(f)). 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 or completion of the evaluation report if the child is not found eligible for special education services (K.A.R. 91-40-8(f)(1)-

(3)).

## Investigative Findings

The findings outlined below include actions taken by the complainant, the parent, and the guardian. For the purpose of clarity, references to the parent will be underlined and italicized.

In an email dated November 20, 2019 from the complainant to the academic administrator for the online school, the complainant stated that the student's therapist was "requesting [an] IEP…based on [emotional disturbances]." The complainant stated that the guardian was attempting to get the parent involved in the student's education "[based] on parental rights." According to the complainant's email, those rights were "limited" by the court," but the complainant did not provide any legal document to support this statement.

On November 26, 2019, the complainant sent another email to the academic administrator for the online school making a "formal request for an IEP" for the student "based on medical and mental health."

On December 3, 2019, *the parent* sent an email to the academic administrator for the online school asking what steps needed to be taken to secure an IEP for the student.

In an email to the academic administrator for the online school dated December 10, 2019, the complainant stated that the parent had "lost his [parental rights]" with regard to the student. The complainant did not provide the school with any judicial order confirming that the parent's rights had been severed nor any order to show that the complainant had been identified as the education decision-maker for the student.

*The parent* sent another email to the academic administrator for the online school on December 12, 2019 asking that she contact him or the student's guardian as soon as possible with regard to an IEP for the student.

On December 18, 2019, the special programs manager called the complainant to discuss his request for an IEP. By report of the special programs manager, the complainant told her that the student had never had an IEP but might have had a 504 plan, although he could not locate it.

The special programs manager placed another call to the complainant on December 20, 2019. The special programs manager told the complainant that in making his request for an IEP, he was actually requesting an evaluation to determine if the student would qualify for an IEP. According to the special programs manager, the complainant stated that he wanted to wait to consent to an evaluation until the student's medical records had been received by the school and a determination could be made as to what testing was needed.

On January 9, 2020, the special programs coordinator called the complainant. At the time of the telephone call, the school had not yet received any medical or mental health records from outside agencies. The special programs manager told the complainant that she would send him a release of records form to be used to request the student's medical records. The release of information form was sent to the complainant via email on January 10, 2020.

In an email to the academic administrator for the online school dated January 13, 2020, *the parent* stated that he had not yet received a telephone call or email from her regarding his request for an IEP for the student.

On January 14, 2020, the academic administrator for the online school sent an email to *the parent* stating that the school had been unaware until January 10, 2020 that the parent maintained educational rights in regard to the student. The academic administrator for the online school told the parent that she had forwarded his request for an IEP to the special programs coordinator who was pursuing an evaluation of the student.

Forms were sent on January 14, 2020 to both *the parent* and the complainant providing prior written notice of the school's proposal to evaluate the student and requesting both parties' consent.

*The parent* provided his written consent for the special education evaluation of the student on January 14, 2020.

The complainant and the special programs manager spoke again by telephone on January 17, 2020. At the time of the call, the school had not received a signed consent for evaluation from the complainant and had not yet received any medical records nor any signed releases of information allowing the school to speak with outside agencies. Release and evaluation consent forms were resent to the complainant on January 17, 2020.

On January 21, 2020, the special programs manager sent an email to the complainant stating that although he had signed and returned an evaluation consent form to the school, he had not checked a box that would indicate he gave consent for the action. The special programs manager also asked the complainant for completed release of information forms. The school received a completed form providing the complainant's signed written consent for evaluation on January 22, 2020.

The school psychologist, who was contracted by the school to conduct the evaluation of the student, sent an email to the complainant on February 4, 2020. The school psychologist provided a basic outline of the evaluation process and asked the complainant for suggestions regarding the best dates and times to conduct the evaluation.

The complainant sent an email to the school psychologist on February 7, 2020 stating that she "should review all of [the student's] mental health history" before starting the evaluation. The complainant wrote, "When you have completed this, we will schedule a [sic] appointment."

The school psychologist sent an email to the complainant on February 9, 2020 stating that she would "review the documents available and contact [the student's] therapists." The school psychologist also told the complainant that she wanted to speak with him by telephone to talk about how the testing sessions would be set up. The psychologist stated, "If you feel that testing right now could cause too many issues, we might consider doing this at a later date."

On February 11, 2020, the special programs manager sent an email to the guardian telling the guardian that she was in the process of sending releases of information for the student's medical records. According to the special programs manager, the complainant wanted the school psychologist contracted by the school to conduct the evaluation of the student to have reviewed all records before any testing was done.

The complainant sent an email to the school psychologist on February 11, 2020 stating that he was "allowing…sometime [sic] to review her mental health history…then I will call you."

In a telephone call with the investigator on February 25, 2020, *the parent* confirmed that he continued to be the educational and medical decision-maker for the student.

## Summary and Conclusions

### Educational Decision-Maker

The complainant is not barred from filing a complaint. Any individual or organization who believes that a school district is not complying with federal or state statutes or regulations relating to special education may file a formal complaint. However, the complainant is not the educational decision-maker for the student.

The student lives with the complainant who is designated as the student's unpaid relative foster parent. However, the rights of the parent – the student's biological father – have not been severed. The student's court-appointed legal guardian has confirmed that the parent maintains education and medical decision-making rights for the student. No evidence was presented to show that the parent has lost his parental rights, and he has chosen to assert them.

The district knew that the complainant was the foster parent for the student and accepted the complainant's November 20, 2019 email statement that the parent's legal rights with regard to the student were "limited." The district accepted the complainant's December 10, 2019 email statement that the parent had lost his parental rights and failed to take the necessary steps to determine the appropriate person to make educational decisions on behalf of the student. Educational decision-making power continued to be incorrectly assigned to the complainant even after the district became aware on January 10, 2020 that the parent maintained educational rights with regard to the student.

At the time this complaint was filed, the district was still assigning educational decision-making authority to the complainant. The district sought the complainant's consent for an evaluation of the student and asked the complainant for authorization for the release of medical and mental health records. The district allowed the complainant to delay the start of the special education evaluation for which the parent – the actual education decision-maker – had provided written consent.

Because the district failed to take appropriate steps to determine who had education decision-making authority for the student and failed to presume that the biological parent was the person with the parent rights under the IDEA, a violation of special education statutes and regulations is identified.

Referral for Initial Evaluation and Timeline for Response to a Request for an Evaluation

On November 20, 2019, the complainant had sent an email to the district asking for an IEP for the student. However, as the student's foster parent, the complainant did not have legal standing to make such a request. K.A.R. 91-40-7(c)(3) states that a school may refer a child for an evaluation if the parent of the child requests an evaluation and the school agrees that an evaluation of the child is appropriate. As established above, the parent in this case is the biological parent, not the complainant.

On December 3, 2019, the parent submitted an email request to the academic administrator for the online school regarding the steps to be taken to put an IEP in place for the student. The parent sent two additional emails to the academic administrator for the online school. The school did not respond to the parent's request until January 14, 2020, twenty school-days after the parent's initial request. Because the district did not respond in a reasonable time, within 15 school days, to the parent's request for special education action, a violation of special education statutes and regulations is substantiated.

Notice of Procedural Safeguards (Parent Rights)

The school sent the parent and the complainant prior written notice of the district's proposal to conduct an evaluation on January 14, 2020 and requested written consent for the evaluation. The district did not, however, also provide the parent with the required copy of the Parent Rights Notice. A violation of special education statutes and regulations is identified.

Timeline for Completion of a Special Education Initial Evaluation

On January 14, 2020, the parent provided written consent for the district to conduct a special education evaluation of the student. While the district has delayed completion of the evaluation due to its interactions with the complainant described above, the 60 school-day timeline for the evaluation remains in place and will not end until April 17, 2020. As of the date of this report, a violation of special education statutes and regulations is not substantiated on this issue.

Note Regarding Release of Information

This report contains personally identifiable information from education records of the student. 34 C.F.R. 300.622(a) requires parent consent before such information may be shared with parties who are not otherwise authorized to

access the information. On March 10, 2020, the parent gave written consent for this report to be shared with the complainant and with the guardian.

## Corrective Action

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

- K.A.R. 91-40-27(c) and 34 C.F.R. 300.30(b)(1), which require districts to determine the appropriate education decision-maker for a student and presume the biological or adoptive parent to be the education decision-maker unless that person does not have legal authority to make educational decisions for the child;
- K.A.R. 91-40-7(c)(3), which identifies who has standing to refer a student for special education services;
- K.A.R. 91-40-26(d)(1) and 34 C.F.R. 300.504(a)(1), which require districts to provide parents with information regarding parent rights upon initial referral or parent request for evaluation;
- K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a), which require districts to respond with prior written notice in a reasonable time to a parent's request for a special education action.

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

1. Submit to Special Education and Title Services (SETS), within 10 days of the date of this report, a written statement of assurance stating that it will comply with
    a. K.A.R. 91-40-27(c) and 34 C.F.R. 300.30(b)(1), by developing a practice for determining the appropriate education decision-maker for any student with an IEP;
    b. K.A.R. 91-40-7(c)(3), by ensuring that individuals or entities with appropriate standing are allowed to make referrals for special education action;
    c. K.A.R. 91-40-26(d)(1) and 34 C.F.R. 300.504(a)(1), by providing parents with information regarding parent rights upon initial referral or parent request for evaluation; and

d. K.S.A. 72-3430(b)(2) and 34 C.F.R. 300.503(a), by responding with prior written notice in a reasonable time to a parental request for special education action.

2. Submit to SETS, within 20 school days of the date of this report, a written plan showing

   a. how _____ School of Kansas staff will be trained in order to ensure understanding of all requirements outlined above under Corrective Action 1, and

   b. the procedure to be followed in determining the educational decision-maker for all students enrolled in the school who have IEPs.

3. Submit to SETS, no later than May 1, 2020, documentation showing that the _____ School of Kansas staff have received training on the topics referenced in Corrective Action 2a. and 2b. At a minimum, this documentation shall include a sign-in attendance sheet, a description of topics covered, and the name of the person providing the training.

4. Submit to SETS, within 10 calendar days of the date of this report, 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, Early Childhood, Special Education and Title Services, 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 Regulations 91-40-51 (f), outlined below.

_____

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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON FEBRUARY 25, 2020

DATE OF REPORT: MARCH 26, 2020

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

The complaint is against USD #___ (_____ Public Schools) who contracts with the _____ _____ Cooperative in Education (____) to provide special education services. In the remainder of this report, "USD #___" and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education (KSDE) on February 25, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on March 26, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on March 11, 2020 as part of the investigation process.

USD #___ had scheduled an interview to take place on March 16, 2020; however, due to school closure caused by the COVID-19 pandemic, the investigator provided questions were provided in writing to USD #___ staff on that date and USD #___ staff submitted a written response to the questions on March 23, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Notice of Meeting (NOM) dated September 24, 2019 scheduling an IEP team meeting for October 22, 2019
- Email written by the parents to ____ _____, Principal of _____ Elementary School, dated September 9, 2019
- Email written by the parents to Ms. _____ [principal] dated November 12, 2019
- Evaluation and Eligibility Report dated November 18, 2019
- Individualized Education Program (IEP) dated November 18, 2019
- IEP Goal Progress Report for second quarter dated in December 2019
- NOM dated February 27, 2020 scheduling an IEP team meeting for March 23, 2020
- Email written by _____ _____, School Psychologist, to the parent dated February 28, 2020
- Copies of raw data sheets dated August 26, 2019 through February 24, 2020
- Copies of behavioral Data Sheet Summaries dated August 26, 2019 through December 19, 2019
- Copies of behavioral Data Sheet Summaries dated January 7, 2020 through February 27, 2020
- Copies of Daily Communication Logs dated December 9, 2019 through February 24, 2020
- Parent Communication Log dated August 16, 2019 – February 27, 2020
- Attendance record for the Responder Training held on February 18, 2020
- Agenda for the Para Training held on March 3, 2020
- USD #___ Response to Allegations written by _____ _____, General Counsel for _____ [the Cooperative], dated March 10, 2020
- USD #___ Response to Investigator's Questions dated March 23, 2020

## Background Information

This investigation involves a 5-year-old female student who is currently enrolled in kindergarten at _____ Elementary School in USD #___ for the 2019-20 school year. The student was initially evaluated on November 18, 2019 and determined eligible for special education and related services due to the exceptionality of emotional disturbance. An initial Individualized Education Program (IEP) that included a Behavior Intervention Plan (BIP) was developed on November 18, 2019

## Issues

Based upon the written complaint, the parents raised three issues that were investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) by not providing breaks as required by the Behavior Intervention Plan (BIP) during the 2019-20 school year.

### Parent Position

The parents reported the student's IEP developed on November 18, 2019 includes a BIP and an IEP goal to address inappropriate behavior.

The IEP goal states,

> When student is in the instructional setting and feeling frustrated or angry about a person or situation, she will ask for a break from the setting or she will go to the safe spot/peace zone in the classroom until she feels that she is ready to return to instruction with classroom peers. This will lead to a decrease in physical aggression to an average of 0 times a day in the previous four weeks.

The BIP allows the student to take the breaks outside of the classroom whenever staff see that she is becoming dysregulated or when the student requests to take a break. The BIP describes the activities in which the student can choose to participate when taking a break. The parents indicated that these breaks are to be provided unconditionally whenever the student requests one and provided as a proactive measure to keep her emotions regulated.

The parents believe that the student's requests for a break are often not honored by school staff, which then triggers the student's inappropriate behaviors at school. The parents indicated that when the student's request for a break is not honored, the student will often communicate her request for a break through inappropriate behavior such as hitting or pinching others.

The parents specifically described an incident that occurred on February 11, 2020 when the student requested a break and the staff did not honor that request as required by the BIP. The Daily Communication Log for February 11, 2020 states, "Student wanted a break, Mrs. J encouraged her to stay in class after just having been on a break." The log states that following the refusal of the break, the student's behavior escalated which resulted in the student hitting Mrs. J.

School District Position

USD #___ reported that the student's November 18, 2019 IEP includes a BIP which states,

> Breaks out of the classroom are provided when the student requests them and when staff notices [*sic*] that she is becoming dysregulated. The student chooses the type of break that she feels will help her at the moment. Breaks can be walks around the school, time in the sensory room, visiting a preferred adult, time outside, or time in the special education classroom. Scheduled breaks will be offered after morning recess and after lunch.

USD #___ noted that the Daily Communication Log includes the student's daily schedule with anecdotal notes about breaks provided to the student

throughout the school day. After an internal review of these logs, USD #___ noted two instances where the student was not provided a break upon request. These occurred on February 4, 2020 and on February 11, 2020.

The Daily Communication Log for February 4, 2020 states,

> After music and at the start of library, the student requested a break. Specifically a sensory break. I asked her if she was sure because in library they are reading a [illegible writing] book . . . but she insisted and a break is what she needed so we took 5 minutes in the sensory room.

The Daily Communication Log for February 11, 2020 also shows the student was not provided a break upon request but was instead encouraged to persist in the classroom activity because she had just been given a break. The district noted that when the student insisted upon a break, one was given. USD #___ further explained,

> The para asked the student if she would persevere in the classroom because she had just had a break. The student immediately insisted upon receiving the break and was allowed to take the break. There was a delay of only a few seconds.

USD #___ stated, "No other instances were noted, and the student clearly has received more than the minimum scheduled number of breaks on each of the days."

The district noted that when this issue was brought to the principal's attention, staff members were re-trained regarding the need to provide breaks whenever the student requested them. The district stated,

> Nonetheless, there was training specific to the issue on February 18, 2020 . . . Although there was not a PowerPoint for the training, the district did maintain a list of employees who attended the training . . . The principal and the special education teacher were the presenters. They reviewed the BIP and discussed what the breaks should look like.

Applicable Regulations, Findings, and Conclusions

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, the November 18, 2019 IEP includes a BIP that required the student be provided breaks out of the classroom whenever the student requested them. Interviews and documentation found two instances when the student was not provided a break as required by the student's IEP and BIP.

The first instance occurred on February 4, 2020 when staff questioned the student's request for taking a break and encouraged her to persist in the classroom activity. When the break was not provided, the student used her words to insist on taking a break and the break was then provided.

The second instance occurred on February 11, 2020 when the student requested a break and, again, was encouraged to persist in the classroom activity by school staff. When the requested break was not provided, the student became aggressive and hit the staff member.

USD #___ contends that the break on February 11, 2020 was not denied but only delayed. However, documentation and interviews show this delay resulted in triggering the exact behavior the BIP was designed to address.

Documentation shows USD #___ was aware of the issue of not providing breaks upon the student's request. The district provided training on two subsequent occasions to staff regarding the requirement to provide the student breaks whenever requested as required by the IEP and BIP. The first occurred on February 18, 2020. The second occurred during a paraprofessional training on March 3, 2020 where the agenda includes a review of IEP plan and procedures and states, "Breaks – even if she just came back from a break she can take another if she asks."

Based on the foregoing, a violation of special education statutes and regulations for failing to implement the student's IEP by not providing breaks as required by the BIP during the 2019-20 school year is substantiated.

> ISSUE TWO: The USD #___ in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with access to the student's educational records in a timely manner during the 2019-20 school year, specifically by not providing the raw data collected on a daily basis prior to the November 2019 IEP team meeting.

Parent Position

The parents believe their access to the student's educational record was restricted during the 2019-20 school year. They reported requesting full access to the student's educational records including the raw data being collected on a daily basis regarding the student's behavior in the classroom prior to the November 18, 2019 IEP team meeting.

Documentation shows the parents sent an email to ____ _____, Principal at _____ Elementary School, on September 9, 2019 requesting "all data being collected on the student." The parent also emailed Ms. _____ [principal] on November 12, 2019 stating,

> Before the meeting next week please provide us with a copy of the data and reports that have been put together by the team and specialist which [sic] we have not seen yet . . . If any other data has been collected or reports put together on the student we would like to see those as well so we can be prepared to work as a group to give the student the best supports possible.

The parents acknowledged receiving summaries of the behavioral data but not the raw data. They reported that USD #___ finally provided the requested raw data at the end of February 2020.

## School District Position

USD #___ believe they have provided the parent with full access to the data collected regarding the student's behavior weekly Data Summary Sheets. These have been provided to the parents since the beginning of September. The district reported that the weekly Data Summary Sheets were a visual representation based on the raw data collected in the classroom and provided the parent and school staff with a more useable and understandable reporting of the data to be used in decision making.

USD #___ reported the parent did not request copies of the raw data until after a mental health wrap around meeting held in February. The district reported that copies of the raw data sheets going back to August 26, 2019 were mailed to the parents on February 21, 2020.

## Applicable Regulations, Findings, and Conclusions

Federal regulations, at 34 C.F.R. 300.501(a) and 300.613(a), require public agencies to provide the parents of a student with a disability an opportunity to inspect and review all education records that are collected and maintained or used by the agency with respect to the identification, evaluation, and educational placement of the student, and the provision of a free appropriate public education. The agency must comply with a parent request to inspect and review education records without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, or resolution session, and in no case more than 45 days after the request has been made.

Federal regulations, at 34 C.F.R. 300.611(b), define education records as the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act (FERPA). FERPA defines education records as those records that contain information directly related to a student and that are maintained by an education agency or institution. (34 C.F.R. 99.3)

In this case, USD #___ collected behavioral data that informed decisions made at the November 18, 2019 IEP team meeting related to the identification of a disability and the provision of FAPE to the student. Interviews and documentation show the district provided the parents with access to the behavioral data through the weekly Data Summary Sheets both prior to and following the November 18, 2019 IEP team meeting. The weekly Data Summary Sheets were a visual representation of the raw data that USD #___ believed was more easily understood and useable by the parent and the other IEP team members. Documentation shows the raw data used to create the weekly Data Summary Sheets was kept and maintained by the district but was not provided to the parents until February 21, 2020, more than three months following the student's eligibility determination and IEP team meeting held on November 18, 2019.

Based on the foregoing, a violation of special education statutes and regulations that allow parents an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student, and the provision of a free appropriate public education is found.

> ISSUE THREE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to invite the student's paraprofessional to the IEP team meeting during the 2019-20 school year.

Parent Position

The parents reported the student has a paraprofessional who supports her throughout the majority of the school day and the parents believe the paraprofessional would have valuable information to share at an IEP team meeting. The parents indicated they requested the student's paraprofessional be present at the next IEP team meeting but the district refused and did not invite the paraprofessional to the IEP team meeting scheduled for March 23, 2020.

## School District Position

USD #___ indicated the parents made a request on February 7, 2020 that the paraprofessional attend the next IEP team meeting. The district noted that paraprofessionals are not required members of the IEP team and reported that the district elected not to invite the paraprofessional to the student's IEP team meeting scheduled for March 23, 2020. USD #___ stated, "Para educators [paraprofessionals] are not qualified to discuss the necessary specially designed instruction or curriculum. Such matters are determined by the licensed teacher and the general education teacher. Thus, para educators typically do not attend IEP team meetings. They are needed in the classroom to work directly with students."

## Applicable Regulations, Findings, and Conclusions

Federal regulations, at 34 C.F.R. 300.321(a), require public agencies to ensure that the IEP team for each student with a disability includes the parents of the student, at least one general education teacher of the student and at least one special education teacher or special education provider of the student. The IEP team must also include a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction, who is knowledgeable about the general education curriculum, and who is knowledgeable about the availability of district resources (this is usually an administrator) as well as an individual who can interpret the instructional implications of evaluation results. In addition, the parent or public agency can, but are not required to, invite any other individual they believe has knowledge or special expertise in regards to the student.

In this case, the issue relates to the paraprofessional being invited to the IEP team meeting. Documentation and interviews found that the parent requested the district invite the student's paraprofessional to the next IEP team meeting. However, because paraprofessionals are not required members of the IEP team and USD #___ did not believe the paraprofessional had knowledge or special expertise in regards to the student that should be shared with the IEP team, USD #___ elected not to invite the paraprofessional to the March 23, 2019 IEP

team meeting. Based on the foregoing, a violation of special education statutes and regulations for failing to invite the student's paraprofessional to the IEP team meeting during the 2019-20 school year is not substantiated.

It is noted that the IDEA allows the parents to invite any individual that they believe has knowledge or special expertise in regards to the student to an IEP team meeting. While the district chose not to invite the paraprofessional to the meeting, there is nothing to prevent the parents from inviting the paraprofessional to attend the student's IEP team meeting themselves.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. A violation has occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   In this case, interviews and documentation found USD #___ failed to implement the student's IEP and BIP on February 4, 2020 and again on February 11, 2020. The November 18, 2019 IEP and BIP require that the student be allowed to take a break whenever she requests one. In both instances, staff did not provide the break when requested by the student and instead encouraged the student to persist in the classroom activities. In one instance, this failure to implement the IEP and BIP resulted in triggering the student to display aggressive behavior, the very behavior the IEP and BIP were designed to address.

B. Federal regulations, at 34 C.F.R. 300.501(a) and 300.613(a), require public agencies to provide the parents of a student with a disability an opportunity to inspect and review all education records that are collected, maintained, or used by the agency with respect to the

identification, evaluation, and educational placement of the student, and the provision of a free appropriate public education. The agency must comply with a parent request to inspect and review education records without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, or resolution session, and in no case more than 45 days after the request has been made.

In this case, interviews and documentation found the parents requested copies of all data collected in regards to the student in emails dated September 9, 2019 and November 12, 2019. However, USD #___ did not provide the parent with access to all education records prior to the November 18, 2019 IEP team meeting. Documentation shows the raw data used to create the weekly Data Summary Sheets was maintained in the student's file and is a part of the student's educational records. While USD #___ did provide the parent access to behavioral data collected through the ongoing provision of daily Communication Logs and weekly Data Summary Sheets, the parents were not provided with the raw data used to create the weekly Data Summary Sheets until February 21, 2020.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a. Comply with federal regulations, at 34 C.F.R. 34 C.F.R. 300.323(c)(2) which requires school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

    b. Comply with federal regulations, at 34 C.F.R. 300.501(a) and 300.613(a), which requires public agencies to provide the parents of a student with a disability an opportunity to inspect and review all education records that are collected, maintained, or used by the

agency with respect to the identification, evaluation, and educational placement of the student, and the provision of a free appropriate public education. The agency must comply with a parent request to inspect and review education records without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, or resolution session, and in no case more than 45 days after the request has been made.

2. No later than September 1, 2020, USD #___ will provide training to the student's IEP team regarding the requirement that special education must be provided in accordance with the IEP. No later than August 1, 2020, USD #___ will contact TASN to request a TASN provider to conduct the training, and USD #___ will provide documentation of this request to SETS. No later September 15, 2020, USD #___ will provide documentation of the date and content of the training as well as who attended the training to SETS.

3. No later than May 15, 2020, USD #___ will provide all of the administrators, special education teachers, and related services providers at _____ Elementary School with a review of what constitutes an educational record and the required timeframe for responding to a parent's request to inspect and review educational records. Because schools are closed due to the COVID-19 outbreak, this review can be in the form of an inservice training or online training. USD #___ shall provide documentation of this training to SETS no later than May 20, 2020. Documentation shall include the name of the person who provided the review, a description of how the review was provided, the content of the review, and either a signature sheet or some other type of documentation showing that each person completed the review.

4. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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(f). While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON MARCH 3, 2020

DATE OF REPORT: MARCH 18, 2020

This report is in response to a complaint filed with our office by ___ and _____ _____, parents, on behalf of their son, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student" and ___ and _____ _____ will be referred to as "the parents" or the "Father" and "Mother" respectively.

The complaint is against USD #___ ____ _____ Public Schools. In the remainder of this report, USD #___ may also be referred to as the "district" or "agency."

The complaint was received by the Kansas State Department of Education on March 3, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ends on April 2, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the Father by telephone on March 9, 2020 and March 17, 2020 as part of the investigation process. In addition, the Mother was interviewed by telephone on March 10, 2020.

___ _____, Superintendent and Director of Special Education at USD #___, was interviewed by telephone on March 11, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #___:

- Formal Complaint Request Form dated February 26, 2020 and signed by the Father
- Discipline Log Entry for an incident occurring on January 23, 2019

## Background Information

This investigation involves a male student who was enrolled at ____ _____ High School in USD #___ during the 2018-19 school year; however, the student has been enrolled at _____ ____ _____ High School in USD #___ for the 2019-20 school year. The student is eligible for special education due to an exceptionality of learning disabled. He had an Individualized Education Program (IEP) that contained a Behavior Intervention Plan (BIP) in effect during the 2018-19 school year.

## Issues

Based upon the written complaint, the complainant raised one issue that was investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Behavior Intervention Plan (BIP) during the past 12 months.

### Parent Position

The parents believe USD #___ failed to implement the student's BIP resulting in exacerbating a disciplinary incident during the 2018-19 school year. The Mother reported that she was in a disciplinary conference with the student and _____ ____, Assistant Principal at ____ _____ High School. The student refused to serve an in-school suspension (ISS) and Ms. ____ assigned the student three days of out-of-school suspension (OSS). The Mother indicated she had visited with the student and he had accepted the additional punishment but was disengaged (silent with his head down). Ms. ____ then asked the student if he understood the consequences of his actions and the student gave her thumbs up but refused to speak. Ms. ____ then confronted the student for not being

cooperative and answering her question verbally. The parents believe this antagonistic behavior triggered the student to become aggressive and have a "full melt down". The Mother reported the student did serve the three days of OSS on a Wednesday, Thursday, and Friday. However, she indicated the student was not allowed to attend a school dance held on Saturday because Ms. ____ did not consider the OSS complete until the student returned to school the following Monday. The Mother was not sure of the exact date this incident occurred.

## School District Position

Mr. _____ reported and documentation showed the student was assigned three days of OSS for refusing to serve an ISS on January 23, 2019.

## Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.153(c) require that a special education state complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received by the state.

In this case, the parents filed a state complaint on March 3, 2020 alleging USD #___ failed to implement the student's BIP. Interviews and documentation found the basis of the allegation was an incident that occurred on January 23, 2019, which is more than one year from the date the state complaint was filed. Based on the foregoing, no findings will be made in regards to the allegation.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal with the State Commissioner of Education, ATTN: Special Education and Title Services, Landon State Office Building, 900 SW Jackson Street, Suite 620, Topeka, Kansas 66612-1212. That notice of appeal must be delivered to Special Education and Title Services, designee of the State Commissioner of Education within 10 calendar days from the date of this report. For further

description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

_____

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
_____ PUBLIC SCHOOLS, USD #___
ON MARCH 5, 2020

DATE OF REPORT: APRIL 2, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____ _____, Executive Director of Special Education for _____ Public Schools on March 16 and 26, 2020. The investigator spoke by telephone with the parent on March 27, 2020.

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

- Permission to Provide Services dated October 14, 2019
- Permission to Transport dated October 14, 2019
- Permission to Exchange Information dated October 14, 2019
- Speech-Language Screening and Consultation Request dated October 15, 2019
- Email exchange dated October 16, 2019 between the parent and the classroom teacher
- Email exchange dated October 21, 2019 between the parent and the classroom teacher
- Email exchange dated October 25, 2019 between the parent and the classroom teacher
- Email exchange dated October 26, 2019 between the parent and the classroom teacher
- Student Intervention Team Request for Assistance – Initial Referral Form dated October 29, 2019
- Student Intervention Team Plan dated October 29, 2019
- Email dated October 29, 2019 from the classroom teacher to the parent

- Email exchange dated October 30, 2019 between the classroom teacher and the parent
- Speech Intervention Consent Form dated October 30, 2019
- Email exchange dated October 31, 2019 between the parent and the classroom teacher
- Email exchange dated November 11, 2019 between the parent and the classroom teacher
- Email exchange dated November 14, 2019 between the parent and the classroom teacher
- Email dated November 14, 2019 from the classroom teacher to SIT members
- Email exchange dated November 15, 2019 between the parent and the classroom teacher
- Email exchange dated January 24, 2020 between the parent and the classroom teacher
- Email dated January 25, 2020 from the parent to the building principal
- Email dated January 26, 2020 from the parent to the building principal, the superintendent, the director of special education, assistant superintendent, and the executive director of teaching and learning
- Email dated January 26, 2020 from the principal to the parent
- Email dated January 28, 2020 from the assistant superintendent to the parent
- Email dated January 28, 2020 from the principal to the parent
- Email dated January 28, 2020 from the parent to the principal
- Email dated January 29, 2020 from the parent to the assistant superintendent
- Emails dated January 31, 2020 from the parent to the principal and assistant superintendent
- Email dated January 31, 2020 from the principal to the parent
- Email dated February 2, 2020 from the principal to the parent
- Email dated February 3, 2020 from the principal to the parent
- Student Social Behavioral Questionnaire dated February 5, 2020
- Intervention Progress Update dated February 11, 2020
- Email dated February 17, 2020 from the parent to the speech and language pathologist
- Email dated February 19, 2020 from the speech and language pathologist to the parent
- Email dated February 18, 2020 from the parent to the music teacher
- Email dated February 26, 2020 from the parent to the superintendent, assistant superintendent, and principal
- Email dated February 27, 2020 from the parent to the superintendent
- Email dated February 27, 2020 from the parent to the assistant superintendent

- Email dated February 27, 2020 from the assistant superintendent to the parent
- Email dated February 29, 2020 from the parent to the superintendent, assistant superintendent, and classroom teacher
- Email dated March 3, 2020 from the assistant superintendent to the parent
- Email dated March 4, 2020 from the principal to the parent
- Emails dated March 5, 2020 from the parent to the principal
- Online calendar for the 2019-20 school year for USD #___
- Undated introductory letter to all parents from the social worker for the 2019-20 school year

## Background Information

This investigation involves an eight-year-old girl who is enrolled in the second grade. The student enrolled in the district on October 7, 2019 when the family moved into the district after having been previously stationed in South Korea.

### Issue

In her complaint, the parent raises the following issue:

Issue One: The district violated the right of the parent to consent to the provision of special education and related services.

### Parent's Position

The parent contends that the classroom teacher referred the student to the building-level Student Improvement Team (SIT) without first informing the parent and provided misleading information to the team which led to the student being evaluated for special education services. The parent further contends that the social worker provided special education services to the student without first providing prior written notice of the proposed service and without obtaining the written consent for the service from the parent. The parent asserts that she was never provided with prior written notice of the procedures the district planned to use to evaluate the student.

Additionally, it is the position of the parent that the district failed to maintain records in an accessible area for the parents to review.

## District's Position

It is the position of the district that while the social worker and the speech and language pathologist have provided the student with general education intervention as a part of the multi-tiered system of supports (MTSS) process, and while efforts have been made to discuss a referral for special education services with the parent, no special education evaluation has been conducted and no special education services have been provided.

The district also asserts that copies of the student's educational records were provided to the parent in a timely manner after the parent's request.

## Special Education Evaluation and Services

Applicable Statutes and Regulations for Special Education Evaluation and Services:
The Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act, and their implementing regulations, require districts to adopt and carry out child find policies and procedures designed to ensure that all children with exceptionalities living in the school district who are in need of special education and related services are identified, located, and evaluated (34 C.F.R. 300.111(a)(1)(i); K.S.A. 72-3410; K.A.R. 91-40-7(a)). KSDE encourages districts to use a multi-tiered system of supports (MTSS) for all children, encompassing school-wide support for both academic and behavioral competency. MTSS is also known as a general education intervention (GEI) process. Schools use these GEI processes to identify children who may need to be referred for a special education evaluation. (K.A.R. 91-40-7(c)(2)).

The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into evaluation for special education.

The Kansas State Department of Education (KSDE) encourages schools to use a school-wide, multi-tiered model of support for all children called Multi-Tier System of Supports (MTSS) which includes both academic and behavior supports. The following briefly explains the multi-tiered aspect of the school-wide approach (See the Kansas State

Department of Education Kansas Special Education Process Handbook, Chapter 2, page 26.)

> Tier 1: All children receive a core instructional program that uses a scientifically validated curriculum that is provided for all students. Schools choose curricula that have evidence of producing adequate levels of achievement (i.e., research-based) and instruction is differentiated within the core to meet a broad range of student needs. Therefore, interventions are provided via the general curriculum. Universal screening of all children to monitor progress and to identify children who may need additional support is conducted. Approximately eighty percent of children in the school will be successful in the general curriculum.
>
> Tier 2: Those children who do not respond to the core instructional procedures will receive targeted group interventions in addition to core instruction. More frequent measures of progress monitoring are used to collect child progress data. Approximately fifteen percent of children in the school will need targeted (supplemental) support.
>
> Tier 3: A few children receive intensive, individualized interventions. These may be in addition to, or instead of, the supports provided in Tier 1 and Tier 2 depending on the needs of the child. Interventions will be more intensive and delivered in more substantial blocks of time. Approximately five percent of children in the school will need this kind of intensive support.

Within a MTSS depicted above, children will receive GEI as a part of the system in place for all students. Data collected at each tier should guide school personnel as to the next steps to take based on the child's response to interventions tried. At least by the time a child is ready to access the more intensive supports of Tier 3, the school should employ the use of individualized problem solving to design the intensive individualized support the child will receive as well as a plan to monitor the child's progress and document the child's response to the scientifically research-based interventions. The approach of individual child problem-solving is therefore a component of the larger school-wide system, or it may stand alone as a method to conduct GEI as outlined below.

If it becomes evident that a child's needs require resources beyond those available in general education, and the school suspects the child is a child with an exceptionality, the child must be referred for a special education evaluation.

As part of the school district's required child find duties, the district must have age appropriate screening procedures for children ages 5 through 21 that include observations, instruments, measures, and techniques that disclose any potential exceptionality and indicate a need for evaluation (34 C.F.R. 300.111; K.A.R. 91-40-7(b)(2)). A teacher or specialist screening a student to determine appropriate instructional strategies for curriculum implementation is not an evaluation for eligibility for special education and related services (34 C.F.R. 300.302). The Office of Special Education Programs (OSEP), which is the office within the United States Department of Education that writes and enforces the federal IDEA regulations, provided further clarification on this distinction between evaluation and screening:

> An "evaluation" as used in the Act [IDEA], refers to an individual assessment to determine eligibility for special education and related services. "Screening" as used in 300.302 refers to a process that a teacher or specialist uses to determine appropriate instructional strategies. Screening is typically a relatively simple and quick process that can be used with groups of children. Because such screening is not considered an evaluation to determine eligibility for special education services, parental consent is not required.... This applies to a child with a disability, as well as a child who has not been identified as a child with a disability. Such screening, therefore, could occur without obtaining informed parental consent for screening. See Federal Register, Vol. 71, Aug. 14, 2006, p. 46639.

Before a student is referred for a special education evaluation, <u>one</u> of the following 3 conditions must be met:

> (1) school staff have data-based documentation that general education interventions and strategies would be inadequate to address the areas of concern for the child; or
>
> (2) school staff have data-based documentation that (A) the child was provided with appropriate instruction in regular education settings that was delivered by qualified personnel, and (B) the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction, and (C) the assessment results were provided to the child's parents, and (D) the assessment results indicate that a special education evaluation is appropriate; or

(3) the parent requests and gives written consent for an evaluation and the school agrees that an evaluation of the child is appropriate. (K.A.R. 91-40-7(c)(1) through (3)).

Before a district conducts a special education evaluation of a student or provides special education services to a student for the first time, parents must be provided with prior written notice and the written consent of the parent must be obtained (34 C.F.R. 300.503(a)(1), 300.303(b); K.S.A. 72-3428(b), 72-3430(b)(2); K.A.R. 91-40-27(a)(1) and (2)). However, parental consent is not required for the administration of a test or other evaluation that is administered to all children unless consent is required of parents of all children (see 34 C.F.R. 300.300(d)(1)(ii)).

Investigative Findings for Special Education Evaluation and Services:
The student enrolled in the district on October 7, 2019.

When the parent came to the school to enroll the student, she told the principal that the student did not have an IEP and was not receiving any special education services or other interventions. The parent stated that the student had been considered for speech services but was not determined to be in need of those services. The parent asked the principal if the student's skills could be rechecked. The principal contacted the speech and language pathologist and asked her to screen the student. The parent also told the principal at the time of enrollment that the student struggled at times with getting overly excited and might need help with navigating her feelings.

All students in the school are assessed three times each year (fall, winter, and spring) using the Social, Academic Emotional Behavior Risk Screener (SAEBRS). SAEBRS is a tool used for the screening of student risk for academic, social/emotional and behavior problems for students in grades kindergarten through 12. In grades kindergarten through 2, teachers provide answers to a series of questions addressing the three target areas and a score is derived. The screening can be completed between assessment periods if a student enrolls after the start of the school year. If a student earns a score below 37 on the SAEBRS, the social worker sends a letter of introduction to the parent along with a permission slip asking for consent for the provision of services.

The social worker at the student's school works with both general and special education students. While social work services can be provided to a student under an IEP, the social workers also provide services to non-identified, general education students as a part of MTSS supports. In addition to other duties, the social worker at

the student's school serves as the "Families in Transition Service Coordinator" for the district.

The student participated in a once weekly group. The goal of the intervention was to provide participating students with skills to self-regulate emotions and enhance social skills.

The student earned a score of 17 on the SAEBRS, well below the cut-off score of 37. The classroom teacher sent home to the parent consent forms provided by the social worker. On October 14, 2019, the parent gave written consent for the social worker to provide services to the student, for the social worker to transport the student, and for the social worker or her assigned intern to exchange information regarding the student with the U.S. Army.

On October 15, 2019, the parent signed a form indicating that she gave her consent for the speech-language pathologist to screen the student with regard to "communicative abilities and… language comprehension and use, articulation, fluency or voice. The results and recommendations of the screening will be reviewed with the parent and teacher to determine a plan of action. A copy will be placed in the speech-pathologist's temporary file." It was noted on the consent form that "this [was] not an evaluation."

In an email dated October 16, 2019, the classroom teacher invited the parent to participate in a Student Intervention Team (SIT) meeting scheduled for October 29, 2019. SIT is one element of the district's MTSS approach designed to assist classroom teachers in identifying Tier 1 and Tier 2 resources to assist students. In an email to the investigator dated March 26, 2020, the principal described the SIT process as follows:

> The purpose of our Student Intervention Team (SIT) is to serve as a "think tank" with a team of teachers from different grade levels that come together to support teachers who bring students to SIT to help better understand the strengths and needs of each child and to generate regular education interventions that can be implemented to support the needs of each individual student discussed. These needs could include social/emotional needs, academic learning needs, speech/language, fine/gross motor, etc. Through this process, the team will review the existing MTSS interventions in place and review existing data to determine response to those interventions. If more supports are needed, the team will brainstorm additional interventions that might be helpful and

> adjustments are made accordingly in a written SIT plan. If over time, we do not see student growth as we would anticipate, the team may discuss additional options to better understand the needs of the child. This could include screenings, trial periods of interventions with specialists (i.e., speech club with our speech pathologist, social skills groups with our social worker), evaluation for special education, etc. Parents can request a screening/evaluation for services at any time and we will then move forward with the screening and/or evaluation with the SIT process simultaneously, as to not slow possible student interventions. The primary purpose of our SIT team is to address student needs in general education. However, if those interventions are not successful the SIT team can refer for a special education evaluation.

The parent replied to the teacher's invitation to attend the SIT meeting on the student via email on October 16, 2019, stating that she would be available for the meeting. The parent asked the teacher if the student was "having serious challenges." The teacher wrote back stating "she is adjusting well. I have noticed there are some social/emotional and behavior areas that I would like to review for some extra support for her in those areas." The parent replied, noting that she was "very concerned about her speech and social skills." The teacher then wrote back stating that the consent for speech screening had been received and speech screening was to be conducted "tomorrow or next week." The teacher noted additionally that "the green sheet that you signed a couple days ago will help with getting the social groups started in the next week or so."

On October 21, 2019, the classroom teacher sent two forms to the parent in preparation for the October 29, 2019 SIT meeting, a "Family Input" form and a "Student Interview."

The student's classroom teacher and the parent first met one-on-one during parent/teacher conferences on October 24, 2019, about two weeks after the student enrolled. According to the teacher, she told the parent that the student was doing well and able to handle the grade level work she had been given. In an email to the investigator dated March 18, 2020, the teacher provided the following description of her meeting with the parent:

> I shared that I noticed quickly how much [the student] loves non-fiction and loves to share many things. I shared some beginning FAST [Formative Assessment System for Teachers] scores (our district assessments) with her and [reported that the student] had met the benchmarks on all the testing except

> the SAEBRS (Social and Emotional Behavior Rating Scale). In addition to sharing my concerns about noticing [the student's] multiple speech errors, I also shared that I had some concerns about her social/emotional behavior, too. I asked mom if she would share about [the student's] PK-1st grade experiences and what other teachers had noticed and what they notice at home. She said when [the student] was 3, she was in an art school and they just did art all day and did not deal with the behaviors. She indicated that [the student] had always had issues with speech, eye contact, and had concerning social behaviors. After she shared that information, I asked her if any of [the student's] past educators had ever visited with her about the characteristics of autism. She said no. I shared that with the characteristics that she was sharing and what I had seen so far, that these were red flags for us as educators. I shared that I had successfully walked through this journey with many families, taught 5 summers with our district autism camp, in addition to my general education years. I thanked her for sharing and encouraged her to research things a bit more on her end and compare that to what they are seeing at home, too. I shared that as her classroom teacher, it's my job to get as many interventions in place as I can through our MTSS [Multi-Tier System of Supports] Tiers, to help support [the student] in the educational setting. I ended the conference by letting her know that I would be getting to work on those interventions as soon as we came back the following week from having parent teacher conferences. She thanked me for my time (normal conferences are 20 minutes, she was here an hour), and she said, "If I would have come to you today and you would have told me there were no concerns, I would have been concerned." I felt very positive about our conversation and moved forward the following week with the first SIT meeting.

The parent sent an email to the classroom teacher on October 25, 2019 reporting on an appointment with the student's doctor on that same date. According to the parent, the doctor referred the student for assessment by a "children expert" but noted that, after interacting with the student, the doctor did not observe any "red flags" for autism. The parent also stated that, after reviewing some online material, she did not think the student's behavior aligned with a very significant number of "red flags." The parent wrote that the student needed to "work on socialization and the areas we discussed." The parent indicated that she would be in touch again with the teacher as soon as the student was seen by the therapist. The teacher responded via email on October 25, 2019 asking the parent if she wanted the team to wait to meet since the meeting with the therapist was upcoming. The parent responded, stating, "I agree it may be best for the team to wait until we have visited with the specialist. I will keep you in the loop with the appointment and the results."

The classroom teacher sent an email to the parent on October 26, 2019 proposing that she (the teacher) meet with the SIT. The teacher stated, "This way, the process is started and…we wouldn't need to start from square one on our end. I hate to let the meeting go by and not take my spot that I currently have reserved. That way, everyone on the team knows the action you are taking. Then, the team will propose a revisit date and then you can share the specialist results at that point. Would you be ok with me doing that plan?" The parent responded via email on October 26, 2019 stating, "This sounds great. Definitely a better course of action. I support it." The classroom teacher wrote back to the parent, stating, "I will meet with them as planned so everyone here will be in the loop and know the route you are heading with the doctors."

The classroom teacher submitted a referral to the Student Intervention Team on October 29, 2019. According to the referral form, the student responded to classroom instruction, read for pleasure and/or information, consistently completed homework, used independent work time wisely, worked well one-to-one, and participated in class discussions although usually in inappropriate ways. The referral also noted that the student had difficulty with transitions, did not hand in work at school due to her speed of completion, was preoccupied with school success, and had difficulty accepting mistakes.

With regard to the student's academic performance, the teacher noted the following:

> [The student] appears to love learning. She often gets very excited to answer questions and does so by blurting out and/or leaving the group to position herself at the front. [The student] has scored at benchmark for grade 2 on her FAST testing…She gets angry and defiant if she is told that something is incorrect and needs re-done. If [the student] has worked through the behavior challenges, she can get on task and complete her work with a slow pace.

With regard to social/emotional skills, the teacher noted that the student followed directions and obeyed rules, showed empathy and sensitivity, told the truth and accepted responsibility, was optimistic and upbeat, enjoyed helping others, did well in specials classes, and was very curious and creative. The teacher noted, however, that the student had trouble making friends because of personal space, was distractible in class, sometimes displayed defiance, was impulsive, sometimes displayed unusual or inappropriate behavior when upset, and displayed a sensitivity to clothing.

The teacher wrote the following summative statement about the student's personal/social concerns:

> [The student] is super kind and willing to help others. She struggles to follow classroom rules if something is not the way she thinks it should be. When this happens, she gets upset quickly and will start to whine, raise her voice, flutter her arms, and yell at the person closest to her. The more upset she becomes, the more it also affects her speech and sentence structure. She wants to do things on her time with her directions and doesn't understand the consequences.

With regard to motor skills, the teacher noted that the student had legible handwriting and copied from the board with 70% accuracy but avoided textures, touch, and getting messy. She shifted excessively in her seat depending upon the seat. The teacher wrote the following summative statement:

> [The student] can write all her letters in a legible fashion. However, she does struggle with spacing and copying from place to place. Both fine and gross motor skills seem a bit slow at times.

In the area of speech/language, the teacher stated that the student had good phonemic awareness. Concerns were noted in the areas of vocabulary development; grammar and syntax; pitch, loudness, and voice quality; speech sound production; and understanding of complex questions and/or instructions. According to the teacher, the student spoke unclearly or in fragments and repeated sounds or words in phrases in conversation. The teacher wrote the following summative statement:

> Mom reports early speech delays. [The student's] speech rate varies all day, especially with excitement or high levels of frustration and/or anxiety. Has a hard time speaking at times. Screening by [the speech and language pathologist] is in process.

In the SIT referral, the teacher noted that speech and Behavior-Social-Emotional Learning (BSEL) interventions were initiated on October 19, 2019. BSEL is described by the district as a Tier 1 classroom intervention delivered in multiple ways using curricular materials from the Second Step and Zones programs. The intervention is delivered to all students in the classroom by the classroom teacher. The social worker also provides additional Tier 2 support to students using the Go-Zen program or may

reinforce other BSEL instruction from the classroom if a student demonstrates a need based on SAEBRS screening.

The referral also stated, "Academically, [the student] is able to understand second grade level work and does her PACK time (daily) in Tier 1 for reading and math." PACK time is the label used by the district to describe the 30 minutes of Tier 1 instruction in the general education classroom in the areas of math and reading.

Additionally, the referral stated, "The speech concerns are what my focus will be on for help with interventions. [The student] struggles immensely with social cues & interactions. She…can appear aggressive to others many times a day in this type of setting from a social standpoint."

The parent completed the "Family Input Form" for the SIT referral. On that form, the parent noted that she had concerns regarding how the student interacted with other children and sometimes with adults. The parent stated that "[the student] is social but does not know how to socialize. She would take her dolls, put them in kids' and adults' faces and jump up and down."

At the SIT meeting on October 29, 2019, a "Student Intervention Team Plan" was developed by the classroom teacher, the SIT Coordinator, and a first-grade teacher identified as a "SIT Member." The school librarian served as the note taker for the meeting. According to the report, the student's academic skills were grade appropriate. The team identified concerns regarding "behavior/tantrums" and noted that the student was "social awkward." It was determined that the social worker and others would work with the student regarding "Zones of Regulation." The "classroom teacher/all" would help to "calm/talk/problem solve" with the student. Goals were to be determined after the classroom teacher spoke with the parent about medical concerns. It was noted in the report that the parent had reported at parent/teacher conferences that a medical diagnosis was being explored.

Following the SIT meeting, the classroom teacher sent an email to the parent on October 29, 2019 stating, "I just finished meeting with our team and shared your plan of action with the doctors and specialist. Please send me the appointment date when you have it and I will notify them to update their records."

On October 30, 2019, the classroom teacher sent an email to the parent to inform her that she had met with the speech and language pathologist who had determined that the student qualified for speech services. The classroom teacher told the parent she

would be sending home papers for the parent to sign in order to "get services started." The parent responded via email on October 30, 2019 stating, "I am happy [the student] has the opportunity to receive the speech services she needs."

On October 30, 2019, the parent gave consent for the student to receive "informal speech intervention services" – a Tier 2 support. According to the consent form, the determination that the student would benefit from these intervention services did not "qualify [the student] for speech and language services. A decision for evaluation/placement in speech and language services will be discussed after the [Tier 2] interventions are completed."

According to the speech and language pathologist, the student was included in a "speech club," a small group of students who came to the speech room to work on speech sounds. In an email sent by the principal to the parent on March 4, 2020, the speech and language pathologist stated, "Speech club is a short term general education intervention and is not special education." The intervention for the student was to last 18 weeks, until April 10, 2020. The purpose of the intervention was to determine whether articulation deficits could be remediated with minimal intervention; if the student did not master the sounds in the 18-week period, the speech and language pathologist would recommend evaluation to determine the student's eligibility for speech services under an IEP.

On October 31, 2019, the parent sent an email to the classroom teacher regarding the student's appointment with an outside specialist, noting that she should learn soon about the date and time of the appointment.

On November 11, 2019, the parent sent an email to the teacher to let her know that the student would be seen at The University of Kansas (KU), but no specific date had been set for the appointment.

The classroom teacher sent an email to the parent on November 13, 2019. After meeting again with the SIT, the classroom teacher offered the following proposal:

> Our team is wondering if you and your husband would be interest [sic] and willing to give your parental consent for us to move forward with completing an evaluation on [the student]. We would look at several areas: cognitive ability, academic ability (Reading, Writing, and Math), behavior and speech. If you gave parental consent, the evaluation would be simultaneously [sic] with the KU visit (neither would be dependent on the

> other) and then we would combine all the information as it was received and make decisions from there, based off of what we see as areas of need for [the student] in the academic setting. Our main goal is to provide her with as many services as we can here at school. A full evaluation would answer several questions and provide answers to how we can provide other services that we might not have in place already. Please let me know your thoughts, concerns, and questions.

The parent responded via email on November 14, 2019, stating that she and her husband had decided they wanted to wait for the "pediatrician professional" to evaluate the student. The parent wrote, "We feel she needs speech therapy and we strongly believe she does not have autism. We have studied as well as spoken to parents with autistic children. She does not exhibit a significant number of the behaviors that raise red flags. We are concerned if she is labeled and treated as such it will impact her in the long run. We are wondering which specific behaviors are raising a red flag. We wish to communicate this to the doctor as well."

The classroom teacher responded to the parent via email on November 14, 2019 that "most of the behaviors exhibited daily are all social type things: personal space, quick frustration escalations, volume of voice, compulsive talking/blurting out, various odd type behaviors that do not match the peer groups at that time, lack of social awareness of herself and others. Our evaluation would not specifically be looking for autism. It's an overall evaluation. Some characteristics might likely show up, but we always refer to the medical teams for a medical diagnosis, should there be one. We are only the evaluation end. I understand your wishes and will share those with the team."

The classroom teacher sent an email to SIT members on November 14, 2019 to let them know that the parent "<u>does not</u> wish to move forward with the evaluation" but would move forward with the KU appointment. The teacher reported that at the request of the parent she had provided a list of behaviors that were of concern.

On November 15, 2019, the parent and the classroom teacher exchanged emails regarding the student. The parent asked the teacher to keep an open mind about the student, noting that the behaviors noted by the teacher "do not raise red flags for autism." The parent stated that while the student "may be 'odd' by your or the school standards…being different may not necessarily be associated with a disease. Having autistic children around in a school may call for a quick judgment with magnifying each of her reactions or behavior to fit the diagnosis…Please be patient with her. It is best to have an independent medical professional examine her for an independent

conclusion. I will share the concerns listed." The teacher responded stating that "we will move forward with the appt. and let them help us."

On January 24, 2020, the classroom teacher sent the parent an email asking whether an appointment had been scheduled at KU and how the process was going. The parent responded via email saying that she would be notified when KU had an available date for an appointment for the student. The parent asked the teacher if she had any specific concern she wanted to discuss at that point. The teacher responded that she would let the SIT know of the student's status. The teacher stated that her concerns about the student remained as reported in November, "personal space." The teacher wrote that the student struggled to "pick up on social cues of how close (and touchy) she can and cannot be with peers. She will often get right up in their face and not realize that it's a problem and she shouldn't be that close."

On January 25, 2020, the parent sent an email to the classroom teacher stating that she had "strong concerns" with the referral. In a second email to the teacher on that same date, the parent stated that "we do not give consent to have anyone other than the speech professional evaluate [the student]."

Also on January 25, 2020, the parent sent an email to the building principal inquiring about the process for "reporting a teacher" and outlining a number of concerns.

The principal called the parent to discuss her concerns and followed up with an email to the parent on January 26, 2020. In the email, the principal suggested possible times for a meeting the two parties had discussed during their telephone call. The parent responded via email on January 26, 2020 indicating that she would "reach out with an available time for a face to face meeting as soon as we organize our schedules." The parent asked for the name and educational background of the school psychologist and asked whether the school psychologist was related to the classroom teacher. The parent also asked for the names and "backgrounds" of the SIT members and inquired as to whether any of those team members had a "personal relationship with [the classroom teacher]" including the teacher's immediate or extended family.

On January 26, 2020, the parent sent an email to the principal containing a 16-item list of questions. The principal responded by calling the parent and suggested a meeting to discuss the parent's concerns. In an email to the parent on January 26, 2020, the principal offered times and dates for the meeting.

The social worker had not provided any general education intervention for the student after January 6, 2020. The group to which the student had been assigned met once a week on Mondays, but there was a snow day on January 13, 2020. School was not in session on January 20, 2020 due to a federal holiday. The social worker was not available on January 27, 2020 due to a meeting conflict.

The parent sent another email to the principal on January 28, 2020. In the message, the parent indicated that she wished to file a formal complaint against the social worker for meeting with the student without parent consent. The parent asked who the social worker reported to and who her supervisor was. The parent also asked for information regarding the nature of the services provided to the student by the social worker. She asked whether the student was seen individually or in a group, and, if in a group, what services the other children in the group were receiving and what their disabilities were. The parent asked additional questions regarding who had notified and authorized the social worker to meet with the student, noting that if that person was the principal, then the parent wanted to file a formal complaint. The parent also indicated that she wished to file a complaint if the school psychologist had met with the student. The parent also asked the principal to "provide us a copy of all school regulations and guidelines."

In an email to the parent dated January 28, 2020, the assistant superintendent provided a copy of the district's policies regarding complaints which included a complaint form.

In an email dated January 28, 2020, the parent stated that she wanted to withdraw any permissions for social work services and any service other than speech. The principal replied on January 28, 2020 saying that she would inform the social worker of the parent's request to withdraw permission for social work services.

On January 29, 2020, the parent sent an email to the assistant superintendent stating that a meeting was scheduled in the near future with a doctor who specialized in autism and behavioral health in children on the military base. The parent stated that the student was on a "wait list" for KU. The parent told the assistant superintendent that she would reach out to him again after meeting with the principal and with the specialist should she wish to pursue a complaint against staff.

On January 31, 2020, the parent sent an email to the principal and assistant superintendent asking for contact information for the social worker. The principal responded via email on January 31, 2020, providing the parent with contact

information for the social worker and addressing the parent's request for a proposed meeting to be held after 4:30. The principal asked the parent to call her to discuss the situation.

In a follow-up email on January 31, 2020, the parent indicated that she and her husband were only available to talk by telephone between 5:00 and 5:30 PM Monday through Friday.

On February 2, 2020, the principal sent an email to the parent. The principal stated that she would email the parent with dates when the team could meet at 5:00 PM. The principal also asked the parent for the name and contact information for the doctor who had asked the school to complete the Student Social Behavior Questionnaire provided by the parent. The principal also asked the parent to share the date for the student's upcoming appointment so the documentation could be completed.

The parent responded via email on February 2, 2020. The parent stated that she was requesting a meeting with the principal, and it was not necessary for the team to be present. The parent declined to sign a release of information allowing the school to speak with the doctor scheduled to see the student.

On February 3, 2020, the principal responded via email to the parent noting that a team of people would be needed to answer the questions posed by the parent. The principal proposed dates and times for the proposed meeting.

The parent sent an email to the superintendent and assistant superintendent on February 3, 2020 stating that she and her husband did not "foresee a positive outcome from a meeting at this time" with the school staff. The parent stated that she would proceed with outside evaluations of the student and would file a formal complaint "should the need arise."

School staff completed the Student Social Behavior Questionnaire for the Developmental and Behavioral Sciences department of the University of Kansas Health System on February 5, 2020.

On February 17, 2020, the parent sent an email to the assistant superintendent which included eleven questions regarding, among other things, the school procedures related to the IEP process, the provision of services by the school psychologist and the social worker, and evaluation by the speech and language pathologist. The assistant

superintendent responded to all of the parent's questions in an email on February 19, 2020.

On February 17, 2020, the parent sent an email to the speech and language pathologist asking her to identify the adults who were present during the student's speech sessions. On February 18, 2020, the parent sent an email to the music teacher asking her for copies of lesson plans from October 2019 to February 18, 2020. On February 20, 2020, the parent sent an email to the classroom teacher referencing a comment regarding sensitivity to clothing that the teacher had included in the Social Behavior Questionnaire.

The speech and language pathologist sent an email to the parent on February 19, 2020. In the message, the speech and language pathologist informed the parent that a graduate student intern was present during the student's speech club. She identified the strategies used to elicit correct speech sound production, and provided information on her training and experience as requested by the parent. A progress update was attached to the email. According to "Notes" included in the progress update, the student's speech club time was scheduled to end on April 10, 2020. The speech and language pathologist stated,

> It is my professional opinion that [the student] will continue to need intervention for speech sounds at that time. In order to move forward with services after April 10th we will need to move through the evaluation process. I recommend a full evaluation in order to gain more information about not only her speech sounds and social communication but also her learning.

On February 26, 2020, the parent sent an email to the superintendent, assistant superintendent, and principal regarding statements made by the classroom teacher in her referral of the student for SIT, by the art teacher on the grade card and on the Student Social Behavior Questionnaire, and by the librarian on the Student Social Behavior Questionnaire. The parent requested that documentation be provided in support of these statements. The parent also asked to have the social worker provide the dates of service to the student and what was provided and asked to have the speech therapist "detail her work" with the student. The parent asked that all information be provided to her by February 28, 2020.

The assistant superintendent sent an email to the parent on February 27, 2020, telling her that he felt that it would not be reasonable for the school to collect and provide

the information requested by the February 28, 2020 date specified by the parent. He indicated that the parent should expect a response from the principal by the end of the workday on March 4, 2020. The assistant superintendent stated that "a face to face meeting" was needed. The parent responded via email on February 29, telling the assistant superintendent that she believed that the information she requested should already be available.

On March 3, 2020, the assistant superintendent sent an email to the parent stating that the team stood "ready to meet with you to help you understand better what is going on and for the [school] team to understand your perspective as well." The assistant superintendent suggested a resource provided by the military base to help families navigate the school systems and provided contact information for that individual.

On March 4, 2020, the principal sent an email to the parent containing the school's responses to the parent's most recent questions. The principal invited the parent to meet in person to discuss her questions and concerns. According to the principal, she believed that,

> if we could have a face-to-face conversation it [would] help you better understand the general education interventions that have been provided to [the student] and the SIT process. These general education interventions and the SIT process are available and accessible to all of our students, as needed, and are not special education services. In addition, this discussion will help us clarify and answer your questions even more effectively and better understand your perspective…A component of this discussion we need to have includes explaining Parental Rights and determining if an evaluation is appropriate and if that is determined to be appropriate, we will provide a Prior Written Notice and request for consent for evaluation for you to accept or decline.

The parent responded to the principal via email early on the morning of March 5, 2020 and again later that day. In her second email, the parent stated that she would "reach out in the month of April to set up a meeting." The parent stated that she and her husband were "exploring a different school." The parent stated that she and her husband remained "firm on not pursuing any evaluation within [the student's current school]." According to the parent, the student had "an active referral for speech pathology with the community. We will continue to utilize the speech services at [the student's current school]. Only the speech services."

Summary and Conclusions for Special Education Evaluation and Services:
Shortly after the student enrolled in the district, a screening tool used 3 times each year with all students in the school to determine risk for academic, social/emotional and behavior problems was administered to the student. The student's score on that instrument prompted the social worker to send home a permission slip asking for the parent's permission for the student to receive social work services. The parent provided her consent on October 14, 2019. Between October 14, 2019 and January 6, 2020, the student was included in a once weekly group general education intervention led by the social worker designed to help her develop skills to self-regulate emotions and enhance social skills. The parent sent an email to the principal on January 28, 2020 withdrawing her consent for the student to be seen by the social worker.

When enrolling the student, the parent told the principal that she would like to have the student's speech skills "rechecked." On October 15, 2019, the parent gave consent for a speech-language screening and consultation. After the screening was completed, the parent gave her written consent for the student to receive informal speech intervention services. The student was incorporated into "speech club." The student's involvement in that speech club was set to end on April 10, 2020.

Both the social work and speech and language services that were provided to the student were general education interventions designed to guide decisions regarding whether the needs of the student were significant enough to warrant referral for a special education evaluation.

The classroom teacher referred the student to the building SIT team, another general education intervention designed to provide support to the teacher in brainstorming strategies to address student needs. The classroom teacher sought to include the parent in a SIT meeting on October 29, 2019. The parent did not participate but agreed to allow the teacher to meet with the team while the parent arranged for an outside evaluation of the student.

The classroom teacher subsequently proposed that the SIT proceed to move forward with a referral for a special education evaluation of the student, but when the parent indicated that she did not want the student to be evaluated, no special education referral was completed, no evaluation was conducted, and no special education services were provided.

The supports that were provided to the student by the speech and language pathologist and social worker were Tier 2 MTSS interventions. No special education referral was made, no special education evaluation was conducted, and no special education services have been delivered. Under these circumstances, a violation of special education statutes and regulations with regard to special education evaluation and provision of special education services is not substantiated.

## Access to Education Records

Applicable Statutes and Regulations for Access to Education Records:
The IDEA requires schools to permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the school. The school must comply with a request without unnecessary delay and before any meeting regarding an IEP, due process hearing, or resolution session, and in no case more than 45 days after the request has been made (34 C.F.R. 300.613(a)). Upon request, the school must provide a parent with a list of the types and locations of education records collected maintained, or used by the district (34 C.F.R. 300.616). An educational record means those records that are directly related to a student and are maintained by the educational agency (34 C.F.R. 300.611(b); 34 C.F.R. 99.3).

Investigative Findings for Access to Education Records:
The parent sent an email to the classroom teacher on January 24, 2020 stating that she wanted to "gain access to the specific report that you submitted to the team in regard to why you feel [the student] is autistic. I wish to have access to review this material. I will present it to her doctors as well and make an appointment for a therapist to review it on base. I will also submit it at her appointment. If you are not able to access it, I wish to request the channels I should follow to access this information. We feel Autism is a disability that should not be taken lightly. I will appreciate acceleration of this information." The classroom teacher wrote back to the parent stating that she would send a copy of the referral home. The teacher stated "I did not and cannot diagnose any student with anything. I can simply share my experiences of students I've had over my 21 years. I share that a lot of her behaviors do favor other children I have had with autism. My goal is to help her as much as possible in the school setting and many times that means reaching out to the medical profession as that is their areas of expertise."

The parent sent another email to the teacher at 4:59 PM on January 24, 2020 stating that she hoped the teacher had not sent a copy of the report home in the student's folder and instead requesting an email copy. The parent expressed concern that the

student might read the report. At 9:48 PM, the teacher responded to the parent stating she had not gotten the parent's email in time to honor the parent's request.

In a January 26, 2020 email to the principal, the parent requested a copy of "all [the student's] school records" from the student's current building of attendance as well as a copy of the records from the student's previous school in South Korea which the parent had provided.

In an email to the principal dated January 27, 2020, the parent again requested copies of the student's school records including reports from the social worker, classroom teacher, and school psychologist.

On January 28, 2020, the principal sent an email to the parent to let her know that she had made copies of the student's records including the following:

- SIT documentation including input provided by the parent;
- signed parent permission for social work services dated October 14, 2019;
- signed parent permission for speech-language screening and consultation request dated October 16, 2019;
- signed parent permission for informal speech interventions dated October 30, 2019;
- all email communication with the classroom teacher; and
- the student's cumulative record.

The principal told the parent that the records were ready to be picked up from the office, or the principal could provide the records to the parent at a school program that evening. The principal noted that additional documents would be available for the parent to review at their upcoming meeting, including Kansas Child Find Expectations mandated by the Kansas State Department of Education (KSDE), SIT procedures overview, and KSDE Parent Rights in Special Education (Procedural Safeguards). The principal asked the parent to let the school know when she would be available to meet.

The parent responded to the principal via email saying that the evening program would work well for the record exchange.

On February 27, 2020, the parent sent an email to the superintendent stating that in response to the parent's request for "school records," the principal had provided copies of emails written by the parent to the classroom teacher and the principal. The parent asked whether emails were a part of school records and asked the

superintendent to provide a "complete list and copy of school records that will be transferred" once the student was accepted into a private parochial school for the 2020-21 school year. The superintendent responded that "emails would not be a part of the student record." He provided the parent with the following list of records typically sent to a receiving school upon a student's transfer:

- Enrollment history,
- Grade cards and transcripts;
- State and district test scores;
- Immunization records;
- Physical or health assessment records;
- English as Second Language (ESOL) form if applicable; and
- SIT and/or Section 504 Plan and/or IEP if applicable.

The superintendent noted that some districts requested discipline records as well and stated that the new school "should have you sign a paper with the request which typically writes out what is being requested."

Summary and Conclusions for Access to Education Records:
The classroom teacher provided the parent with a copy of the SIT referral the same day the parent sent an email requesting it. Copies of all educational records were made available to the parent within two days of the date the parent sent the principal an email asking for them. A violation of special education statutes and regulations with regard to the parent's right to inspect and review education records is not substantiated.

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from

the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____
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)

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES
REPORT OF COMPLAINT
FILED AGAINST
_____ PUBLIC SCHOOLS, USD #___
ON MARCH 5, 2020

DATE OF REPORT: APRIL 4, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with _____ _____, Director of Special Education for _____ Public Schools on March 16, 2020. The investigator spoke by telephone with the parent on April 2, 2020.

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

- IEP for the student dated April 16, 2019
- Email dated August 26, 2019 from the special education teacher to the parent
- Notice of Meeting dated August 26, 2019
- Email dated August 29, 2019 from the parent to the special education teacher
- Notice of Meeting dated September 10, 2019
- Meeting Signature Page dated September 24, 2019
- Prior Written Notice dated September 24, 2019
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated September 24, 2019
- Email dated October 1, 2019 from the special education teacher to the parent
- Email exchange dated October 28 and 29, 2019 between the parent and the principal
- Email exchange dated November 3, 2019 between the parent and the principal
- Email exchange dated November 3, 2019 between the parent and the special education teacher
- Notice of Meeting dated November 7, 2019

- Signed permission slip for the November 13 and 15, 2019 field trips
- Email exchange dated November 14 and 15, 2019 between the parent and the special education teacher
- Email dated November 18, 2019 from the special education teacher to the parent
- Draft IEP dated November 19, 2019
- Notice of Meeting dated November 22, 2019
- Email dated November 30, 2019 from the parent to the principal of the neighborhood school
- Email dated December 2, 2019 from the principal of the neighborhood school to the parent
- Email exchange dated December 2, 2019 between the school psychologist and the parent
- Email dated December 2, 2019 from the principal to the parent
- Email dated December 3, 2019 from the principal to the parent
- Notice of Meeting dated December 6, 2019
- Email dated December 12, 2019 from the principal to the parent
- Email dated December 13, 2019 from the principal to the parent
- Notice of Meeting dated December 17, 2019
- Meeting Signature Page dated December 17, 2019
- Meeting Agenda dated December 17, 2019
- Evaluation Team Report dated December 17, 2019 (13 pages)
- Evaluation Team Report dated December 17, 2019 (9 pages)
- Multidisciplinary Team Staffing Participants dated December 17, 2019
- Prior Written Notice for Identification dated December 17, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services/Placement and Request for Consent dated December 17, 2019
- Email dated December 19, 2019 from the principal to the parent
- Email dated December 31, 2019 from the principal to the parent
- Draft IEP for the student sent to the parent on December 31, 2019
- Prior Written Notice for Placement, Change in Services/Placement and Request for Consent dated January 7, 2020
- IEP Meeting Agenda dated January 7, 2020
- IEP for the student dated January 7, 2020
- Email dated January 7, 2020 from the principal to the parent
- Email exchange dated January 13 and 14, 2020 between the parent and the principal
- Email dated January 16, 2020 from the principal to the parent
- Notice of Meeting dated January 16, 2020

- Email dated January 21, 2020 from the principal to the parent
- Prior Written Notice for Initial Services, Placement, Change in Services/Placement dated February 7, 2020
- Notice of Meeting dated February 10, 2020
- Prior Written Notice for Evaluation or Reevaluation and Request for Consent dated February 12, 2020
- Prior Written Notice for Change in Services/Placement dated February 17, 2020
- IEP Amendment Between Annual IEP Meetings dated February 18, 2020
- Prior Written Notice for Initial Services, Placement, Change in Services/Placement dated February 18, 2020
- Meeting Signature Page dated February 18, 2020
- Meeting Agenda dated February 18, 2020
- Prior Written Notice for Initial Services, Placement, Change in Services/Placement dated February 18, 2020
- Meeting Signature Page dated March 3, 2020
- Meeting Agenda dated March 3, 2020
- Prior Written Notice dated March 3, 2020
- Notice of Meeting March 12, 2020
- Parent Input for 2020/2021 IEP

## Background Information

This investigation involves a ten-year-old boy who is enrolled in the fourth grade. The student was adopted by the parent, his grandmother, after being removed from his biological mother when he was approximately one month old.

The student was evaluated at Children's Mercy Hospital in October of 2017 and was given diagnoses of Attention Deficit Disorder (ADD) with hyperactivity and Disruptive Mood Dysregulation Disorder (DMDD). Following hospitalization at the University of Kansas Hospital in January of 2018, the student was diagnosed with Generalized Anxiety Disorder (GAD), Attention Deficit Hyperactivity Disorder – Combined Type (ADHD), Opposition Defiant Disorder (ODD), and Sensory Processing Difficulties. The student was hospitalized several times during 2018 in both general medicine and psychiatric facilities. The parent reports that the student has been given a diagnosis of Autism. He is seen on occasion by a psychiatrist.

The student began receiving Early Childhood Special Education services from the district in the areas of speech and language and behavior in October of 2012 and continued to receive special education services in his neighborhood elementary school

into the 2016-17 school year. As a result of a disciplinary action during that school year, the student was removed from the neighborhood school and was provided Learning Support Services (LSS) at a special day school setting in the district.

In January of 2018, following a behavior incident and hospitalization, the student returned to the district and was placed in the same special day school program he had previously attended as a result of the disciplinary action described above. The special day school program is designed for students who require a highly structured environment, instruction in social-emotional learning, and opportunities to generalize skills in a wide variety of settings.

Placement at the school was considered to be a "diagnostic" in nature to allow the district to complete a reevaluation of the student. The student attended school 3 hours per day in one-to-one or small group settings and continued to receive speech and language services. In February of 2018, the student began to have outbursts of aggression that resulted in property damage, and the police were called. The student was subsequently placed on "homebound services" which were delivered in the same school building he had been attending. The student participated in four homebound sessions, and did not attend school between April 10 and 24, 2018. The student enrolled in a nearby district on May 21, 2018.

During the 2018-19 school year, the student was placed by the parent in an inpatient psychiatric residential treatment facility. According to the parent, the student had been inappropriately medicated and needed to be in a setting where all medications could be withdrawn and a new treatment plan could be put in place. While at the residential facility, the student attended the program's special day school. An IEP was developed at the residential treatment facility on April 16, 2019. The student exited the residential setting on April 30, 2019.

## Issue

In her complaint, the parent raised the following issue:

> The district failed to provide the student with the opportunity to transition to and be educated in the least restrictive environment alongside his non-disabled peers in a general education building in compliance with prior written notice provided to the parent on September 24, 2019.

## Parent's Position

The parent contends that an entrance meeting was held by the district on September 24, 2019. At that meeting, the parent asserts, it was determined that the student had met goals needed to transition into the "general education population." According to the parent, a prior written notice form was developed which stated that

1. The transition would begin to his home school General Education Building…;
2. additional data would be collected in that setting; and
3. his IEP from [the previous district] would be amended to that end and though the team determined that the services would begin the following week, the PWN [prior written notice] stated that
4. the services were to begin within 10 days.

The parent states that the district did not follow through on that decision and, despite the parent's questioning of their actions, would not state why the student was not being allowed to begin transitioning to his general education building (his neighborhood school) so that data could be collected in that setting.

## District's Position

The district contends that it has made a good faith effort to move ahead with transition activities for the student throughout the 2019-20 school year.

## Applicable Statutes and Regulations

The Individuals with Disabilities Education Act (IDEA) and the Kansas Special Education for Exceptional Children Act require that when a child with an exceptionality transfers to a new school district in Kansas with a current IEP from a previous school district in Kansas, the new school must provide a free appropriate public education (FAPE) to the child, including services comparable to those described in the child's IEP from the previous school district. Once the new district receives the current IEP, the new school may adopt the child's IEP from the previous school district or develop and implement a new IEP (K.S.A. 72-3429(g)(1); 34 C.F.R. 300.323(e)).

Written notice must be provided to parents whenever a district proposes to make changes to the educational placement of a child (K.S.A. 72-3430(b)(2)(A); 34 C.F.R. 300.503(a)(1)). Parental consent must be obtained before a district makes a substantial change in the placement of or a material change in services for a child (K.S.A. 72-3430(b)(6)). Parents must be provided with prior written notice when a district refuses a parent's request to change the educational placement of their child

or refuses to make a change to the provision of special education and related services (FAPE) to the child (K.S.A. 72-3430(b)(2)(B); 34 C.F.R. 300.503(a)(2)).

Investigative Findings

The student enrolled in the district with an active IEP from another Kansas school district which called for placement in an alternative school setting. According to that IEP, which was dated April 16, 2019, the student was to receive the following services:

- 340 minutes for one day each week of special education services in an alternative school;
- 360 minutes three times per week of special education services in an alternative school;
- 15 minutes of indirect Occupational Therapy (OT) services per month; and
- 20 minutes per week of speech and language service in the alternative setting.

On August 26, 2019, the district provided the parent with notice of a team meeting to be held on September 5, 2019 at the special day school, the student's building of attendance. On August 29, 2019, the parent subsequently sent an email to the special education teacher stating that she could not attend the scheduled meeting. Another meeting was scheduled for September 24, 2019, and the parent was provided notice of that meeting on September 10, 2019.

The parent participated in the September 24, 2019 meeting as did staff from both the district's alternative school and the student's neighborhood school as well as representatives of several outside agencies.

At the conclusion of the meeting, the parent was provided with notice of the following changes in the student's services:

- 45 minutes, five days per week, of direct reading services in a special day school setting;
- 315 minutes, four days per week, of direct special education services in a special day school for behavior;
- 250 minutes, one day a week, of direct special education services in a special day school for behavior;
- 20 minutes a week of direct speech services in a special day school setting;
- 15 minutes per month of indirect OT services in a special day school setting; and
- 30 minutes a day of transportation services

The district also provided notice that a number of "accommodations" would be provided to the student including the following:

- "Access to supports to help with self-regulation (weighted blanket, theraputty, etc.);
- Daily Morning Triage;
- When upset, [the student] will have access to supervised calm/quiet room away from his classroom for him to become calm and regulated;
- Help with organization of school work, use of graphic organizers, and chunking material;
- Use of sensory items and/or fidgets when appropriate;
- Role play, practice, and reinforcement of appropriate responses to frustrating situations;
- Staff should give [the student] wait time after giving directions/redirection;
- Use of reward menu;
- Teach, and reinforce, [the student] in understanding of emotional trigger and responses;
- Reduce number of required math problems when [the student] can show mastery with fewer;
- Advanced warnings of changes in routines/schedules;
- When contacted by IEP case manager, OT collaboration to assist with specialized instruction to engage learning experiences;
- Reduced writing demands to no more than 2 short paragraphs;
- Frequent movement breaks throughout the day;
- Alternate preferred and [non]preferred activities when possible;
- Provide [the student] between two choices [sic] when possible; and
- Extra supervision during transitions to be sure they are smooth for [the student]."

The prior written notice and consent form stated, "the team discussed having [the student] begin transitioning to his general education building. The team will have [the student] do a field trip to his home building. The team will write an amendment for services to begin at [the neighborhood school] at a later date, once student [sic] has opportunity to process change."

By report of the district, the team discussed what the field trips would consist of and determined there would need to be more than one to help the student process the change.

The form explained that:

> [T]he actions…are proposed because at this time the team believes that this is the best way to meet [the student's] needs until more data in this setting is collected. Current data indicates that [the student] is making progress toward his behavior goals. He has consistently had 100% days according to his point sheet. He is able to utilize the strategies taught to him and generalize them in a variety of settings. [The student] is also making progress on his reading goal…It was considered to reject [the student's] IEP from [his previous district], however the team believes that providing comparable services is in [the student's] best interest at this time…[The student] will not have access to his general education due to being at a special day school. [The district] is providing comparable services at a special day school setting. This placement will be discussed at his annual IEP meeting in 4-6 weeks.

The parent gave written consent for the district's proposed actions on September 24, 2019.

The team also proposed that an evaluation be conducted to collect additional information in preparation for that proposed annual IEP review. The parent was provided with prior written notice of the information to be collected during the evaluation and gave written consent for the district to evaluate the student. The prior written notice and consent form signed by the parent on September 24, 2019 stated, "the team would like to evaluate [the student's] current placement and determine if it is the least restrictive environment and appropriate programming for [the student]. A functional behavioral assessment will be conducted in order to develop a behavior intervention plan."

On October 1, 2019, the special education teacher contacted the parent via email to schedule the first field trip. According to the email, the special education teacher planned the trip for "Friday [October 4, 2019] from 8:30 to 9:30. We will transport him using [a local taxi service] and he will ride with a peer as well as a staff member. While there he will meet with [the principal, school psychologist, special education teacher, and classroom teacher]. He will also have a chance to see some other classes while he is there. He will then return to [the special day school] using [the taxi service] with a peer and a staff member."

On October 2, 2019, the parent contacted the superintendent via email asking whether the district's contracted transportation services had "approved KBI and KANIS background checks." The superintendent responded to the parent via email on

October 3, 2019 saying that the information could be obtained through the police department.

The special education teacher sent an email to the parent on October 3, 2019 stating "[The student] talked a lot about going to [the neighborhood school] this week. This morning he did say he was a little nervous because there's more people but after talking to me…he seemed excited again. I also checked his folder before he left today to ensure the permission slip was in there. We will need that for him to be able to go tomorrow."

The parent declined to sign the permission slip for the October 4, 2019 field trip stating that she wanted the district to confirm whether the police department background checks for individuals providing transportation to students were "KBI, state and federal registries KANIS" background checks.

On October 6, 2019, the special education teacher followed up with the parent about the student's field trip and was told by the parent that she was waiting for a response to her transportation questions.

The special education teacher contacted the parent on October 23, 2019 to begin the process of scheduling a meeting to review the evaluation of the student and to discuss changes to the student's IEP.

The parent sent an email to the principal on October 28, 2019 asking about the principal's communication with the superintendent or his staff regarding the student's transition. The principal responded via email on October 29, 2019 telling the parent that the same background checks were completed on the taxi drivers who would transport the student as were completed on police officers. The principal noted that the background checks included state and federal registries and KBI (the Kansas Bureau of Investigation). The parent wrote back to the principal on November 3, 2019 stating, "Now that it's taken care of I assume we will resume with the transition?" The principal replied, "Yes, we can have [the student] go over this week for a tour and introductions, and start his daily schedule the following week. I have [copied the special education teacher] in this email so she can get everything set up for [the student's] transition."

The parent wrote back on November 3, 2019 stating that she had concerns about the student transitioning to the neighborhood school "in a large classroom setting. He really needs a higher teacher to student ratio and a small classroom." The special

education teacher responded, asking the parent, "What are your thoughts on him visiting [the neighborhood school] 3 or 4 times for 30-45 minutes prior to the evaluation meeting. During this time we will continue to collect data on [the student's] 'zones' before, during, and after visits which we can compare to data we have already collected." On November 4, 2019, the parent responded to the special education teacher, stating "I don't mind [the student] going but the concern remains because during the IEP meeting the principle [sic] there said his school could not accommodate [the student's] need to have a high teacher to student ratio in a small classroom environment."

The special education teacher sent an email to the parent on November 5, 2019 telling the parent that she was "sending home a permission slip for [the student] to visit [the neighborhood school] next week on Wednesday and Friday. If you would look it over, then sign and return with [the student] tomorrow if you are okay with what I have set up."

Notice of an evaluation review meeting scheduled for November 19, 2019 was sent to the parent on November 7, 2019.

On November 8, 2019, the parent signed the permission slip for field trips to the neighborhood school scheduled for November 13 and 15, 2019. The student took his first field trip on November 13, 2019.

The parent sent an email to the special education teacher on the evening of November 14, 2019 stating that the student would be absent from school the following day. The special education teacher wrote back to the parent asking if she would like to pick up draft paperwork for the November 19, 2019 team meeting. On November 15, 2019, the parent responded that the paperwork could be sent home after the parent and student returned to town. The parent stated, "Please postpone the meeting."

The special education teacher sent a draft copy of an IEP for the student to the parent via email on November 18, 2019.

The parent contacted the special education teacher via email on November 20, 2019 indicating that she was trying to find a date/time to meet. On November 22, 2019, the district sent the parent a notice of a meeting scheduled for December 3, 2019.

On November 25, 2019, the parent sent an email to the teacher saying that "there seems to be a bit of confusion about the meeting date, as I received a NOM for 3

December at 2:00. I am working with those on my end to come up with alternate dates. We will keep you posted."

On November 30, 2019, the parent sent an email to the principal of the student's neighborhood school asking "why [the student's] transition to [the neighborhood school] was stopped after visiting only one day." The neighborhood school principal responded to the parent on December 2, 2019 stating "we have not transitioned [the student] yet as we need to hold his IEP/Reevaluation meeting scheduled for December 3rd. During that meeting we will discuss what these services might look like at [the neighborhood school]."

On December 1, 2019, the principal sent an email to the parent reminding her of the December 3, 2019 meeting. In her message, the principal indicated that the team would review the reevaluation and conduct an annual IEP meeting to review the student's placement. The parent sent an email to the principal on December 2, 2019 stating that she had not agreed to a meeting on December 3, 2019, and the meeting was cancelled. On December 3, 2019, the principal proposed three new dates and times; the parent proposed three different dates for the meeting.

The parent sent an email to the principal of the neighborhood school on December 10, 2019 stating "I know that he hasn't transitioned yet. When the team met in Sep [sic], the plan was to have [the student] start 'transitioning' the following week by visiting [the neighborhood school] once or twice and evaluate him during those visits. I am aware that there was a slight delay while the District confirmed that their drivers had KBI background checks. However, once that was confirmed [the student] only visited once, so I'm asking why the transitioning was stopped after visiting only one day."

On December 12, 2019, the principal sent an email to the parent regarding the parent's questions about transition. The principal stated "our plan was to have [the student] visit a couple of times to [the neighborhood school], collect data during his visits, gauge how he did during those visits, and then incorporate that information into the evaluation and determining [sic] further placement/services for [the student]. We had those visits scheduled November 13th and November 15th. [The student] went to [the neighborhood school] on November 13th and did very well. [The student] was not at school on November 15th, so he was not able to go on that date. The evaluation includes observation information from [the student's] visit to [the neighborhood school]. At the meeting, we will discuss these observations. When we hold his IEP meeting, the team will discuss services/placement options, develop a transition plan for [the student], etc."

Notice of the December 17, 2019 team meeting to review evaluation results and conduct an IEP review was provided to the parent on December 6, 2019.
The principal sent a permission slip to the parent via email on December 13, 2019 and noted that a paper copy would be sent home with the student on December 16, 2019. The permission slip would allow the student to be transported to the neighborhood school for a field trip on December 18, 2019 prior to Winter Break. At the team meeting on December 17, 2019, the parent stated that the student would not be available for the second field trip scheduled for the following day because of an appointment.

The school team convened on December 17, 2019 for a reevaluation meeting. The parent was present. The district presented a draft version of a proposed IEP which included a plan to transition the student to his neighborhood school, but the parent did not want to proceed with the IEP meeting at that time asking that the team meet again on January 7, 2020 for an IEP meeting. The parent requested a copy of the draft IEP which was subsequently provided to her on December 31, 2019. The parent signed a draft evaluation report; although a final copy of the evaluation report including clerical corrections and updated baseline information was provided to the parent, she declined to sign that document.

The parent was provided with a form entitled "Prior Written Notice for Identification" on December 17, 2019. The form stated that the student continued to qualify for special education services and noted that the team would meet on January 7, 2020 to discuss an amendment to the student's April 16, 2019 IEP. Those changes could include "behavior intervention plan, goals, and services/placement."

The district had also presented the parent with a form entitled "Prior Written Notice for Identification, Initial Services, Placement, Change in Services/Placement and Request for Consent" which proposed adding two additional behavioral goals to the IEP and also noted that the student "[qualified] for a Behavior Plan." Since an IEP meeting had not actually been conducted, this form was provided to allow the parent to review proposed changes prior to the scheduled January 7, 2020 IEP meeting

The IEP meeting for the student was held on January 7, 2020. A Behavior Intervention Plan was incorporated into the IEP, and goals and accommodations were added to the student's IEP. The team proposed that the student go to his neighborhood school for 55 minutes on three days each week. While at the school, he would receive 25 minutes of attendant care to help with transitions during breakfast and would also participate in 30 minutes of social skills training in a special education setting while at

the neighborhood school. The parent gave her written consent for the changes to the student's IEP proposed by the district.
Following the meeting, the principal, on January 7, 2020, sent an email to the parent including two copies of the revised IEP for the student, one a "clean" copy, the other highlighting changes.

The student's transition to his neighborhood school began on January 8, 2020. On January 13, 2020, the parent sent an email to the principal to provide "parent input" with regard to the January 7, 2020 IEP for the student. In her email, the parent outlined a list of things that she wanted to have changed in the student's IEP. The parent told the principal that she would not be available for a meeting on February 11, 2020 but could meet on February 18 or 25, 2020. The principal responded on January 14, 2020 confirming a February 18, 2020 meeting date and telling the parent a notice of meeting would follow. That notice was provided to the parent by the principal via email on January 16, 2020.

On January 21, 2020, the principal sent an email to the parent which included a revised IEP which reflected parent feedback.

On January 23, 2020, the parent sent an email to the special education teacher requesting a meeting for the purpose of transitioning the student to a resource room in his neighborhood school. A meeting was scheduled for February 5, 2020, but school was cancelled on that day, and the meeting was rescheduled for February 7, 2020. The district provided the parent with prior written notice of refusal to provide services full time in a resource room in his neighborhood school. That refusal was based upon a documented increase in instances of physical aggression following the student's transition to the neighborhood school on January 8, 2020. While the instances of verbal aggression had decreased, the number of disruptive comments made by the student had increased. The student had spent an increased amount of time in the "trauma informed care room" and had made comments about "not being able to control his body, not being able to have a safe body, etc."

The district offered and then withdrew its offer for mediation after the school and the parent came to consensus about what the student would need to do before his time in the general education setting would be increased. A goal was set for the student to have 5 consecutive days without physical aggression. If the student met that goal, the district would propose a change in placement at a meeting scheduled for February 18, 2020. That change would include the student's participation in the general education classroom for "morning meeting" as well as breakfast. Additionally, the team discussed

adding a journal that the student could use to communicate his frustrations. The special education teacher would attempt daily to process with the student any events that would be reflected on his point sheet. The team also proposed a series of 7 meetings to be held during the remainder of the school year to review the student's progress and discuss the addition of more time in the neighborhood school.
The district provided prior written notice to the parent outlining refusal of the parent's proposal to change the student's placement to the resource room and detailing the agreed-upon plan.

The team, including the parent, agreed to meet bi-weekly beginning February 18, 2020. Behavioral goals were set for the student. The student's time in the neighborhood school would increase as long as the student was meeting his goals.

On February 11, 2020, the parent met with the teacher and the school psychologist to discuss items related to the "parent feedback" provided in the parent's January 13, 2020 email sent to the principal. The meeting was intended to be an "informal discussion" rather than an IEP meeting, but the parent requested that clarifying statements be included in the IEP. At the meeting, the parent asked for additional testing in the areas of general intelligence, academic performance, and communicative status.

The parent was provided with prior written notice of the district's proposal to conduct a reevaluation of the student. The parent's consent for the reevaluation was requested and was provided. According to the consent form, dated February 12, 2020, the decision to reevaluate the student was based upon the need to determine whether the student would meet criteria to be identified as a student with a disability under the category of Autism. It was noted that the information gathered through the reevaluation would be used "to determine appropriate placement and services for [the student]."

A meeting was held on February 18, 2020. The team proposed adding time for the student at the neighborhood school. The district proposed that the student spend time at the school for 5 days each week. He would be present for breakfast and social skills 3 days each week and would be present for 2 days per week for breakfast and morning meeting. An IEP amendment form was presented to the parent along with prior written notice detailing the proposed change. On February 25, 2020, the parent requested that changes be made to the prior written notice form given to her on February 18, 2020. The parent wanted to have a statement included in the document that the team would "meet every two weeks to review data and determine additional

services for the remainder of the 19-20 SY. At that time, the team will determine the schedule for review for the 20-21 SY."

On March 3, 2020, a bi-weekly meeting with the parent was held. The parent asked that more time in the neighborhood school be added. The district refused to make the requested change because it was not supported by data and provided the parent with prior written notice of refusal. Because the student seemed to struggle more on Mondays, the team did add a Monday-morning "triage/check-in" to the IEP.

The principal sent an email to the parent on March 6, 2020 proposing dates for the next bi-weekly meeting. The parent responded on March 11, 2020 to confirm a March 26, 2020 date for that meeting.

Summary and Conclusions

The student started the school year with an active IEP from another Kansas district calling for full time placement in an alternative school setting, and the current district began providing comparable services to the student.

In a meeting held on September 24, 2019, the district provided the parent with prior written notice describing services to be provided to the student and stating that the team would have the student take a "field trip" to his neighborhood school and would write an amendment to the student's IEP for services to begin at that neighborhood school "at a later date" once the student had an "opportunity to process change." The district contacted the parent four school days later on October 1, 2019 to discuss the scheduling of the first trip to the neighborhood school for October 4, 2019, seven school days after the September 24, 2019 meeting, but the parent had concerns about background checks for the drivers who would be transporting the student and declined to allow the student to be transported on that date. Over the next month, the special education teacher and the principal communicated with the parent who continued to have reservations about the transportation of the student for a field trip to his neighborhood school. It was not until November 8, 2019 that the parent gave the district written permission to transport the student for field trips on November 13 and 15, 2019. The student took the trip on November 13, 2019 but did not come to school on November 15, 2019. Another field trip was scheduled for December 18, 2019 but the student did not take that trip because of an appointment.

During this same period of time, the district was working with the parent to schedule the evaluation/annual IEP meeting. The district began the process of scheduling the

meeting on October 23, 2019, approximately four weeks after the September 24, 2019 meeting. The first date for that meeting agreed upon by the parent and the district was November 19, 2019, approximately 8 weeks after the meeting of September 24, 2019. The parent cancelled the November 19, 2019 meeting. The district proposed a team meeting on December 3, 2019, but the parent did not agree to that date, so no meeting was held. The team convened an IEP meeting on December 17, 2019, and the results of the evaluation were reviewed. However, the parent did not want to hold the annual IEP meeting on that same day as planned, preferring to take the district's draft IEP with her to review. The annual IEP meeting was held on January 7, 2020, and, on January 8, 2020, the student began the process of transitioning to his neighborhood school by going to the school three days a week for breakfast and a social skills group. While, as noted on the prior written notice and consent form, the parent wanted to see the student at his neighborhood school "100% of the day," the parent gave her written consent for the implementation of this plan.

On January 23, 2020, the parent requested that the student be transitioned to a resource classroom in the neighborhood school. A meeting to discuss that request was scheduled for February 5, 2020 but rescheduled for February 7, 2020 because of a weather-related school closing. At the February 7, 2020 meeting, the parent requested a full transition of the student to the neighborhood school. The district felt a gradual transition was important for the student's success. The parties discussed the option of mediation to resolve their disagreement on this issue but were able to reach agreement when the district proposed a plan to increase the student's time in the neighborhood school setting if he was able to meet a behavior goal at the special day school by February 18, 2020. The district also proposed a series of bi-weekly team meetings to discuss the student's progress and the addition of time in the neighborhood school building. The parent was provided with prior written notice of the plan.

At a meeting on February 18, 2020, the team proposed adding more time at the neighborhood school for the student. The parent was provided with prior written notice of the proposed change in services and placement on February 18, 2020 and on February 25, 2020 the parent requested changes to the prior written notice form. The parent did not give written consent for the proposed changes. The team met again on March 3, 2020, and the parent requested that additional time in the general education setting be added to the student's IEP. The district provided prior written notice of refusal for that proposed change since the parent had still not provided her written consent for increases in time at the neighborhood school which the district had

already proposed in a prior written notice form on February 18, 2020. Another team meeting was scheduled for March 26, 2020.

The student started the school year with an active IEP from another Kansas district calling for placement in a special school setting. The current district began providing comparable services to the student but responded to the parent's request for increased integration of the student into the neighborhood school setting. The district made a good faith effort to schedule "field trips" to begin the transition process, but those trips were delayed because of parental concerns. Once those concerns were resolved in early November, the district promptly moved ahead to arrange the student's first field trip on November 13, 2019. Although other field trips were scheduled by the district, the student was not available to participate in any of those trips. Nonetheless, one day after an IEP meeting on January 7, 2020, the district increased the student's time at his neighborhood school. While the district has not felt it is in the best interest of the student for him to be transitioned to the neighborhood school setting as the parent has requested, the district has provided the parent with prior written notice of its refusal to take that action, and has continued to work toward increasing levels of integration of the student into the general education environment. As a result of these actions, the district has provided opportunities for the student to transition to a less restrictive environment and has carried out the provisions specified in the prior written notice form of September 24, 2019. Under these circumstances, a violation of special education statutes and regulations is not substantiated.

## Corrective Action

Information gathered in the course of this investigation has not substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Therefore, no corrective actions are required.

## Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. While the Kansas State Department of Education (KSDE) offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____
Diana Durkin, Complaint Investigator

Appeals:
(f)(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)

In the Matter of the Appeal of the Report
Issued in Response to a Complaint Filed
Against Unified School District No. ___
_____ Public Schools: 20FC___-001

## DECISION OF THE APPEAL COMMITTEE

## BACKGROUND

This matter commenced with the filing of a complaint on March 5, 2020, by _____ _____, on behalf of her son, _____ _____. An investigation of the complaint was undertaken by a complaint investigator on behalf of the Special Education and Title Services team at the Kansas State Department of Education (KSDE). Following the investigation, a Complaint Report addressing the allegations was issued on April 4, 2020. That Complaint Report concluded that there was no substantiation of a violation of special education statutes or regulations.

Thereafter, the parent filed an appeal of the Complaint Report. Upon receipt of the appeal, an Appeal Committee was appointed and it reviewed the parent's original complaint, the Complaint Report, the notice of appeal and attachments submitted by the parent, and the response to the parent's appeal and attachments submitted by the district. The Appeal Committee has reviewed the information provided in connection with this matter and now issues this Appeal Decision.

## PRELIMINARY MATTERS

Scope of Inquiry: The Appeal Committee limits its inquiry to the issue investigated in the Complaint Report and presented in the appeal. No new issues will be decided by the Appeal Committee. Further, the Appeal Committee will not address any previous issues already settled by a previous complaint investigation. The appeal process is a review of the Complaint Report issued on April 4, 2020. The Appeal Committee does not conduct a separate investigation. The Appeal Committee's function is to determine whether sufficient evidence exists to support the findings and conclusions in the Complaint Report.

On page 1 of the parent's appeal notice, the parent objects to the way the investigator interviewed the parties and the documents that the investigator reviewed. The pertinent regulation, K.A.R. 91-40-51(f)(1), permits a party to "appeal any of the findings or conclusions of a compliance report." This regulation makes no provision for the

appeal of the investigative process; therefore, the Appeal Committee will not address any appeal of methods the investigator used to conduct the investigation.

Relevant Law: On page 2 of the parent's appeal notice, the parent states, "The investigative report cites K.S.A. 72 statutes regarding this complaint.... [I]t is the parent's belief that regulations contained in K.A.R. 91-40 should be considered in this complaint." The Appeal Committee notes that state special education regulations contained in the 91-40 section of the Kansas Administrative Regulations (K.A.R.) are subject to the Kansas Special Education for Exceptional Children Act, which encompasses Kansas Statutes Annotated (K.S.A.) 72-3403 through 72-3481. The regulations are the administrative rules that flesh out and implement the statutes. The investigator correctly cited K.S.A. 72-3429(g)(1), and there is no corresponding regulation for that particular statute.

## DISCUSSION OF ISSUE ON APPEAL

In her complaint filed on March 5, 2020, the parent raised one issue, which is also the issue on appeal:

> The district failed to provide the student with the opportunity to transition to and be educated in the least restrictive environment alongside his non-disabled peers in a general education building in compliance with prior written notice provided to the parent on September 24, 2019.

The investigator made the following conclusions on page 17 of the Complaint Report regarding the implementation of the September 24, 2019 PWN:

> The student started the school year with an active IEP from another Kansas district calling for placement in a special school setting. The current district began providing comparable services to the student but responded to the parent's request for increased integration of the student into the neighborhood school setting. The district made a good faith effort to schedule "field trips" to begin the transition process, but those trips were delayed because of parental concerns. Once those concerns were resolved in early November, the district promptly moved ahead to arrange the student's first field trip on November 13, 2019. Although other field trips were scheduled by the district, the student was not available to participate in any of those trips. Nonetheless, one day after an IEP meeting on January 7, 2020, the district increased the student's time at his neighborhood school. While the district has not felt it is in the best interest

> of the student for him to be transitioned to the neighborhood school setting as the parent has requested, the district has provided the parent with prior written notice of its refusal to take that action, and has continued to work toward increasing levels of integration of the student into the general education environment. As a result of these actions, the district has provided opportunities for the student to transition to a less restrictive environment and has carried out the provisions specified in the prior written notice form of September 24, 2019. Under these circumstances, a violation of special education statutes and regulations is not substantiated.

Both in the parent's original complaint and in her appeal notice, the parent argues that the district did not follow through on the proposals outlined in a prior written notice (PWN) dated September 24, 2019. On page 2 of the parent's appeal notice, she writes:

> To answer this complaint the district would need to prove that they followed through on what was written on the 24 Sep [*sic*] PWN and what was stated during that meeting. The record shows that this did not occur. The student did not begin transition as stated, data was not collected in the Neighborhood Building, and no Amendment to his April 16, 2019 annual IEP from USD #233 was written.

The parent's appeal notice reiterates this argument on pages 10 and 11:

> The parent by report and attached documentation shows that the district did not follow through with the PWN and discussion and neither amended the 2019 IEP, collected data in the neighborhood school environment, transitioned the student to his neighborhood school, nor wrote a new IEP incorporating the transition.

In its written response to the parent's notice of appeal, the district contends that "[the investigator] found correctly: '…the district has provided opportunity for the student to transition to a less restrictive environment and has carried out the provisions specified in the prior written notice form of September 24, 2019…'"

The Appeal Committee examined the contents of the September 24, 2019 PWN at issue. In the section "Description of the Action Proposed or Refused", which is the section of a PWN where the district describes the proposed actions to which it is committing, the document states in relevant part on page 2:

> The team discussed having [the student] begin transitioning to his general education building. The team will have [the student] do a field trip to his

> homebuilding. The team will write an amendment for services to begin at [the neighborhood school] at a later date, once student has opportunity to process change. The team will conduct an evaluation to collect additional information.

The Appeal Committee reviewed the Complaint Report and documents submitted by both the parent and district on appeal to determine whether there is sufficient evidence to support the investigator's conclusion (Complaint Report pp. 15, 17) that the district carried out the PWN commitments quoted above.

The first sentence in the relevant part of the PWN quoted above is, "The team discussed having [the student] begin transitioning to his general education building." The Appeal Committee finds that there is no commitment in this statement to have [the student] begin transitioning to his general education building. It is merely a statement of fact about what was discussed at the meeting. The only commitments were to have "[the student] do a field trip to his home building" and to "conduct an evaluation to collect additional information." Those commitments were fulfilled within a reasonable time, as described below in this Appeal Decision.

The second sentence in the relevant part of the PWN quoted above is a commitment to "have [the student] do a field trip to his homebuilding." The Appeal Committee finds, as evidenced by emails between the parties, that the student did take a field trip to his neighborhood school on November 13, 2019. While the PWN only commits to "a field trip" the district also scheduled additional field trips for November 15, 2019 and December 18, 2019, but the student did not participate in those field trips due to absence.

The third sentence in the relevant part of the PWN quoted above is, "The team will write an amendment for services to begin at [the neighborhood school] at a later date, once the student has opportunity to process change." This is, at best, a conditional commitment. It commits to writing an amendment for services to begin at [the neighborhood school] at some unspecified time in the future "once the student has the opportunity to process change." A reasonable reading of this statement is that the team was agreeing to amend the IEP to begin services at [the neighborhood school] once the student has an opportunity to successfully process change. It does not appear to this Appeal Committee that the team was making a commitment to begin services at the neighborhood school without regard to whether data indicated that the student would be able to successfully process that change. Nevertheless, the Appeal Committee finds, as evidenced by the December 12, 2019 PWN and the student's

January 7, 2020 IEP, that the district did write an amendment for services to begin at the neighborhood school. The December 12, 2019 PWN proposed that "The team will meet on 1.7.20 @ 8:30 a.m. to discuss an amendment to the 4.16.19 annual IEP. Changes may include behavior intervention plan, goals, and services/placement." The January 7, 2020 IEP includes the following special education services at the neighborhood school:

- Special Education Transportation for 10 minutes, 3 times per week, every week from the general education building to the special day school.
- Specialized Instruction in social skills 30 minutes, 3 times per week, every week in the special education classroom in the general education building. Rationale: [the student] is working on increasing his time in the general education building.
- Attendant Care in a general education environment 25 minutes, 3 times per week, every week for breakfast.

The parent gave consent for these service changes in a PWN dated January 7, 2020.

The fourth and final sentence in the relevant part of the September 24, 2019 PWN, quoted above, is a commitment to "conduct an evaluation to collect additional information." The Appeal Committee finds, as evidenced by emails between the parties and Evaluation Team Reports dated December 17, 2019, that the team did conduct an evaluation to collect additional information. According to a second September 24, 2019 PWN signed by the parent, this evaluation was conducted to determine if the student's current placement at the time was the least restrictive environment and appropriate programming for the student. The parent argues on appeal that the district was required to collect data in the neighborhood school. The Appeal Committee finds that the September 24, 2019 PWN at issue in the Complaint Report and in this appeal did not commit the district to collect data in the neighborhood school. The action proposed is stated as "The team will conduct an evaluation to collect additional information." The explanation of why the action is proposed is stated, in relevant part, as "The actions above are proposed because at this time the team believes that this is the best way to meet [the student]'s needs until more data in this setting is collected." The phrase "in this setting" is referring to the student's contemporaneous placement listed on the bottom of page 2 of the PWN at issue, which is stated as "special day school setting."

Finally, the Appeal Committee will address the timeframe within which the district was required to begin implementing these commitments. On page 4 of the PWN, in the "Request for Consent for Special Education Action" section, the document states, "The proposed actions will begin within 10 school days (unless there is a reasonable justification for delay) upon receiving your written consent." The Appeal Committee

finds that the district began the proposed actions within 10 school days. As evidenced by emails between the parties and as the investigator correctly concludes on page 15 of the Complaint Report:

> The district contacted the parent four school days later on October 1, 2019 to discuss the scheduling of the first trip to the neighborhood school for October 4, 2019, seven school days after the September 24, 2019 meeting, but the parent had concerns about background checks for the drivers who would be transporting the student and declined to allow the student to be transported on that date. Over the next month, the special education teacher and the principal communicated with the parent who continued to have reservations about the transportation of the student for a field trip to his neighborhood school. It was not until November 8, 2019 that the parent gave the district written permission to transport the student for field trips on November 13 and 15, 2019. The student took the trip on November 13, 2019 but did not come to school on November 15, 2019. Another field trip was scheduled for December 18, 2019 but the student did not take that trip because of an appointment.

In summary, the process of implementing the commitments in the PWN began within four school days when the district contacted the parent on October 1, 2019 to schedule a field trip to the neighborhood school, proposed to take place on October 4, 2019, seven school days after the date of the September 24, 2019 PWN. While the field trip did not actually take place until November 13, 2019, this was due to the parent's concerns stated above, which the Appeal Committee finds to be a reasonable justification for delay, as permitted by the above quoted statement in the September 24, 2019 PWN.

## CONCLUSION

The Appeal Committee concludes that the Complaint Report is sustained.

This is the final decision on this matter. There is no further appeal. This Appeal Decision is issued this 30th day of April, 2020.

APPEAL COMMITTEE:

Brian Dempsey

Laura Jurgensen

Mark Ward

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES
REPORT OF COMPLAINT
FILED AGAINST
_____ _____ SCHOOLS, USD #___
ON MARCH 11, 2020

DATE OF REPORT: APRIL 10, 2020

This report is in response to a complaint filed with our office by _____ ___ on behalf of her son, _____. _____ will be referred to in the remainder of this report as "the student." 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 March 17, 2020. The investigator spoke by telephone with the parent on April 3, 2020.

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

- Confidential Educational Evaluation dated February 25, 2019
- Notice of Meeting dated September 12, 2019
- Notice of Meeting dated September 25, 2019
- Notice of Meeting dated October 1, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 1, 2019
- Notice of IEP Review/Revision Meeting dated October 17, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated October 17, 2019
- Notice of IEP Review/Revision Meeting dated November 11, 2019
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 11, 2019
- IEP for the student dated November 20, 2019

- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated November 20, 2019
- Daily behavior data sheets dated January 8, 21, and 22, 2020
- Email dated January 22, 2020 from the parent to the case manager, principal, assistant director of special education, Autism/behavior consultant, school psychologist, classroom teacher, the parent advocate, and others
- Email exchange dated January 23, 2020 between the case manager and the parent
- Email dated January 23, 2020 from the classroom teacher to the parent and educational team
- Email dated January 26, 2020 from the parent to the classroom teacher and the educational team
- Email dated January 28, 2020 from the principal to the parent
- Email dated January 29, 2020 from the parent to the principal
- Email exchange dated January 30, 2020 between the case manager and the parent
- Email exchange dated February 19, 2020 between the school psychologist and the parent
- Prior Written Notice for Identification, Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent dated March 10, 2020
- Email dated March 10, 2020 from the school psychologist to the parent

## Background Information

This investigation involves a seven-year-old student who is enrolled in the first grade in his neighborhood elementary school.

After an evaluation by a psychologist at the Developmental and Behavioral Sciences department of Children's Mercy Hospital, the student was given a diagnosis of Autism Spectrum Disorder without accompanying intellectual impairment, with language impairment, associated with a known medical or genetic condition or environmental factor (Micro-deletion). The student has also been diagnosed with Attention Deficit Disorder.

The student attended the Riley ABA & Autism Center, a program that, according to its website https://www.rileyaba.com, provides "individualized therapeutic based services based on the science and principles of applied behavior analysis to children diagnosed with autism and their families."

According to the report of a special education evaluation conducted by the district at the request of the parent dated February 25, 2019, the student met criteria for being considered a child with an exceptionality under the category of Autism. Per the report, the student demonstrated deficits in pragmatic language and in his ability to appropriately adjust his behavior to varying school settings. The student also demonstrated delays in his ability to transition in the general education classroom and across other school environments. Problems were noted with his ability to self-start, self-direct, and switch and self-monitor his own behavior. The student was determined to be eligible for and in need of special education services. However, an individualized education plan (IEP) for the student was not developed until the 2019-20 school year.[1]

## Issue

In her complaint, the parent raised the following issue:

> By allowing the student to leave the classroom during math in order to complete his work in the resource room, the district encouraged escaping behavior, violated the student's IEP, LRE, and his behavior intervention plan (BIP).

## Parent's Position

The parent asserts that neither the student's IEP nor his behavior plan allow the district to send the student to the resource room setting. On the contrary, it is the parent's position that by allowing the student the choice of leaving his classroom, the district is actively reinforcing negative escape behavior.

The parent believes that in addition to the morning paraeducator support the student is already receiving, the student's behavior is indicative of the need for support from a special education certified paraeducator during math instruction from 12:20 to 1:45 P.M. daily to work on executive functioning skills.

[1] **Post-investigation note:** At the time of the writing of this report, the investigator had insufficient information to determine whether or not the gap in time that elapsed between the February 25, 2019 eligibility determination and the initial proposed IEP in fall 2019 was a violation of the 60-school-day evaluation time-line requirement in K.A.R. 91-40-8(f)(2)-(3) and (h). KSDE later determined that no violation occurred because the parent consented to extend the 60-school-day initial evaluation timeline in November 2018, pursuant to K.A.R. 91-40-8(f). When the eligibility determination was made on February 25, 2019, the parent did not give consent to the initial provision of special education and related services at that time.

## District's Position

The district asserts that it has provided the student with a free appropriate public education (FAPE), has worked amicably with the parent, and has met as a team to address the concerns stated by the parent in her complaint. The district contends that providing the student the option of leaving his classroom during work time in math does not deviate from the student's IEP or his BIP. Rather, it is the district's position that allowing the student the "choice" to complete his work in the resource setting is reflective of compliance with one of the accommodations specified in the student's IEP, not a change in placement. The district states that the student makes the choice of where he wants to sit to complete his independent math work after participating in all of the classroom math instruction. It is the position of the district that in passing to the resource room to complete his independent math work, the student has been given a "break", something also called for in his IEP. The district contends that the student sometimes chooses to stay in the classroom and sometimes chooses to go to the resource room and notes that allowing this accommodation has proven beneficial to the student.

The district contends that a meeting was held on January 31, 2020 to address the parent's concerns regarding the implementation of the student's IEP and BIP and that a trial period of paraeducator support was proposed to address the parent's concerns.

## Educational Placement and IEP Implementation

### Applicable Statutes and Regulations for Educational Placement and IEP Implementation:

Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulations implementing the Kansas Special Education for Exceptional Children Act at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The federal regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

In addition, the school is required to develop an IEP in which services are stated in a manner that is clear to the parents and to all others who are involved in both the development and implementation of the IEP. (See 34 C.F.R. Part 300, Appendix A, Q. 35, Federal Register, March 12, 1999, p. 12479.)

34 C.F.R. 300.503(a)(1) and K.S.A. 72-3430(b)(2)(A) provide parents with the right to receive prior written notice whenever a district proposes to initiate or change the educational placement of their child. K.A.R. 91-40-27(a)(3) requires that districts in Kansas obtain written parental consent before making a substantial change in the placement of an exceptional child. K.A.R. 91-40-1(sss) defines a "substantial change in placement" as "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.S.A. 72-3432 specifies the contents of the prior written notice provided to parents when requesting consent for a substantial change in placement and requires the agency to include a description of the action proposed as well as an explanation of why the agency proposes to take the action.

Investigative Findings for Educational Placement and IEP Implementation:
The district initially proposed an IEP for the student in a meeting on October 1, 2019. Additional meetings to develop the document had been held on October 17, 2019 and November 11, 2019. The initial IEP for the student was finalized at a meeting on November 20, 2019. Goals established in the IEP relate to social skills, communication, and behavior. The student was to receive 50 minutes of specially designed instruction for 5 days each week *in the general education classroom* as well as 20 minutes of speech/language services twice a week in a special education classroom.

The "Accommodation/Modifications/Supplementary Aids and Services" section of the student's November 2019 IEP includes the following:

- Scheduled ***breaks*** [emphasis added] throughout his day (allowing frequent movement breaks) and provision of a break card;
- Visual schedule and reminders for changes in routine, especially when unexpected;
- Give him ***choices*** [emphasis added] when necessary (i.e. where to sit & work, which assignment to complete first, how to display understanding of the concept, etc.);
- Positive reinforcement for expected behaviors – reinforcement system ("I am working for" chart);
- Break assignments down into steps – chunking of assignments;
- Check often for understanding – have [the student] repeat directions back to teacher;
- Modified/shortened assignments;

- Present new information both visually and auditorily to develop [the student's] ability to interpret what is being said;
- Work to be copied from the board will be provided beforehand or a scribe will be permitted so [the student] can concentrate on the teacher's verbalizations;
- [The student] requires additional space to organize his materials;
- Provide [the student] with trusted point person to check-in with.

The Behavior Intervention Plan included in the student's November 2019 IEP includes the following statements regarding "Escape."

- "Make escape less desirable: One way we can keep [the student] from engaging in problem behavior to get escape is to make sure that he is not hungry for escape:
    - Give frequent predictable breaks, by decreasing the amount of work between reinforcement breaks, particularly during nonpreferred activities. While more frequent access to reinforcers may sound like it will slow down progress, it may actually increase the amount of work that [the student] is able to get done and increase his enjoyment and yours.
    - Make the amount of work that he will do before a break more predictable. This can be done through the use of a timer, a token system or by setting the amount of work on the desk next to a break card (2 books then a break).
- Check for Understanding: There are a number of times that [the student] looks like he is being noncompliant, but it is unclear whether or not he understands the direction and/or has the skills to complete the activity. It is important that we continue to have a good handle on [the student's] receptive language and academic skills so that we will know whether we are seeing a lack of compliance or a lack of understanding/ability.
- Foreshadowing: When preferred activities are ending or you are removing preferred items, give some warning before termination ("[Student], in 5 minutes, it will be time to be finished with the (toy))."
- Positive Directives: When giving [the student] instructions, rather than saying what he should stop doing, instead focus on what he should do. For example, rather than saying, "[Student], stop walking around the room" instead say, "[Student], sit down" or "[Student], go line up at the door."
- ***Choices*** [emphasis added]: Increase the amount of choices [the student] gets to make in a day. Give limited choices (i.e., a choice between 2 items or activities) as frequently as possible during the day."

At the time of the filing of this complaint, the student was receiving support from two special education teachers. One provided morning "triage" service, setting the student up for his school day. This provider offered a sensory activity and sometimes a social story and at times helped with the student's behavior checklist and visual schedule. She also provided executive functioning training and helped the student start his morning work. The second special educator served as the student's case manager and facilitated the implementation of the student's IEP but provided no direct service to the student.

On January 22, 2020, the parent sent an email to the student's case manager stating that the student had informed the parent that he was going to the resource room during his class. The parent stated that she had not been told that this would be happening.

The case manager responded via email on January 23, 2020, telling the parent that the student had been "checking in" during the time allotted for students to complete independent work in math – not during instructional time. The email states that the student had come to the resource room to finish his independent work and "get back on track." The case manager wrote that the student had been responding to the additional instruction and experiencing success, noting that the student had been "very willing and cooperative when doing his work once he gets the one-to-one instruction." According to the case manager, the team was "discussing new strategies to help [the student] better succeed in the classroom."

The district confirms that the student had, on several occasions, been offered the option of completing independent math work in the resource room but reports that the student only exercised the option to leave the classroom on three occasions. Daily behavior data sheets provided by the district show that, on January 8, 21, and 22, 2020, the student chose to go to the resource room. On January 8, 2020, the student spent approximately 20 minutes in the resource room. The student spent an hour in the resource room on January 21, 2020. He spent approximately 20 minutes in the resource room on January 22, 2020.

On January 23, 2020, the parent sent an email to the case manager stating that the "check in person" included in the student's IEP was to come to the student in the general education classroom "to gauge his emotion and his executive functioning skills," but the IEP did not call for the student to leave the classroom to check in with the case manager. The parent stated that she believed that a meeting should be held

"to clear things up" and to address issues the parent had with the content of a proposed Behavior Intervention Plan.

In a January 23, 2020 email response to the parent, the case manager stated that she felt it was a "great idea to set up a team meeting to come up with a new plan [because] the current plan is no longer effective."

On January 23, 2020, the classroom teacher sent the parent and the IEP team for the student an email summarizing the strategies currently in place for the student and reporting on the student's response to those strategies. The parent responded to the classroom teacher and the team on January 26, 2020 outlining concerns she had with the administrator and the case manager. The parent stated that she "should have been notified immediately that [the student] was being asked to make a choice to stay or leave the classroom [because] decisions made by the team without parent involvement is not making decisions as a team."

A meeting was held on January 31, 2020 to discuss the student's progress, and the parent's concerns regarding the terms "break" and "reset" in the student's BIP. Following the meeting, the Autism coach and the two special education teachers who provided support to the student, came together to discuss the terminology used in the student's IEP and behavior plan so that all parties could have a common understanding. By report of the district, the behavior plan for the student was not revised at that time but the team believed that the terms "break" and "reset" were understood by school staff.

Summary and Conclusions for Educational Placement and IEP Implementation:
On three occasions during the month of January 2020, the student exercised an option given to him by his classroom teacher to leave the general education classroom and go to work in the resource room to complete independent math work. The student was away from the general classroom setting and in a special education setting for approximately one hour and forty minutes in total.

The student's IEP states that all special education services for the student will be delivered in the general education setting. However, in an email to the parent, the resource teacher stated that the student came to the resource room to finish his independent work and "get back on track." The case manager wrote that the student had been responding to the additional instruction and experiencing success, noting that the student had been "very willing and cooperative when doing his work once he gets the one-to-one instruction."

The "Accommodation/Modifications/Supplementary Aids and Services" section of the student's IEP refers to "breaks" and "choices." The district contends that when allowing the student to choose to go to sit in the resource room, staff was following the student's IEP, giving him a "break" and allowing him a "choice" of where to work. The parent asserts that she never anticipated that the student would be given the option of leaving the general education classroom to spend more time in a special education setting where he would receive additional instruction. The parent believed that, by giving the student the option to leave his classroom, the district is encouraging "escape behaviors" and rewarding the student's preference for one-to-one adult attention, behaviors that are specifically targeted for reduction in the student's behavior intervention plan.

According to the district, the Autism coach met on March 9, 2020 with the principal, case manager, classroom teacher, school psychologist, speech and language pathologist, and the paraeducator who would be working with the student under the proposed trial intervention. The purpose of the meeting was to review and clarify the language of the student's BIP.

The parties have met to discuss the definition of "breaks" and to discuss the parent's concerns, but at the time of the writing of this report, no changes have yet been made to the student's IEP or his behavior intervention plan that further define either "breaks" or "choices." It is clear to the investigator that the parties did not have a "meeting of the minds" regarding the definitions of a "break" and "choices." Regardless of the definitions of the terms "break" and "choice," a change of placement occurred when the student went to the resource room upon the suggestion of the classroom teacher. By proposing an option for the student to leave the general education setting and move to a special education setting where the student would receive specialized instruction from a special education teacher, the district effectively changed the student's placement.

Further, the district provided approximately one hour and forty minutes of special education services to the student in a special education setting without providing prior written notice to the parent of the removal of the student from the regular education environment. Though prior written notice was required, parent consent was not required. This change of placement did not constitute a substantial change in placement because it was for durations of 20 minutes on January 8 and 22, and for 1 hour on January 21, all of which are less than 25% of the student's school day.

A violation of special education statutes and regulations is substantiated because the parent was not provided with prior written notice before the district removed the student from the regular education environment to the special education environment.

Special Education and Related Services (Paraeducator Support)

Applicable Statutes and Regulations for Special Education and Related Services (Paraeducator Support):
34 C.F.R. 300.503(a)(1) and K.S.A. 72-3430(b)(2)(A) provide parents with the right to receive prior written notice whenever a district proposes to initiate or change the provision of a free appropriate public education (FAPE) to the child. The United States Supreme Court has interpreted FAPE to mean an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances (Endrew F. v. Douglas County School Dist. RE-1, 580 U.S. __ (2017)). In short, any proposed change by a school district to the IEP for a child requires prior written notice. Further, K.A.R. 91-40-27(a)(3) requires that districts in Kansas obtain written parental consent before making a material change in services to an exceptional child. Material change in services is defined at K.A.R. 91-40-1(mm) as "an increase or decrease of 25 percent 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."

Investigative Findings for Special Education and Related Services (Paraeducator Support):
In her email to the case manager dated January 22, 2020, the parent stated that the team might need to "reconsider a para in the classroom during math."

At the January 31, 2020 meeting referenced above, the team discussed the parent's request for the student to receive paraeducator support during math. The meeting ended with an understanding that options for additional support would be reviewed by the district and presented to the parent.

On February 19, 2020, the school psychologist sent an email to the parent stating that school staff was of the opinion that the time of day when math instruction was provided was the critical factor impacting the student's behavior rather than the subject matter itself. The district proposed a trial intervention of paraeducator support at two times during the afternoon – from 12:20 to 12:50 during math and from 2:35 to 3:05 during social studies/science/Spanish. Data would be taken on the student's progress and response to the intervention which would then be used to determine if

more paraeducator support was appropriate and "if the team should consider adding it to his IEP." The school psychologist stated that she would like to plan a meeting in 4 to 6 weeks to review the intervention data with the parent and the team. The school psychologist asked the parent to let her know if she was comfortable with the team initiating the intervention.

On February 27, 2020, the parent met with the school psychologist and the assistant director of special education to discuss the district's proposal. According to the parent, she did not agree with the district's plan but felt that if it was to be implemented, she first wanted to have an opportunity to interview the paraeducator who would be providing support.

On March 10, 2020, the school psychologist sent an email to the parent asking if a time could be set up for the parent to meet with the paraeducator. In the email, the school psychologist attached prior written notice of its proposal to provide an option for a "trial intervention" for push-in paraeducator support for the student "during designated times of his afternoon." According to the prior written notice form, the school team believed parental consent was not required for the proposed action. The school team rejected the parent's request for the student to receive full-time paraeducator support during math, determining that "it was the time of day rather than the academic subject [the student] exhibits difficulties in." However, the trial intervention would provide 60 additional minutes per day of special education services beyond what was specified in the student's November 2019 IEP.

The parent did not respond to the school psychologist's email, and the trial intervention was not implemented. Students in the district were out of school on spring break for the week of March 16 through March 20, 2020. All school buildings in the state of Kansas were closed to slow the spread of the COVID-19 virus by executive order no. 20-07 of the Kansas Governor on March 17, 2020.

Summary and Conclusions for Special Education and Related Services (Paraeducator Support):

The district proposed a "trial intervention" to address the parent's request for additional paraeducator support for the student during math. That intervention would have provided 60 additional minutes per day of special education services to the student beyond the 50 minutes of services specified in the student's November 2019 IEP. The district provided the parent with prior written notice of the proposed action but did not request parent consent.

As a result of the school closure caused by the COVID-19 virus, the district did not implement the "trial intervention." Had it been implemented, the special education services to the student in the general education setting would have more than doubled, well beyond the 25% level considered to be a material change in services. While prior written notice of the proposed action was given to the parent, parental consent for the proposed material change in services was neither sought nor obtained. Therefore, a violation of special education statutes and regulations is identified.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations on issues presented in this complaint. Specifically, a violation has occurred with regard to:

- 34 C.F.R. 300.503(a)(1) and K.S.A. 72-3430(b)(2)(A) which require districts to provide prior written notice to a parent a reasonable time before the district proposes to change the educational placement of the child.
- K.A.R. 91-40-27(a)(3), which requires that districts obtain parental consent before making a material change in services to an exceptional child.

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

1) Submit to Special Education and Title Services (SETS), within 10 days of the date of this report, a written statement of assurance stating that it will comply with
   a) 34 C.F.R. 300.503(a)(1) and K.S.A. 72-3430(b)(2)(A) by providing prior written notice to parents a reasonable time before proposing to change the educational placement of a child with an exceptionality., and

   b) K.A.R. 91-40-27(a)(3), by requesting parental consent before making a material change in services to an exceptional child.

2) No later than 10 school days after the start of the 2020-21 school year,
   a) Convene an IEP team meeting for the purpose of reviewing and revising the behavior intervention plan in the student's IEP as appropriate, and to clarify the meaning of any ambiguous terms upon which the parent and school district disagree.

b) At the meeting described above under Item 2)a), the team must address the student's need for paraeducator or other special education support. If the team determines that the student requires additional support in the classroom from a paraeducator, the district must reflect the change in services on the student's proposed IEP, provide the parent with prior written notice of the proposed change, and request the written consent of the parent if proposing any material change in services to or substantial change in the placement of the student.

c) No later than 5 calendar days after the IEP meeting described in 2)a) and 2)b) occurs, USD #___ must provide to SETS a copy of the Notice of Meeting sent to the parent. If changes are made to the IEP as a result of that meeting, USD #___ must also provide to SETS a copy of the revised IEP, a copy of the prior written notice, and a copy of the request for parent consent if the proposed changes are a material change in services or a substantial change in placement.

3) No later than 20 calendar days after the date of this report, provide training to all of the school staff who are members of the student's IEP Team. Such training must include at a minimum, a) information about what actions constitute a change of educational placement, b) information about the definition of "material change in services", and c) information about the requirement to obtain written parent consent before making a material change in services. Due to the ordered closure of school buildings caused by the COVID-19 outbreak, this training may be delivered to the required staff via virtual methods such as video conferencing or a webinar. No later than 21 calendar days after the date of this report, USD #___ must provide to SETS the name and position of the person who delivered the training, the content of the training, and documentation showing that each required staff member attended the training – such as an attendance record or sign-in sheet.

4) Submit to SETS, within 10 calendar days of the date of this report, 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 or conclusions in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned email address within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON MARCH 16, 2020

DATE OF REPORT: APRIL 15, 2020

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

The complaint is against USD #___ who contracts with the ____ _____ _____ Special Education Cooperative (_____) to provide special education services. In the remainder of this report the terms "USD #___", "public agency", and "school district" shall refer to both of these responsible public agencies.

The complaint was received by the Kansas State Department of Education (KSDE) on March 16, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ended on April 15, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on April 1, 2020 as part of the investigation process. In addition, ____ _____, Assistant Director of _____ [the Cooperative], was interviewed on April 2, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Individualized Education Plan (IEP) for the student dated December 18, 2019 with an initiation date of December 19, 2019

- Multidisciplinary Staffing Summary from the December 18, 2019 IEP team meeting and signed by all IEP team members
- Prior Written Notice (PWN) for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated December 18, 2019 and signed by the parent on that same date
- Letter written by _____ ____, Special Education Teacher, to the parent dated January 8, 2020
- IEP for the student dated December 18, 2019 with an initiation date of January 10, 2020
- Timeline of events handwritten by ____ ____, School Psychologist, dated December 18, 2019 through February 18, 2020
- The 2019-20 School Year Calendar for USD #___
- Email written by the parent to Ms. ____ [Special Education Teacher] dated January 14, 2020 at 9:55 p.m.
- Email written by Ms. ____ [Special Education Teacher] to the parent dated January 15, 2020 at 5:39 p.m.
- Email written by the parent to Ms. ____ [Special Education Teacher] dated January 15, 2020 at 7:15 p.m.
- Email written by Ms. ____ [Special Education Teacher] to the parent dated January 16, 2020 at 12:27 p.m.
- Email written by the parent to Ms. ____ [Special Education Teacher] dated January 16, 2020 at 1:51 p.m.
- Email written by Ms. ____ [Special Education Teacher] to the parent dated January 16, 2020 at 5:36 p.m.
- Email written by the parent to Ms. ____ [Special Education Teacher] dated January 16, 2020 at 7:13 p.m.
- Email written by Ms. ____ [Special Education Teacher] to the parent dated January 20, 2020 at 10:34 a.m.
- Email written by Ms. ____ [Special Education Teacher] to the parent dated January 27, 2020 at 3:25 p.m.
- Email written by the parent to Ms. ____ [Special Education Teacher] dated February 3, 2020 at 6:20 p.m.

- Email written by _____ _____, Assistant Director of _____ [the Cooperative], to the parent dated February 3, 2020 at 8:32 p.m.
- Email written by Ms. _____ [Special Education Teacher] to the parent dated February 4, 2020 at 9:51 a.m.
- Email written by Ms. _____ [Special Education Teacher] to the parent dated February 4, 2020 at 12:26 p.m.
- Email written by Ms. _____ [Special Education Teacher] to the parent dated February 10, 2020 at 8:38 a.m.
- Email written by Ms. _____ [Special Education Teacher] to the parent dated February 10, 2020 at 8:52 a.m.
- Email written by the parent to Ms. _____ [Special Education Teacher] dated February 10, 2020 at 10:22 a.m.
- Email written by Ms. _____ [Special Education Teacher] to the members of the student's IEP team dated February 10, at 10:33 a.m.
- Email written by Ms. _____ [Special Education Teacher] to the parent dated February 10, 2020 at 12:34 p.m.

## Background Information

This investigation involves a male student who is enrolled in the 6th grade at _____ Elementary School in USD #___ during the 2019-20 school year. He has attended USD #___ since second semester of 2nd grade. Per parent report, the student has a medical diagnoses of oppositional defiant disorder (ODD), attention deficit hyperactivity disorder (ADHD), and depression. USD #___ conducted an initial special education evaluation of the student during the first semester of the 2018-19 school year resulting in a determination that the student was not eligible for special education services on January 17, 2019.

The parent did not agree with the evaluation provided by the district and requested an independent educational evaluation (IEE) on March 4, 2019. USD #___ contracted with _____ _____, Psychologist at Neuroeducational Associates, to conduct the IEE. The multidisciplinary team including the parent considered this IEE on November 25, 2019 and the student was determined eligible for

special education and related services due to the exceptionality of emotional disturbance. USD #___ convened an IEP team meeting on December 18, 2019 for the purpose of developing an initial IEP for the student.

## Issues

Based upon the written complaint, the parent raised one issue that was investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the special education services beginning on December 19, 2019.

### Parent Position

The parent believes USD #___ did not provided the required special education services for almost two months following the December 18, 2019 IEP team meeting. The parent participated in an IEP team meeting on December 18, 2019 and reported he gave consent for initial services and placement at the conclusion of that IEP team meeting.

The Prior Written Notice (PWN) for Identification, Initial Services, Educational Placement, Change in Services, Change of Placement, and Request for Consent dated December 18, 2019 proposes initial services and placement and notes that parent consent is required. The action proposed is described as "The student is entering special education services with the exceptionality of emotional disturbance." The explanation of why the action is proposed states, "The student has shown the need for SPED support services in order to adequately progress in his general education curriculum." The options considered and why rejected states, "Not initiating services is rejected. The student is demonstrating the need for SPED services." Documentation shows the parent signed consent for the proposed action on December 18, 2019.

The parent stated that he received a copy of the draft IEP documenting that the student will receive 60 minutes per day of special education direct services in the regular education classroom to address three behavior goals. He reported that his understanding was that the special education services described in the IEP would start when school came back in session after the winter break and, in fact, the student did receive those special education services for a couple of days in January.

However, the parent stated that those special education services were discontinued during the first week back at school. The parent reported he received a letter dated January 8, 2020 written by _____ ____, special education teacher, explaining that the draft IEP from the December 18, 2019 IEP team meeting had been updated to include more specific amounts of time for the special education services with a new implementation date of January 10, 2020. Ms. ____ [Special Education Teacher] also indicated that because of these updates, new signatures were required in order for the updated IEP to be implemented.

The parent reported being confused because USD #___ staff told him multiple times that the IEP was an evolving document and the December 18, 2019 IEP was "a good starting point." He stated, "It was reiterated that services would start when school came back in session which was on Jan 6th 2020. I was told several times that if there was anything in the finished IEP we disagreed with we could try to come to a [*sic*] agreement or call another IEP meeting."

The parent indicated that he emailed Ms. ____ [Special Education Teacher] multiple times throughout January and February to clarify the situation. He received an email written by Ms. ____ [Special Education Teacher] on February 4, 2020 that explained,

> We did initially start providing services to the student with in [*sic*] a day or two from our IEP team meeting, in his reading class. But, once I had gotten through the draft IEP and completed it with service minutes and fixing "impedes learning" check box, I realized that we did not have your consent on service minutes. I didn't

> want that to be seen as something we implemented without your consent. Also, initiation date was changed. Because that date was changed was another reason we needed new signatures. So, until we had new signatures which gives us your consent to implement the plan, we stopped the services we had started. I needed that final IEP back with signatures in order to continue the services.

The parent reported an IEP team meeting was finally held on February 18, 2020 and the provision of special education services was initiated on February 19, 2020.

School District Position

USD #___ acknowledged that an IEP team meeting was held on December 18, 2019 following an initial eligibility determination on November 25, 2019. USD #___ reported that the services in the IEP were not provided immediately following the December 18, 2019 IEP team meeting because both parents did not sign the original draft of the IEP sent home on December 18, 2019 and subsequently did not sign the final draft of the IEP sent home on January 8, 2020.

_____ _____, School Psychologist reported the parent and the student's mother attended the December 18, 2019 IEP team meeting but that the mother left the meeting before it was concluded. Because the mother did not sign that she agreed with the IEP, Ms. _____ [School Psychologist] described the plan for implementation in the timeline of events as follows:

> The parent will take draft IEP home to sign. Draft IEP will move to active when he and student's mother have time to go over the IEP in detail. The parent will bring the IEP back with both parents' signatures on it. The parent is hoping to get the IEP back to us tomorrow – services will start at that time – they will let us know if they want to meet to discuss anything.

USD #___ staff reported that a signed copy of the IEP was not returned on December 19, 2019 nor when school resumed following the winter break on January 6, 2020.

Ms. ____ [Special Education Teacher] wrote a letter to the parent on January 8, 2020 regarding "cleaning up wording in the student's IEP paperwork." The letter indicated that the student was provided "some inclusion services" and described a block of 30 minutes of paraprofessional support during his reading class period. The letter stated,

> When looking over this draft that I anticipate being the final draft for us to work from, please go through page by page and compare it to the original draft we gave you at the meeting so you can see any and all adjustments. I tweaked verbiage in some places, and added more details in others so that anyone picking up his IEP can see what he needs and how to best serve him through this IEP.

The letter concludes, "Due to the change in the initiation date, we need to have new signatures [*sic*] page. Please sign and return it to me on Friday, if possible."

When a signed copy of the new draft IEP was not returned on January 10, 2020, Ms. ____ [Special Education Teacher] consulted with ____ _____, Assistant Director of _____ [the Cooperative], regarding how to proceed. Dr. _____ [Assistant Director of the Cooperative] was told the parents had not signed consent to implement the IEP and she advised Ms. ____ [Special Education Teacher] to stop services.

Multiple emails were exchanged between the parent and Ms. ____ [Special Education Teacher] beginning January 14, 2020 to try to answer questions and schedule an IEP team meeting to discuss this situation. On February 3, 2020 the parent asked, "Is the student currently receiving special education services? The reason I am asking is we where [*sic*] told he was going to at the beginning of the year, and then it changed to he wouldn't; until we signed the IEP." Dr. _____ [Assistant Director of the Cooperative] replied via email to the parent on that same date stating, " . . . legally we should not serve students until the IEP has

been consent [*sic*] to." Dr. _____ [Assistant Director of the Cooperative] suggested, "another meeting is a good idea."

Multiple emails were again exchanged between Ms. ____ [Special Education Teacher] and the parent trying to arrange a mutually agreeable time to conduct another IEP team meeting. An IEP meeting was held on February 18, 2020 with IEP services starting for the student on February 19, 2020.

In investigating this child complaint allegation, Dr. _____ [Assistant Director of the Cooperative] indicated that she gathered information from Ms. ____ [Special Education Teacher] and Ms. ____ [School Psychologist] and the following timeline of events was shared:

- Initial Eval Determination 11/25/19
- NOM [Notification of Meeting] sent 12/3/19
- Meeting held 12/18/19
- Purpose of mtg
    - create IEP
    - Draft IEP developed - sent home for mom to sign per parent request
    - PWN was signed
- IEP not signed and returned 12/19/19
- Out for winter break 12/20/19 – 1/5/20
- IEP not signed and returned 1/6/20
- 30 minutes per day of paraprofessional support in reading class began being providing 1/6/20
- Ms. ____ [Special Education Teacher] "cleaned up" the IEP developed on 12/18/19 and sent updated IEP and letter of explanation to the parent 1/8/20 and requesting parents to review and sign the updated IEP
- IEP not signed an returned 1/10/20
- Special education services stopped 1/10/20
- January 2020 - Parents communicate with Ms. ____ [Special Education Teacher] regarding changes they wanted to make to the draft IEP and directly indicated they did not want services based on the draft IEP.
- February 2020 – Parents and Ms. ____ [Special Education Teacher] arrange mutually agreeable time to reconvene the IEP team

- IEP meeting held 2/18/20

Dr. _____ [Assistant Director of the Cooperative] reported she was unaware that the PWN had been signed by the parent at the IEP team meeting on December 18, 2019 when she initially responded to the parent's question regarding IEP implementation. Dr. _____ [Assistant Director of the Cooperative] shared that she depended upon the description of events from Ms. ____ [Special Education Teacher], which focused on the fact that the parent had not signed the IEP instead of actually reviewing paper / computerized documentation of the IEP process. She explained _____'s [the Cooperative's] procedure is for IEP paperwork to be completed at the building level by the special education teacher and school psychologist. That paperwork is then submitted to and reviewed by the information system clerk at _____ [the Cooperative] for content and signatures. Dr. _____ [Assistant Director of the Cooperative] acknowledged that once the parent had been provided with PWN and consent was obtained, the services described in the IEP should have been provided to the student.

Applicable Regulations, Findings, and Conclusions

Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), at 34 C.F.R. 300.501(b)(1), require school districts to ensure that parents are given the opportunity to participate in meetings with respect the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education (FAPE) to the child.

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Federal regulations at 34 C.F.R. 300.503(a) and 34 C.F.R. 300.503(b) require that written notice must be given to parents a reasonable time before the responsible public agency proposes or refuses to initiate or change the

identification, evaluation, educational placement, or the provision of a free appropriate public education of the student.

Federal regulations at 34 C.F.R. 300.503(b) require that the PWN provided to parents by the responsible public agency must contain a description of the action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action.

In addition, federal regulations at 34 C.F.R. 300.300(b)(1) requires public agencies obtain informed consent from the parent of the child with a disability prior to the initial provision of special education and related services to the child.

Documentation and interviews found that USD #___ convened an IEP meeting to develop an initial IEP for the student on December 18, 2019. Both the student's father and mother were initially in attendance at the IEP team meeting but the mother left the meeting early. USD #___ contends that because the mother left the IEP team meeting before it concluded, the IEP could not be implemented until the mother had reviewed and signed that she agreed with the draft IEP. For this reason, USD #___ did not provide special education services until after the February 18, 2020 IEP meeting because the student's mother never signed the draft IEP with an initiation date of December 19, 2019 or the final draft IEP with an initiation date of January 10, 2020.

This contention is not consistent with the requirements of the IDEA. First, there is nothing in the IDEA that requires both parents to participate in the development of the IEP or that the parents must attend the entire IEP team meeting. Instead, the IDEA only requires that the school district ensure that parents are provided with the opportunity to participate in the IEP team meeting. In this case, documentation shows both the parents attended the December 18, 2019 IEP team meeting and were provided with the opportunity to participate in the December 18, 2019 IEP team meeting even though the mother left the IEP team meeting before the meeting was concluded.

Second, the IDEA does not require that parents sign agreement with an IEP. The Office of Special Education Programs (OSEP), which is the office within the United States Department of Education (USDE) that writes and enforces the IDEA regulations, has stated,

> [W]e do not view the consent provision of the Act [IDEA] as creating the right of parents to consent to each specific special education and related service that their child receives. Instead, we believe that parents have the right to consent to the initial provision of special education and related services. "Fully informed," in this context, means that a parent has been given an explanation of what special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP.... There is nothing in the Act [IDEA] that requires IEP members to sign the IEP.... Under 300.300(b)(1), parental consent is for the initial provision of special education and related services generally, not for a particular service or services. (71 Federal Register, August 14, 2006, pp.46634 and 46682; 73 Federal Register, December 1, 2008, p.73011).

Instead, the requirement is for the public agency to provide the parents with PWN following the IEP team meeting either proposing or refusing to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the student. This written notice must contain a description of the specific action proposed or refused by the agency and an explanation of why the agency proposes or refuses to take the action. In addition, public agencies are required to obtain written parent consent prior to the initial provision of special education and related services to the child.

Finally, there is nothing in the IDEA that requires both parents to provide written consent to the initial implementation of special education and related services. In Letter to Ward (56 IDELR 237, 2010) OSEP stated, "There is no requirement in Part B [of the IDEA] that the public agency obtain consent for the initial provision

of special education and related services… from both parents with legal authority to make educational decisions on behalf of the child."

In this case, the parent was provided with a PWN at the conclusion of the December 18, 2019 IEP team meeting. The PWN document included a description of the proposed action as "The student is entering special education services with the exceptionality of emotional disturbance." The PWN also included an explanation of why the action was proposed by stating, "The student has shown the need for SPED support services in order to adequately progress in his general education curriculum." In addition, the PWN included the options considered and why each was rejected.

The PWN shows the parent signed consent for initial services on December 18, 2019. As such, the services described in the December 18, 2019 IEP for 60 minutes per day of special education direct services in the regular education setting beginning on December 19, 2019 should have been provided to the student. Instead, USD #___ waited almost two months before beginning to provide special education services to the student due to a mistaken belief that both parents were required to sign the IEP in order to obtain consent to implement the IEP.

Based on the foregoing, a violation of special education statutes and regulations for failing to implement the student's IEP by not providing the 60 minutes per day of special education services in the regular education setting on December 19, 2019 as required by the IEP during the 2019-20 school year is substantiated.

It is noted that a fundamental misunderstanding of the requirements of the IDEA in regards to parent participation as well PWN and consent contributed to the identified noncompliance.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. A violation has occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   In this case, interviews and documentation found USD #___ failed to implement the student's IEP beginning on December 19, 2020 through February 19, 2020. Based upon the USD #___ school calendar and the required 60 minutes per day of special education services in general education classroom, the student should have received a total of 1920 minutes of special education services between December 19, 2019 and February 18, 2020. Documentation found only 150 minutes of special education services were actually provided between January 6 and January 10, 2020.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

   a. Comply with federal regulations, at 34 C.F.R. 300.323(c)(2) which requires school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

2. No later than September 1, 2020, USD #___ will provide training to all of the general education administrators, school psychologists, special education teachers, and related services providers in the district regarding the requirement that special education must be provided in accordance with the IEP as soon as possible following the development of the IEP. In addition, this training must address the IEP process, specifically parent participation, prior written notice, and parent consent. No later than August 1, 2020, USD #___ will contact TASN to request a

TASN provider to conduct the training, and USD #___ will provide documentation of this request to SETS. No later September 15, 2020, USD #___ will provide documentation to SETS of the date and content of the training as well as a sign-in sheet of all individuals who attended the training.

3. No later than September 1, 2020, USD #___ shall make a written offer to the parent of compensatory special education direct services in the regular education setting for no less than 1,920 minutes. The written offer must include a schedule for the provision of the compensatory services. The parent may accept all, part, or none of the offered compensatory services. USD #___ shall provide a copy of the written offer to SETS on the same day is it provided to the parent. No later than September 15, 2020, USD #___ shall notify SETS of the parent's decision regarding the offer of compensatory services. If the parent accepts all or part of the services, USD #___ shall notify SETS and the parent when the compensatory services have been completed.

4. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to 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(f). While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to

the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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 AND TITLE SERVICES
REPORT OF COMPLAINT
FILED AGAINST
KANSAS CITY KANSAS PUBLIC SCHOOLS, USD #500
ON MARCH 16, 2020

DATE OF REPORT: APRIL 15, 2020

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

## Investigation of Complaint

Diana Durkin, Complaint Investigator, spoke by telephone with Dr. Kelli Charles, Executive Director of Schools for USD #500 on March 18, 2020. On April 3, 2020, the investigator spoke by telephone with Kelli Broers, Counsel for the district. In a telephone conference on April 13, 2020, the investigator spoke again with Ms. Broers as well as with Angela Greer, case manager and special education teacher for the student. In a separate conference call on April 13, 2020, the investigator spoke with Ms. Broers and with Rebecca Romaine, special education coordinator.

The investigator spoke by telephone with the parent on April 4, 2020.

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

- Class schedule for the student for the 2018-19 school year
- Individualized Education Program (IEP) for the student dated February 5, 2019
- IEP Meeting Attendance Signature Page dated February 5, 2019
- Meeting Summary dated February 5, 2019
- Class schedule for the student for the 2019-20 school year
- Notice of Meeting dated January 9, 2020
- Draft IEP for the student dated January 28, 2020
- Meeting Summary dated January 28, 2020
- IEP Meeting Attendance Signature Page dated January 28, 2020
- Audio recording of the January 28, 2020 IEP meeting

- Screen shots of January 29, 2020 text exchange between the parent and the special education coordinator
- Screen shots of January 31, 2020 text exchange between the parent and the special education coordinator
- Notice of Meeting dated February 3, 2020
- February 12, 2020 audio recording of a conversation with the student's theater teacher provided by the parent
- Online school calendar for USD #500 for the 2019-20 school year
- Online information regarding the district's College Fair

## Background Information

This investigation involves a sixteen-year-old student who is enrolled in the 10th grade. According to the student's February 5, 2019 IIEP, he receives speech and language services, paraeducator support in the general education setting, and special education support in a special education setting.

At an annual IEP review meeting on January 28, 2020, the team presented a draft of a revised IEP, but the parent requested a reevaluation of the student and did not want to reconvene the IEP team until that evaluation is complete. The parent provided her written consent for the reevaluation on February 11, 2020. The district had completed the academic portion of the reevaluation before classes in the district were dismissed for spring break on March 13, 2020. To slow the spread of the COVID-19 virus, the Kansas Governor issued Executive Order 20-07 requiring all Kansas school buildings to close for the remainder of the 2019-20 school year on March 17, 2020. District staff and the parent held a meeting on April 4, 2020 to discuss whether an IEP Team meeting should be held before the reevaluation has been completed, and the decision was made to hold off on revising the student's IEP until the reevaluation has been completed.

Pending the final revision of the February 5, 2019 IEP, the student continues to be served under the provisions of that document even though the parent asserts that because of flaws in that IEP – some of which are outlined below in this report – that document is not valid.

## Issues

In her complaint, the parent presented the following ten issues:

1. An IEP team meeting was held on February 2, 2020 without all required participants.
2. The parent was not allowed to speak with the superintendent.
3. The student's IEP is not individualized.
4. The student's IEP is incomplete, contains no goals, and has been copied and pasted.
5. The parent has been denied 10-days prior written notice, and documents have been forged.
6. Grade documentation has been inconsistent and changes have been delayed.
7. The parent was not involved in decision-making regarding the student's placement and did not have a say in scheduling.
8. The student's special education teacher conducted an "uncertified" evaluation of the student, worked on the student's IEP outside of the school setting, and did not include the student or the parent in the process of developing the student's IEP during the month of January 2020.
9. The student has been denied [a free appropriate public education] FAPE.
10. Students have been transported by the district using personal vehicles rather than buses.

In a letter dated March 16, 2020, the Dispute Resolution Coordinator for the Kansas State Department of Education (KSDE) Special Education and Title Services stated that 34 C.F.R. 300.153(b) and K.A.R. 91-40-51(a) require that a special education complaint include a statement that a school district has violated a requirement of federal or state special education law or regulation and the facts on which the statement is based. The federal special education law is the Individuals with Disabilities Education Act (IDEA), and the state special education law is the Kansas Special Education Exceptional Children Act. With regard to Issue 2 above, the Dispute Resolution Coordinator states, "The IDEA and state special education law do not give parents a right to speak with school administrators. Since this is not addressed in the federal or state special education law, KSDE does not have authority to investigate and will not investigate this particular concern."

With regard to Issue 6 above, the coordinator states, "The IDEA and state special education law do not address class grades or the procedures for changing grades. Since this is not addressed in either federal or state special education law, KSDE does not have authority to investigate and will not investigate this particular concern."

With regard to Issue 7 above, the coordinator states, "While the IDEA and state special education law give parents the right to participate in any decision regarding the

educational placement of their child with a disability in the least restrictive environment, the parent did not provide any facts to support the statement that a placement decision was made for the child without parent involvement. A special education complaint must include both a statement that the school has violated a requirement of federal or state special education law and facts on which that statement is based. Since no facts were included to support the statement that the parent was not involved in the decision regarding placement of the child, this concern does not meet the minimum filing requirement and will not be investigated."

Issue One: An IEP team meeting was held on February 2, 2020 without all required participants.

Parent's Position

According to the parent, she had initially agreed to come to an IEP Team meeting on February 4, 2020 but subsequently notified the school that she would not attend since she had not been afforded 10-day prior notice of the meeting. It is the position of the parent that she was told by the student's theater teacher that the district held the meeting without her. The parent further contends that the meeting was held in the absence of the theater teacher even though it had been decided at a previous IEP team meeting on January 28, 2020 that this specific teacher needed to be present for the follow-up meeting.

District's Position

The district asserts that after the parent told the special education coordinator that she had decided not to participate in the proposed IEP meeting on February 4, 2020, the meeting was cancelled.

Applicable Statutes and Regulations

The membership of an IEP team is specified and described in state and federal statutes and regulations (K.S.A. 72-3404(u); K.A.R. 91-40-17 (f)(1); 34 C.F.R. 300.321(a),(b)). The school district must ensure that the IEP Team includes the following members:

- the parent(s);
- not less than one general education teacher of the child if the child is, or may be, participating in the general 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;
- the school representative or designee; and
- a person who can interpret instructional implications of evaluation results (who may also be a staff member assuming another role at the meeting).
- If the purpose of the IEP meeting is to consider postsecondary goals and transition services, the school district must invite the child with a disability to attend the meeting.

The school may designate which teacher or teachers of the child will serve as IEP team member(s), taking into account the best interests of the child. Further, if qualified to do so, a district staff member of the IEP team may serve in the role of two or more required members of a child's IEP team (K.A.R. 91-40-17(i)).

Investigative Findings

The IEP Team held a meeting on January 28, 2020 to complete the required annual review of the student's IEP. A "Meeting Summary" of that meeting shows that the IEP team planned to reconvene on January 31, 2020 at 2:00 PM. However, the parent sent a text to the special education coordinator on January 29, 2020 stating that her IEP "support" person who had participated in the initial meeting at the request of the parent would not be able to attend the IEP Team meeting on January 31, 2020 because of a scheduling conflict. In her text, the parent stated that she would like to reschedule for "any day next week [in the afternoon]." The special education coordinator indicated that she would work with the team to come up with an alternative date, and, on January 31, 2020, the parent and special education coordinator agreed that the meeting would be rescheduled for February 4, 2020.

The parent subsequently sent texts to the special education coordinator stating that she did not "feel comfortable continuing based on/off of the information/paperwork we currently have on [the student]." The parent wrote "it would be beneficial to [the student] to wait and base his IEP off of all new reevaluation data." According to the district, after this communication from the parent, the IEP Team meeting was cancelled.

The parent, however, contends that the meeting was held even though she was not present. In support of her allegation, the parent provided the investigator with an audio recording of a February 12, 2020 conversation the parent had with the student's theater teacher. In the recording, the parent states that the special education

coordinator had sent her a text message on January 31, 2020 asking if the parent could attend a follow-up IEP Team meeting on February 4, 2020. On the recording, the parent states that she had initially agreed to attend but then changed her mind since she had not been afforded 10-day notice of the meeting. The parent states that "they went ahead and held that meeting." The teacher replied "I don't know. That was [a bad] week for me. I was sick and then my mom was in the hospital" but indicated that she thought they only needed "one gen. ed. teacher." At another point in the conversation, the parent asks the teacher if she attended the second meeting. The teacher replied that she did not "because I wasn't here but I was also told by [the student's special education teacher]…that they were working on getting coverage for [another general education teacher] because they only need one gen. ed. teacher. They can't get two substitutes."

Summary and Conclusions

A follow-up to the EP Team meeting of January 28, 2020 was scheduled for January 31, 2020. The parent cancelled that meeting because her support person could not be present. The meeting was rescheduled for February 4, 2020, but the parent subsequently wrote to the special education coordinator saying that she did not feel comfortable moving ahead with a meeting until new reevaluation data was available. The February 4, 2020 IEP Team meeting was cancelled.

While the parent believes that the district conducted the IEP Team meeting in her absence, no evidence was presented to substantiate that allegation. Nothing in the audio recording made by the parent of a conversation the parent had with the student's theater teacher provides proof that an IEP Team meeting was held. While, on the recording, the teacher is heard stating that she had been told that her attendance was not required at the follow-up IEP Team meeting, the teacher is also heard telling the parent that she did not know if the IEP Team meeting was held because she had not been at school due to her own illness and the hospitalization of her mother. Because there is no evidence to show that the district convened an IEP Team meeting on February 4, 2020 in the absence of the parent, as alleged in this complaint, a violation of special education statutes and regulations is not substantiated on this issue.

Issue Three: The student's IEP is not individualized.

Parent's Position

The parent asserts that because the student's February 5, 2019 IEP contains information about another student, she did not believe that the IEP was individualized for the student.

## District's Position

It is the position of the district that while another student's name is included in the body of the text of the student's February 5, 2019 IEP for this student, the inclusion of that information is a scrivener's error and did not result in the release of personally identifiable information.

## Applicable Statutes and Regulations

The IDEA requires that parental consent must be obtained before a district discloses personally identifiable information of a child with a disability to any unauthorized individual, unless the information is contained in education records and the disclosure is allowed without parent consent under a FERPA (Family Educational Rights and Privacy Act) exception (34 C.F.R. 300.622; K.A.R. 91-40-50(b)). The federal regulations implementing the IDEA, at 34 C.F.R. 300.32 state that "personally identifiable" means information that contains--

- the name of the child, the child's parent, or other family member;
- the address of the child;
- a personal identifier, such as a child's social security number or student number, or
- a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

"Education records" means any document or medium on which information directly related to one or more students is maintained by any educational agency that collects, maintains, or uses personally identifiable student information to provide special education and related services to children with disabilities (K.A.R. 91-40-50(a)(2), (3); also see 34 C.F.R. 300.611(b),(c)).

## Investigative Findings

The majority of the content of the student's February 5, 2019 IEP is clearly a reflection of the student's individual skills and needs. However, personally identifiable information regarding another student is included in four portions of the "Academic"

section of the student's February 5, 2019 IEP. Specifically, information about another student is included

- under Reading Fluency,
  "When given a 3rd grade fluency test, [the name of the other student] was able to read 118 words per minute with 3 omissions, and he corrected/stated 2 of them after several seconds to utilize decoding skills."
- under Reading Comprehension,
  "[The name of the other student] was given two 4th grade tests to be read independently and answer comprehension questions on those two tests: (10/20, 11/20) 53%."
- in the description of how reading needs will be met,
  "[The other student] was given two 4th grade tests to be read independently and answer comprehension questions on those two tests: (10/20, 11/20) 53%."
- and in the "Baseline" portion of the student's second goal.
  "[The other student] was given two 4th grade tests to be read independently and answer comprehension questions on those two tests: (10/20 and 11/20) 53%."

Each of these sections of the student's February 5, 2019 IEP also contain information specifically related to the student which describe different skills and different assessment measures than were attributed to the other student.

The parent states that she knows the student whose name appears in her son's IEP and reports that he "lives down the street."

In a telephone conversation with the investigator on April 13, 2020, the special education coordinator acknowledged that the information should not have been included in the student's IEP but asserts that it did not divulge *accurate* personally identifiable information related to the other student's performance.

## Summary and Conclusions

While the student's February 5, 2019 IEP does contain information related to another student, the IEP is in all other ways clearly developed to address the special education needs of the student who is at the center of this complaint and reflects a plan that has been individualized to meet this student's needs.

However, even if the inclusion of information regarding another student in this student's IEP was the result of a writing or editing error on the part of the developer of the document and did not accurately describe the other student's performance, it should not have been included in this student's IEP. Because the district included personally identifiable information attributed by name to another student in the IEP of this student, a violation of special education statutes and regulations is identified.

Issue Four: The student's IEP is incomplete, contains no goals, and has been copied and pasted.

Parent's Position

The parent contends that the student's February 5, 2019 IEP has blanks in some places, seems to have been copied and pasted from another source, and contains no goals. According to the parent, the student's IEP does not indicate that he has been diagnosed with Autism, and states that, after high school, the student will "live." The parent asserts that the IEP contains no college-related goals, no self-advocacy goals, and no transition goals.

District's Position

It is the position of the district that complaints regarding the student's February 5, 2019 IEP are not timely insofar as the document was completed more than 12 months prior to the filing of this complaint. Regardless, the district asserts that the February 5, 2019 IEP for the student is fully compliant with special education statutes and regulations.

Applicable Statutes and Regulations

K.S.A. 72-3429(c) and 34 C.F.R. 300.320 specify the required content of a student's IEP. The IEP for a child with a disability must include measurable annual goals designed to enable the child to be involved in and make progress in the general education curriculum and to meet the needs of the child which have resulted from his or her disability (K.S.A. 72-3439(c)(2)(A), (B); 34 C.F.R. 300.320(a)(2)(i)(A).

In developing a student's IEP, the IEP team must consider, in the case of a child whose behavior impedes the student's learning or that of others, the use of positive behavioral interventions and supports and other strategies to address that behavior (K.S.A. 72-3429(d)(4); 34 C.F.R. 300.324(a)(2)(i)).

Beginning at age 14, and updated annually thereafter, the IEP for a child with a disability must include appropriate measurable postsecondary goals based upon appropriate transition assessments related to training, education, and employment and transition services needed to assist the child in reaching the postsecondary goals (K.S.A. 72-3429(c)(8); 34 C.F.R. 300.320(b)(1), (2)). Measurable postsecondary goals are different from measurable annual goals in that they measure an outcome that occurs after a student leaves high school.

Investigative Findings

The February 5, 2019 IEP for the student contains two measurable annual goals:

1) By February 4, 2020, [the student] will have fewer than 3 outbursts during while [*sic*] in a classroom/school setting.
2) In 36 instructional weeks, or by 02/04/2020, [the student] will be able to independently read 5th grade content, and then be able to answer comprehension questions, with at least an 85% accuracy rate on 4 of 5 opportunities.

While the February 5, 2019 IEP was completed more than one year prior to the filing of this complaint, this IEP is the student's active IEP currently in effect at the time of filing and during investigation.

Though the student has behavioral needs, as reflected by the IEP goal to reduce outbursts in a classroom/school setting, neither the student's February 5, 2019 IEP, nor the IEP meeting summary of the same date reflect that the IEP team considered the use of positive behavior interventions and supports and other strategies to address the student's behavior that impedes his learning or the learning of others. The IEP contains a section that asks the questions, "Does the student's behavior impede his/her learning or the learning of others? Describe how the team is addressing the behavior that is impeding the student's learning or the learning of others? Is there a need to conduct a Functional Behavior Assessment?" However, no answers were provided for these questions and that entire section is left blank.

At the time the student's February 5, 2019 IEP was developed, the student was 15 years old and is now 16 years old.

The document does not contain any measurable postsecondary goals in the areas of training, education or employment or transition services needed to assist the student

in reaching postsecondary goals. Several portions of the section of the student's February 5, 2019 IEP entitled "Desired Post School Outcomes" have not been completed, including those related to

- education and training and current experiences;
- employment and employment readiness; and
- where the student plans to live after high school.

Sections of the "Transition Assessment" section are repetitive from one section to another and do not give a differentiated picture of the differences between the student's "Strengths," "Needs," and "Preferences."

Summary and Conclusions

The February 5, 2019 IEP did include measurable annual goals but did *not* include measurable postsecondary goals related to education and training and employment and did *not* include transition services needed to assist the student in reaching postsecondary goals. Additionally, neither the IEP nor the IEP meeting summary show that the team considered the use of positive behavior interventions and supports and other strategies to address the student's behavior that impedes his learning or the learning of others. Because of these omissions, a violation of special education statutes and regulations is substantiated.

Issue Five: The parent has been denied 10-days prior written notice and documents have been forged.

Parent's Position

The parent contends she was not provided 10-day notice prior to the February 4, 2020 IEP Team meeting and asserts that the notice of meeting form she was given contains information that is inaccurate.

District's Position

The district contends that the date and manner of delivery of the prior notice of meeting were inadvertently carried over from a meeting notice for the January 28, 2020 IEP meeting to the notice of the February 4, 2020 IEP meeting. The district asserts that when the error was noticed, the parent was contacted and asked to return the form for correction, but she declined to do so.

## Applicable Statutes and Regulations

Districts must take steps to ensure that one or both parents are present at each IEP meeting or are otherwise afforded the opportunity to participate in the IEP meeting. The meeting is to be scheduled at a mutually agreed upon time and place. The district must provide notice of an IEP meeting to the parent in writing at least 10 calendar days prior to the meeting (K.A.R. 91-40-17(a)(1), (2); 34 C.F.R. 300.322(a), (b)).

In Kansas, a parent may waive the right to 10-day prior written notice and allow an IEP meeting to be held in less than 10 calendar days (see KSDE Sample Notice of Meeting Form, bottom of page 2 at https://www.ksde.org/Portals/0/SES/forms/Notice_of_Meeting.pdf). If the parent is given the notice of meeting less than 10 days prior to the meeting and declines to waive the right to such notice, the meeting should not be held.

## Investigative Findings

As noted above under Issue One, a follow-up meeting was scheduled at the end of the January 28, 2020 IEP Team meeting. That meeting was to have been held on January 31, 2020, but the parent contacted the special education coordinator to ask that the meeting be cancelled since the parent's "support" person could not attend on that date. In a text to the coordinator, the parent indicated that the meeting could be scheduled for any afternoon the following week, and the coordinator said she would talk with the members of the IEP team to see what date would work. The coordinator and the parent agreed on January 31, 2020 that the meeting would be held on February 4, 2020.

The parent provided the investigator with a copy of a meeting notice form dated February 3, 2020. On the third page of that form, the document shows that the notice form was hand-delivered to the parent on January 10, 2020.

As noted under Issue One, the parent opted not to participate in the scheduled February 4, 2020 meeting, and that meeting was not held.

## Summary and Conclusions

After setting a meeting date of February 4, 2020 for a follow-up IEP Team meeting, the district provided the parent notice of that meeting less than 10 days prior to the scheduled date of that meeting. Additionally, the notice form stated that the

document had been hand-delivered to the parent on January 10, 2020 even though the date for the meeting had not been established until January 31, 2020. The parent did not waive her right to receive the meeting notice at least 10 days prior to the meeting. She did, however, decide not to participate in the meeting. The meeting was cancelled, thus rendering the need for 10-day prior notice of meeting to the parent moot. Under these circumstances, a violation of special education statutes and regulations is not substantiated.

Issue Eight: The student's special education teacher worked on the student's IEP outside of the school setting, conducted an "uncertified" evaluation of the student, and did not include the student or the parent in the process of developing the student's IEP during the month of January 2020.

Parent's Position

The parent contends that the teacher inappropriately evaluated the student in the area of reading. The parent further asserts that the special education teacher worked on a draft IEP for the student dated January 28, 2020 at home, which increased the likelihood that someone without the authority to do so would see the document, resulting in a breach in confidentiality. It is also the position of the parent that neither she nor the student were included in the process of the development of the IEP.

District's Position

The district contends that the special education teacher is fully capable of conducting and qualified to administer the kind of formative and summative assessments she conducted in order to determine the student's progress toward attainment of the goals established in his February 5, 2019 IEP.

The district stipulates that the student's special education teacher did work on the student's draft IEP dated January 28, 2020 from her home, but asserts that special education statutes and regulations do not prohibit the teacher from doing so.

It is the district's position that the student and the parent have been and will continue to be involved in the annual review and revision of the student's IEP.

Confidentiality

Applicable Statutes and Regulations for Confidentiality:

As noted above under Issue Three, the IDEA requires that parental consent must be obtained before a district discloses personally identifiable information of a child with a disability to any unauthorized individual, unless the information is contained in education records and the disclosure is allowed without parent consent under a FERPA (Family Educational Rights and Privacy Act) exception (34 C.F.R. 300.622; K.A.R. 91-40-50(b)). Federal IDEA regulations, at 34 C.F.R. 300.32 state that "personally identifiable" means information that contains--

- the name of the child, the child's parent, or other family member;
- the address of the child;
- a personal identifier, such as a child's social security number or student number, or
- a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

"Education records" means any document or medium on which information directly related to one or more students is maintained by any educational agency that collects, maintains, or uses personally identifiable student information to provide special education and related services to children with disabilities (K.A.R. 91-40-50(a)(2),(3); also see 34 C.F.R. 300.611(b),(c)).

Investigative Findings for Confidentiality:

In a telephone conversation with the investigator on April 13, 2020, the special education teacher confirmed that she did work at home on a draft version of an IEP which was subsequently presented to the IEP team on January 28, 2020. The teacher stated that she is well aware of the need to protect the confidentiality of the student's records and did not expose any personally identifiable material regarding the student to others.

In her complaint, the parent states that she has a "huge privacy concern" because the special education teacher acknowledged during an IEP meeting on January 28, 2020 that she worked on the student's IEP at home. The parent did not, however, provide any specific facts to support an allegation that the privacy rights of the student were violated or that any personally identifiable information regarding the student was exposed.

Summary and Conclusions for Confidentiality:

Because no evidence was provided by the parent to support her contention that the teacher disclosed any personally identifiable information regarding the student, a

violation of special education statutes and regulations is not substantiated on this aspect of Issue Eight.

## Evaluation

Applicable Statutes and Regulations for Evaluation:

34 C.F.R. 300.15 defines "evaluation" to mean "procedures used...to determine whether a child has a disability and the nature and extent of special education and related services that the child needs." A reevaluation is conducted at least once every 3 years to determine whether a child continues to have a disability and whether the child continues to need special education and related services (34 C.F.R. 300.303(b)(2), 300.305(a)(2)(i)(B), (iii)(B). Prior written notice and parental consent is required for an initial special education evaluation and before conducting a reevaluation of the student (34 C.F.R. 300.300 (a)(1)(i), (c)(1)(i)). However, neither prior written notice nor parental consent is required when conducting either summative or formative assessments as screening for the purpose of determining student progress on annual goals or for the development of instructional strategies associated with curriculum implementation. Such screening shall not be considered to be an evaluation (34 C.F.R. 300.302; 71 Federal Register, August 14, 2006, p. 46639).

Investigative Findings for Evaluation:

An audio recording was made of the IEP Team meeting held on January 28, 2020. During that meeting, the topic of the teacher's assessment of the student's reading skills was discussed. As heard on the recording, the special education teacher had, while providing service to the student, conducted formative assessment of the student's skills as well as observed the student during instruction. Additionally, in preparation for the development of the IEP Team's annual review of the student's IEP, the teacher had completed summative assessments designed to provide the IEP Team with information on the student's skills. These assessments were conducted for the purpose of instructional planning and for the development of updated baseline information for the purpose of writing annual goals. There is no indication on the recording that the special education teacher conducted any type of standardized, norm referenced assessment of the student for the purpose of determining continued eligibility for special education services.

Summary and Conclusions for Evaluation:

Testing was conducted by the special education teacher in preparation for the IEP Team's annual review of the student's IEP in order to generate updated baseline information for the sole purpose of developing new annual goals. Neither notice nor

consent are required for the teacher to conduct this type of assessment. A violation of special education statutes and regulations is not substantiated on this aspect of Issue Eight.

Parent/Student Participation in IEP Development

Applicable Statutes and Regulations for Parent/Student Participation:
34 C.F.R. 300.322(a) requires that each school district must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate. Further, as mentioned above under Issue One, membership of an IEP team is specified and described in state and federal statutes and regulations (K.S.A. 72-3404(u); K.A.R. 91-40-17 (f)(1); 34 C.F.R. 300.321(a),(b)). The school district must ensure that the IEP Team includes the following members:

- the parent(s);
- not less than one general education teacher of the child if the child is, or may be, participating in the general 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;
- the school representative or designee; and
- a person who can interpret instructional implications of evaluation results (who may also be a staff member assuming another role at the meeting).
- If the purpose of the IEP meeting is to consider postsecondary goals and transition services, the school district must invite the child with a disability to attend the meeting.

Investigative Findings for Parent/Student Participation:
The audio recording of the January 28, 2020 meeting confirms that both the parent and the student were present. A draft IEP was presented to the parent and the student prior to the meeting. The recording provides a record that both the parent and the student provided input during the meeting. Many topics were covered, and the parent and her "support" person raised concerns and questions regarding the draft document as well as the student's February 5, 2019 IEP. The team was scheduled to reconvene on January 31 and February 4, 2020 to continue the discussion but the parent cancelled both meetings, noting on February 4, 2020 that she preferred to postpone any further discussion of the student's IEP until after the reevaluation of the student she requested on January 28, 2020 had been completed.

Summary and Conclusions for Parent/Student Participation:
The audio recording of the January 28, 2020 IEP meeting provided evidence of the presence and participation of both the parent and the student in the process of conducting an annual review of the student's IEP. A violation of special education statutes and regulations is not substantiated on this aspect of Issue Eight.

Issue Nine: The student has been denied a free appropriate public education (FAPE).

Parent's Position

The parent asserts that unlike his peers, the student has not been assigned his own locker, was not allowed to participate in district-sponsored "college trips" because the special education classroom teacher was not available to accompany him, and was enrolled in a physical science class during his sophomore year that he had completed during his freshman year. The parent asserts that the student's enrollment in the physical science for a second time has led to the student being bullied by other students and has resulted in a loss of 1.5 credits.

Locker Assignment

District's Position:
The district asserts that the student was afforded the same opportunity to request a locker as all other students in the building.

Applicable Statutes and Regulations for Locker Assignment:
Federal regulations, at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulations at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

Investigative Findings for Locker Assignment:
Lockers are assigned to students at the student's school only if an individual student makes a request for one. The locker policy was explained during all-school daily announcements for one week at the beginning of the 2019-20 school year. Students wanting a locker were asked to notify their family advocacy teacher or to contact the vice principal.

The student's IEP does not specify that he is to have a locker. The school has no record of the student having made a request for a locker. Not all students have made such a request, and lockers were available at the time this complaint was filed.

Summary and Conclusions for Locker Assignment:
The student's IEP does not require that he be given a locker. The district therefore followed the same policy with regard to this student as required of all other students in the building which required the student to ask for a locker if he wanted one. There is no record of the student having made such a request. A violation of special education statutes and regulations is not substantiated on this aspect of Issue Nine.

Participation in District-Sponsored College Trips:

District's Position:
The district asserts that there have been no district-sponsored trips to colleges. In the absence of clarifying information from the parent regarding this issue, the district could not respond.

Applicable Statutes and Regulations for Participation in District-Sponsored College Trips:
In order to receive a FAPE, students are to be included in more than just classroom activities. Schools must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to have an equal opportunity to participate with nondisabled children in school sponsored nonacademic and extracurricular activities to the maximum extent appropriate to the needs of that child (34 C.F.R. 300.107, 34 C.F.R. 300.117, and K.A.R. 91-40-3(b)(1)).

Investigative Findings for Participation in District-Sponsored College Trips:
The student's February 5, 2019 IEP does not specifically address the student's participation in "college trips."

The parent reports that the student's special education teacher told her that the student would not be allowed to participate in "a couple of" school-wide college trips using district transportation because the teacher was unable to go on those trips. When questioned by the investigator during a telephone call on April 4, 2020 and via email on April 12, 2020, the parent provided no specific information regarding the dates, nature, or locations of these "college trips."

According to the school's website, colleges, community colleges, and universities sent representatives to the building in the fall of the 2019-20 school year. No transportation would have been required for the student to participate in these "college visits." However, these visits are intended for seniors; the student is a sophomore.

According to the special education coordinator and the district website (kckps.org), the district also sponsors a "College Fair" once a year. This year's fair was held at another high school in the district. At the fair, senior students had a two-hour opportunity to interact with various colleges, universities, trade-schools, and braches of the military. The students were transported to the fair by bus. As noted above, the student is a sophomore and would not have been allowed to participate in the school-day portion of the fair.

As shown on the district website, parents, community members, middle school students and high school students in grades 9-11 could participate in after school sessions on the day of the fair. These sessions provided students the opportunity to learn more about the college-going experience. The website stated that there was a shortage of buses available to transport students, so students from the student's school who wanted to attend this portion of the fair were required to catch a bus to the site at 1:40 PM in order to participate in this portion of the fair.

The student's IEP does not specify that the student needed any supplementary aids or services in order to have an opportunity to participate in the College Fair nor is "College Fair" a part of the student's transition services.

The special education classroom teacher does not recall having any discussion with the parent regarding the student's participation in any of the above-described activities. The parent did not provide the investigator with any specific information regarding the activities the student was denied an opportunity to attend beyond the reference to "college trips." In a letter to the district dated March 16, 2020, and copied to the parent, the Dispute Resolution Coordinator for Special Education and Title Services stated

> The investigator, in her judgment, may determine that one or more allegations are beyond the jurisdiction of a state complaint. 34 C.F.R. 300.153(b) and K.A.R. 91-40-51 (a) requires that a special education complaint must include a statement that a school district has violated a requirement of federal or state special education law or regulation and the facts on which the statement is

> based. The federal special education law is the Individuals with Disabilities Education Act (IDEA) and the state special education law is the Kansas Exceptional Children Special Education Act [*sic*]...A special education complaint must include both a statement that the school has violated a requirement of federal or state special education laws and the facts on which that statement is based.

In this issue, the parent did not provide sufficient facts for the investigator to determine whether a violation has occurred. Since the minimum filing requirement of 34 C.F.R. 300.153(b) and K.A.R. 91-40-51(a) was not met, this issue could not be effectively investigated. Therefore, a violation of special education statutes and regulations is not substantiated on this aspect of Issue Nine.

Course Enrollment/Bullying

District's Position Regarding Course Enrollment/Bullying:
The district contends that change to the student's schedule did not result in a denial of FAPE.

Applicable Statutes and Regulations for Course Enrollment/Bullying:
In a letter to the district dated March 16, 2020, and copied to the parent, the Dispute Resolution Coordinator for Special Education and Title Services stated

> The Department's [KSDE's] Special Education and Title Services team has authority to investigate only complaints alleging a violation of special education statutes and regulations that occurred not more than one year from the date the complaint is filed. Any issue in a complaint that does not relate to special education laws, or that occurred more than one year prior to the filing of the complaint will not be investigated. The investigator, in her judgment, may determine that one or more allegations are beyond the jurisdiction of a state complaint.

The IDEA and state special education law do not address bullying, so the investigator does not have authority to investigate whether bullying occurred (34 C.F.R. 300.153(b)(1); K.A.R. 91-40-51(a)).

However, an alleged denial of FAPE, regardless of the reason (whether bullying or improper course enrollment) must be investigated. Federal regulations, at 34 C.F.R. 300.101, require states to ensure that a free appropriate public education (FAPE) is

made available to all children with disabilities residing within the state. Accordingly, Kansas regulations at K.A.R. 91-40-2(b)(1) require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. The regulations, at 34 C.F.R. 300.17, define FAPE, in part, as special education and related services provided in conformity with an IEP.

Investigative Findings for Course Enrollment/Bullying

The student's February 5, 2019 IEP states

> The student will complete the Kansas high school graduation requirements, including four units of English language arts, three units of history and government, three units of science, three units of mathematics, one unit of physical science, one unit of fine arts, and six units of elective courses. Elective courses might include coursework in Art, computers, business communications, marketing, entrepreneurship, freshman 101, debate, forensics.

The student's February 5, 2019 IEP showed that the student had earned 3.5 of the 25 credits he would need for graduation. The IEP stated that the student was expected to graduate with a high school diploma in May 2022.

The class schedule for the student for the third and fourth quarters of the 2018-19 school year shows that the student was enrolled in Physical Science.

According to the class schedule for the student for the 2019-20 school year, the student was again enrolled in physical science as of August 8, 2019, the first day of school. The student's enrollment in that class ended on August 26, 2019, and the student was placed in Consumer Education beginning the following day.

The draft IEP for the student dated January 28, 2020 shows that, at the time the document was developed, the student had earned 11.5 of the 25 credits he would need for graduation.

In telephone conversations with the investigator on April 13, 2020, both the special education teacher and the special education coordinator affirmed that the student had by the end of the first semester of the 2019-20 school year actually earned 12 of the credits required for graduation and was on track to graduate in 2022. If the student remains on his current pace for credit accumulation, he will have earned 4 more credits by the end of the 2019-20 school year, and could have 24 of 25 credits by the end of his junior year.

In the February 12, 2020 audio recording of a conversation between the parent and the student's theater teacher during which the student was present, the student's grades were reviewed. At that time, the student was earning A's in all of his classes.

Summary and Conclusions for Course Enrollment/Bullying

The student was, between August 8 and August 26, 2019, enrolled in a physical science course which he had completed during the 2018-19 school year. No evidence was presented to show that the student's progress toward meeting graduation requirements was negatively impacted by either the change in his class schedule or by any alleged associated bullying. The student has continued to earn credits toward graduation and is expected to graduate with a high school diploma in May of 2022. Because there is no evidence to show that the student's brief enrollment in the Physical Science class during the 2019-20 school year has denied the student a FAPE, a violation of special education statutes and regulations is not substantiated on this aspect of Issue Nine.

Issue Ten: Students have been transported by the district using personal vehicles rather than buses.

Parent's Position

The parent reports that she had gone to the site of the 2018-19 Job Olympics to support her son. According to the parent, she called the school because students were late in arriving at the location and was told that there were problems with the buses that were carrying the students. The parent contends that she subsequently observed some students from the school arrive by bus and some by private car. When asked, during a telephone call with the investigator on April 4, 2020, for additional information regarding this allegation, the parent could not recall which students arrived by car and which by bus and was unable to say with certainty that the student was transported by private car.

District's Position

In a telephone conversation with the investigator on April 13, 2020, the special education coordinator confirmed that students from the student's school did arrive late to the Job Olympics. However, the coordinator stated that none of the students were transported by personal vehicles.

## Applicable Statutes and Regulations

As noted above under Issue Nine, the Dispute Resolution Coordinator for Special Education and Title Services stated in a letter to the district dated March 16, 2020, and copied to the parent, that a special education complaint must include a statement that a school district has violated a requirement of federal or state special education statutes or regulations and the facts on which the statement is based (34 C.F.R. 300.153(b); K.A.R. 91-40-51(a)).

## Conclusion

All parties stipulate that the student participated in the Job Olympics event. The parent could not say whether this student arrived at the event by bus or car and was unable to provide sufficient facts for the investigator to determine whether a violation has occurred. Since the minimum filing requirement was not met, Issue 10 was not investigated further.

## Corrective Action

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

- K.A.R. 91-40-50(b) and 34 C.F.R. 300.622, which protect the confidentiality of personally identifiable information regarding a student with a disability;

- K.S.A. 72-3429(d)(4) and 34 C.F.R. 300.324(a)(2)(i), which require that when developing a student's IEP, in the case of a child whose behavior impedes the student's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior; and

- K.S.A.72-3429(c)(8) and 34 C.F.R. 300.320(b), which require that, for students age 14 and older, an IEP must contain appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, and employment and the transition services needed to assist the child in reaching the postsecondary goals.

Therefore, USD #500 is directed to take the following actions:

1) Submit to Special Education and Title Services (SETS), within 10 days of the date of this report, a written statement of assurance stating that it will comply with

    a) K.A.R. 91-40-50(b) and 34 C.F.R. 300.622 by preventing the unauthorized disclosure of personally identifiable information regarding a student with a disability without the consent of the parent;

    b) K.S.A. 72-3429(d)(4) and 34 C.F.R. 300.324(a)(2)(i), by considering, during IEP development, the use of positive behavior interventions and supports and other strategies to address behavior in the case of a child whose behavior impedes the child's or others' learning; and

    c) K.S.A.72-3429(c)(8) and 34 C.F.R. 300.320(b), by including in every IEP for each student age 14 and older, appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, and employment and the transition services needed to assist the child in reaching the postsecondary goals.

2) No later than 10 school days after the start of the 2020-21 school year,

    a) Convene an IEP team meeting for the purpose of reviewing and revising the student's February 5, 2019 IEP OR developing a new IEP for the student.

    b) At the meeting described above under Item 2)a), the IEP team must

        i) consider positive behavior interventions and supports and other strategies to address the student's behavior that impedes the student's or others' learning, and

        ii) must develop appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, and employment and the transition services needed to assist the student in reaching the postsecondary goals.

    c) No later than 5 calendar days after the IEP Team meeting described in 2)a) and 2)b) occurs, USD #500 must provide to SETS a copy of the Notice of Meeting

sent to the parent. If changes are made to the IEP as a result of that meeting or if a new IEP is developed for the student, USD #500 must also provide to SETS a copy of the new or revised IEP, a copy of the prior written notice, and a copy of the request for parent consent if any proposed changes are a material change in services or a substantial change in placement.

3) No later than 20 calendar days after the date of this report, provide training to all of the school staff who are members of the student's IEP Team. Such training must include at a minimum, a) instruction regarding the necessity of protecting personally identifiable information of students with disabilities, b) instruction about the development of measurable postsecondary goals based upon age-appropriate transition assessments related to training, education and employment and transition services needed to assist the student in reaching the postsecondary goals, as well as the requirement that the IEP of each student age 14 or older must contain these goals and services, and c) instruction regarding the necessity for considering positive behavior interventions and supports and other strategies to address behavior when the student's behavior impedes the learning of the student or others.

   Due to the Kansas Governor's ordered closure of school buildings caused by the COVID-19 outbreak, this training may be delivered to the required staff via virtual methods such as video conferencing or a webinar. No later than 21 calendar days after the date of this report, USD #500 must provide to SETS the name and position of the person who delivered the training, the content of the training, and documentation showing that each required staff member attended the training – such as an attendance record or sign-in sheet.

4) Submit to SETS, within 10 calendar days of the date of this report, 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). While KSDE offices are closed and not able to accept postal mail

due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org.

## Right to Appeal

Either party may appeal the findings or conclusions in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned email address within 10 calendar days from the date of this report. For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which is included below.

_____

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)

KANSAS STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON APRIL 14, 2020

DATE OF REPORT: MAY 14, 2020

This report is in response to a complaint filed with the Kansas State Department of Education (KSDE) by ____ and _____ _____, parents, on behalf of their daughter, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student", _____ _____ will be referred to as "the mother", ____ _____ will be referred to as "the father", and both will be referred to as "the parents."

The complaint is against USD #___ (_____ Unified School District) who contracts with the _____ _____ ____ _____ _____ Interlocal Cooperative (____IC) to provide special education services. In the remainder of this report the terms "USD #___", "public agency", and "school district" shall refer to both of these responsible public agencies.

The complaint was received by KSDE on April 14, 2020. The Kansas State Department of Education allows for a 30-day timeline to investigate the child complaint, which ended on May 14, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on April 30, 2020 as part of the investigation process. In addition, the school district made the following persons available for a telephone interview on May 4, 2020:

_____ _____, Assistant Director of ____IC [the cooperative]

_____ _____, Principal of _____ Elementary School
_____ _____, Special Education Teacher
____ ____, Occupational Therapist (OT)
____ _____, First Grade Classroom Teacher
_____ _____, General Counsel

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Individualized Education Plan (IEP) for the student dated March 7, 2019 and signed by IEP team members on March 7, 2019
- Notes from the March 7, 2019 IEP team meeting handwritten by the mother
- IEP for the student dated March 7, 2019 and amended on October 1, 2019
- IEP for the student dated November 21, 2019 and signed by IEP team members on December 5, 2019
- IEP Team Meeting Notes dated December 5, 2019 written by school staff
- Notes from the December 5, 2019 IEP team meeting handwritten by the mother
- Occupational Therapist Report on Referred Students dated October 22, 2019
- Psychoeducational Evaluation dated November 15, 2019
- Speech Language Report dated November 21, 2019
- IEP Goal Progress Report dated October 8, 2019
- Response to the allegations letter written by Ms. _____ [General Counsel] and dated April 29, 2020
- Timeline describing changes made to the "specialized paper" between October29, 2019 and March 10, 2020 written by Ms. ____ [Occupational Therapist]
- Data sheets for OT goals dated August 28, 2019 through March 29, 2020
- Blank sample of the three-line paper

- Samples of student work written on three-line paper from November 2019, February 18 and February 25, 2020
- Samples of spelling work completed by the student not written on three-line paper
- Signed affirmations of knowledge of the student's IEP from ____ _____, paraprofessional, dated January 28, 2020 and from Ms. _____ [the student's first grade classroom teacher] dated February 3, 2020
- Email written by the mother to Ms. _____ [the student's special education teacher] dated October 10, 2019 at 3:59 p.m.
- Email written by Ms. _____ [the student's special education teacher] to the mother dated October 11, 2019 at 8:34 a.m.
- Email written by the mother to Ms. _____ [the student's special education teacher] dated October 21, 2019 at 9:32 p.m.
- Email written by the mother to Ms. _____ [the student's special education teacher] dated October 27, 2019 at 1:19 p.m.
- Email written by Ms. _____ [the student's special education teacher] to the mother dated October 28, 2019 at 11:18 a.m.
- Email written by the mother to Ms. _____ [the student's special education teacher] dated October 29, 2019 at 7:02 p.m.
- Email written by Ms. _____ [the student's special education teacher] to the mother dated February 25, 2020 at 1:46 p.m.
- Email written by the mother to Ms. _____ [the student's special education teacher] dated February 25, 2020 at 9:22 p.m.
- Email written by the mother to Ms. _____ [the student's special education teacher] dated March 11, 2020 at 4:53 p.m.
- Email written by Ms. _____ [the student's special education teacher] to the mother dated March 12, 2020 at 9:30 a.m.
- Email written by Ms. _____ [elementary school principal] to Ms. _____ [assistant director of the cooperative] dated April 9, 2020 at 10:51 a.m.
- Email written by the mother to the complaint investigator dated May 3, 2020

- Copies of the student's Communication Logs for October 29, November 12, and December 10, 2019
- Copies of the student's Communication Logs for January 14, February 11, and March 3, 2020

## Background Information

This investigation involves a female student who is enrolled in the first grade at _____ Elementary School in USD #___ during the 2019-20 school year. She was initially evaluated at age four and was found eligible for special education and related services due to the exceptionality of young child with a developmental delay. The student has received special education and related services since that time. Due to parent concerns with academic progress, the student was reevaluated by USD #___ during first semester of the 2019-20 school year. An IEP team meeting was held on November 21 and continued until December 5, 2019 to determine continued eligibility and to review / revise the student's IEP.

## Issues

Based upon the written complaint, the parents raised one issue that was investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the accommodation/modifications for modified spelling tests and providing specialized paper for writing during the 2019-20 school year.

During their interview on April 30, 2020, the parents clarified that the reference to the modified spelling tests included in the allegation was referring to the use of the specialized paper on the spelling tests rather than the spelling test expectations. For this reason, this investigation will only focus on the use of the specialized paper.

### Parent Position

The parents believe USD #___ has not consistently implemented the student's IEPs in regards to the use of the specialized paper during the 2019-20 school year despite numerous verbal and written reminders to the school staff.

They reported the student has had three IEPs in effect this school year. When school started in August, the first IEP in effect was dated March 7, 2019. The second IEP in effect was the October 1, 2019 amendment to the March 7, 2019 IEP. The third IEP in effect was developed at IEP meetings that began on November 21 and concluded on December 5, 2019. Despite three different IEPs being in effect during the school year, the parents noted that the same accommodation for "specialized paper / developmentally appropriate paper as needed throughout her school day in all daily subjects in the regular education building for the length of the IEP" was included in all three of the IEPs.

The parents reported that the student struggles with spacing and alignment of letters and the accommodation of specialized paper helps establish visual boundaries for writing. The parent indicated the student's handwriting skills have continued to be an area of concern throughout the entire 2019-20 school year, which necessitated the OT adjusting the type of specialized paper to be used by the student. The parents provided the following dates and summaries from the student's communication journal to support this assertion:

> 10/29/2019 - OT indicates different specialized paper with colored line, sends example home. The word "different" indicates that specialized paper should have already been implemented.
>
> 11/12/2019 - OT indicates pages have been adapted in spelling book. OT notes spelling book pages - example of how the requirement applies to all writing.
>
> 12/10/2019 - OT indicates working on letter alignment, sends paper home and indicates team is to use same verbiage. The student is still struggling with handwriting.

1/14/2020 - OT indicates working on writing letters, cues are needed. The student is still struggling with placement of letters, which is what the highlighted portion of the specialized paper is supposed to help with.

2/11/2020 - OT indicates working on letter alignment with lower case letters and it continues to be difficult for the student.

3/3/20 - OT indicates change in specialized paper, introduces blue line at bottom.

The parents reported and Ms. ___, the OT, confirmed that several different types of specialized paper were recommended for use during this school year in an effort to help the student. Based on the student's performance, the OT adjusted the type of paper to be used to address the writing goals included in the three different IEPs. The parents and Ms. ___ [occupational therapist] reported that all of these adjustments were shared with the special education teacher, Ms. _____, the general education teacher, Ms. _____, and the paraprofessionals working with the student.

The parents reported they first learned of the failure to provide the accommodation at the October 2019 parent/teacher conferences when they asked Ms. _____ [the student's first grade classroom teacher] about the specialized paper. Based on her response, the parents believe that Ms. _____ [the student's first grade classroom teacher] was not fully informed of her responsibilities in regards to implementing the student's IEP.

Following the conference, the mother sent an email dated October 27, 2019 to Ms. _____ [the student's special education teacher] stating,

> It was frustrating to learn at parent teacher conferences that the accommodation of special paper for writing (three-lined paper) is not being implemented. Mrs. _____ [the student's first grade classroom teacher] indicated that she doesn't have any of that paper. The student's writing notebook from *Handwriting Without*

> *Tears* only has three lines on a few of the pages. If the para has the special paper, it is not being used. I took the student's writing notebook home with me the night of conferences and took a pencil and ruler and drew in the third line on each remaining page. The para should have either drawn in the third line or allowed the student to complete the writing exercise on the special paper. My expectation is that the student receives the accommodations that are indicated in her IEP so she can be successful. The accommodation of special paper was not implemented for nine weeks and is now only being implemented because I made it happen. This is incredibly frustrating. Please help me understand how the paras are implementing the rest of the accommodations.

On October 28, 2019, Ms. _____ [the student's special education teacher] responded to the mother in an email indicating that she had followed up with Ms. _____ [the student's first grade classroom teacher] who reported that no handwriting work had been given to the student that did not have three lines on it. In the email, Ms. _____ [the student's special education teacher] explained,

> Three-lined paper was provided by me at the start of school. I provided more again today. I also went over every accommodation with both the AM and PM paras in the student's classroom again today to ensure that all of the accommodations were being implemented. The handwriting book was an oversight on my part as I did not realize that it only had 2 lines and I indicated that to you last Monday when we spoke and I offered to add in a third line or even make the student a handwriting book using the 3 lined paper. You indicated that you wanted to look at the book at home. The 3 lines are working well in her handwriting book.

Ms. _____ [the student's special education teacher] went on in the email to outline how each of the accommodations in the student's IEP was being implemented and reiterated that she had provided three lined paper to use for writing assignments when there were not three lines for the accommodation to provide the specialized paper.

The mother responded via email on October 29, 2019 writing,

> The handwriting in the notebook did occur without three lines. This is handwriting work. So yes, the student has had handwriting assignments on paper without three lines, which does not follow the IEP. I am happy to hear that the paras had that paper; however, it was not being used. My expectation is you follow-up with the paras to make sure that they are using the paper. . . . I agree that you offered to alter the *Handwriting Without Tears* notebook and I took it home that night and did it myself. I did that because it needed to be done and we have been through 9 weeks of school ad there are not three lines on all pages. Today, Ms. ____ [occupational therapist] sent home a note with different paper and indicated that she and Mrs. _____ [the student's first grade classroom teacher] agreed that paper is the best. I expect that paper will be used from here on.

The IEP team met on November 21 and December 5, 2019 to review the results of a reevaluation to determine continued eligibility for special education and related services, and to review and revise the IEP as necessary. The parents reported that the IEP team discussed the continued need to use the specialized paper as an accommodation. The parents stated, "The notes [from the IEP team meeting kept by the parent] clearly indicate that the special paper is to be used for all writing regardless of subject. It was clear to all IEP team members . . . Testing data, progress reports, and observations of the team indicate the student struggles with her spacing, size, and alignment of letters and that the specialized paper is necessary for addressing this need."

However, the parents reported that the student continued to bring home schoolwork that was not on the specialized paper and they shared these concerns with Ms. _____ [the student's special education teacher]. Each time, they were assured that the specialized paper would be used at school.

The parents reported meeting with Ms. _____ [the student's first grade classroom teacher], Ms. _____ [the student's special education teacher], and Ms. ___ [occupational therapist] at the Spring Parent Teacher Conference where Ms. _____ [the student's first grade classroom teacher] shared two spelling tests with them that were not on the specialized paper. When asked why the accommodation for the specialized paper was not being implemented, the teacher apologized and showed them other examples of work using the specialized paper. The parents again shared their concerns about the consistent use of the specialized paper with these staff as well as the building principal, _____ _____.

The parents believe it is clear that the student continues to struggle with spacing and alignment of letters and the accommodation of specialized paper helps establish visual boundaries for writing. All three of the IEPs in effect this school year have included an accommodation for the daily use of the specialized paper for any assignments where writing is required. However, this accommodation has not been provided consistently despite multiple discussions and reminders.

## School District Position

USD #___ acknowledged that all three of the student's IEPs in effect during the 2019-20 school year included the accommodation of "specialized paper / developmentally appropriate paper as needed throughout her school day in all daily subjects in the regular education building for the length of the IEP". School staff also acknowledge that the specialized paper was not used at all times throughout the school day because they interpreted the language "as needed throughout her school day in all daily subjects" as a determination made using the professional discretion of the staff working with the student.

School staff reported that the student is very focused on the act of writing with correct letter formation and proper alignment when she uses the specialized paper to the detriment of the academic content. School staff described the student being so focused on trying to write everything down correctly that she misspelled words and/or phonemes that she had previously demonstrated

mastery.  School staff also shared a similar example from the math class where the student was so focused on correctly writing the numerals that she was unable to perform the arithmetic calculation to solve the problem correctly.

School staff reported this information was shared and discussed with the IEP team and a conclusion made "that the adapted paper probably should not be used for everything."  School staff stated, "While the parent may want the student to use the adapted paper at all times, that is not what was discussed or intended by the IEP team."

However, because of the parent's misunderstanding of the use of this accommodation, USD #___ is planning to reconvene the student's IEP team when school is able to reopen to discuss and clarify the term "as needed"  in regards to the use of the specialized paper.

In response to the parent's report that the first grade general education teacher was unaware of the accommodation for using the specialized paper for writing done in the classroom, Ms. _____ reported that she was made aware of this accommodation through the IEP at a Glance document provided by Ms. _____ [the student's special education teacher] at the beginning of the school year.

Ms. _____ [the student's special education teacher] confirmed her procedure and practice of sharing the IEP Snapshot document for each of the students on her caseload with their general education teachers and the beginning of each school year.  Ms. _____ [the student's special education teacher] indicated that she created a new procedure and practice to obtain written confirmation from each school staff working with a specific student stating that the IEP snapshots were received, read, and that the school staff person agrees to follow each student's IEP.  Ms. _____ [the student's first grade classroom teacher] signed the student's IEP Snapshot document on February 3, 2020 and ____ _____, the paraprofessional who works with the student, signed the student's IEP Snapshot document on January 28, 2020.

Applicable Regulations, Findings, and Conclusions

Federal regulations at 34 C.F.R. 300.323(d) require public agencies to ensure that the student's IEP is accessible to each teacher and service provider who is responsible for its implementation and that each teacher and provider working with a student with a disability is informed of their specific responsibilities related to implementing the student's IEP and the specific accommodations, modifications and supports that must be provided for the student in accordance with the IEP.

While the parents believe that Ms. _____ [the student's first grade classroom teacher] was not informed about her responsibility to provide the accommodation for using the specialized paper, interviews found that the special education teacher, Ms. _____, did have a procedure and practice for providing general education teachers with information about their responsibilities for implementing the IEPs at the beginning of the school year. While no written documentation was kept showing this occurred in August 2019, both Ms. _____ [the student's first grade classroom teacher] and Ms. _____ [the student's special education teacher] described the use of the IEP Snapshots as a means of providing this information. It is noted that Ms. _____ [the student's special education teacher] added a procedure to obtain written confirmation from school staff at the beginning of second semester and documentation showed both the classroom teacher and the paraprofessional working with the student affirmed their awareness of this responsibility. Based on the foregoing, noncompliance is not identified in regards to this requirement.

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In addition, federal regulations at 34 C.F.R. 300.320(a)(7) require the public agency to ensure that IEPs include the anticipated frequency of services and modifications.

This requirement is clarified by the Office of Special Education Programs (OSEP) in the August 14, 2006 Federal Register In the comments to the regulations on page 46667. The OSEP states,

> What is required is that the IEP include information about the amount of services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and other IEP Team members. The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP.

Chapter 5, Section G of *The Kansas Special Education Process Handbook* provides guidance regarding the frequency of services and modifications by stating,

> Sometimes it is difficult to be precise in determining just how much service will be required throughout the year. Sometimes services are provided on a situational basis, such as "reading the math test to the child." The IEP should not indicate these services are "as needed." The IEP has to describe when and how the service will be provided throughout the year.

In this case, interviews and documentation show that the three IEPs in effect during the 2019-20 school year all included the accommodation of "specialized paper / developmentally appropriate paper as needed throughout her school day in all daily subjects in the regular education building for the length of the IEP". The parents believed this accommodation required the use of the specialized paper in every subject on every day and provided documentation showing USD #___ staff did not use the specialized paper in all subject areas throughout every school day. USD #___ staff acknowledge that the specialized paper was not used in every subject every day because the language "as needed throughout the school day" allowed for the school staff working with the student to use their professional discretion to determine when the student would use the specialized paper for assignments involving writing.

It is obvious that the parents and USD #___ staff have very different understandings of what the language "as needed throughout her school day in all daily subjects" means because the term was not clearly stated in a manner that was understood by all of the parties involved in the development and implementation of the IEP. For this reason, a review of documentation was conducted to ascertain how these very different understandings were reached and shared between both parties.

Following the October Parent Teacher Conference, the parents made it clear that their expectation was that the student use the specialized paper in all subjects every day. As described above, the parent stated in an email to Ms. _____ [the student's special education teacher] following the conference dated October 27, 2019, "The accommodation of special paper was not implemented for nine weeks and is now only being implemented because I made it happen." Ms. _____ [the student's special education teacher] appeared to agree to these interpretations by emailing the parent to reiterate that she had provided three-lined paper to use for writing assignments when there were not three lines for the accommodation to provide the specialized paper.

School staff indicated their professional discretion interpretation of the meaning of "as needed throughout the school day" was discussed at the November 21 and December 5, 2019 IEP team meeting when they shared several examples of times the use of the specialized paper and focus on letter formation and alignment had interfered with academic content. For this reason, USD #___ concluded there were times the student should not use the specialized paper to complete an assignment. However, documentation found the Meeting Notes from the November 21 and December 5, 2019 IEP team meeting written by school staff do not reflect any discussion regarding the accommodation for the use of specialized paper being at the discretion of school staff. In contrast, the parent's handwritten meeting notes from that IEP team meeting specifically state "box, special paper, visual boundary helps writing, use for any writing." It is noted that as a result of that IEP team meeting, the language of the

accommodation remained the same as the two previous IEPs in effect during the 2019-20 school year.

The parent again shared concerns regarding the accommodation not being provided at the March 2020 Parent Teacher Conference. An email dated April 9, 2020 written by _____ _____, Principal of _____ Elementary School, to _____ _____, Assistant Director of _____ [the cooperative], summarized the actions taken as a result of that meeting and stated,

> At conferences, ____ [Ms. _____] [the student's first grade classroom teacher] did show two tests that did not use the special lined paper . . . She apologized to the parents and owned up to her mistake . . . ____ [the student's first grade classroom teacher] and I met in the teacher workroom the day after the conferences and made a plan that she would gather all of the papers (assignments, worksheets, etc.) for the next week and have the para make the blue line mark on all of the worksheets (per the new plan of specially designed paper that I found out about the night of conferences). That way all papers would be ready to go for the week. We did not want to plan too far in advance because the special lined paper has changed multiple times since the IEP, so workbooks were not modified for more than a week at a time as well. ____ [the student's first grade classroom teacher] left me and was going to go tell _____ [Ms. _____] [the student's special education teacher] what the plan was."

Documentation clearly shows that the parents consistently expressed their belief that the specialized paper was to be used in every subject on every day. USD #___ staff appeared to acknowledge this interpretation as evidenced in emails correspondence following the October 2019 Parent Teacher Conference and again in emails describing the actions taken following the March 2020 Parent Teacher Conference.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEP by not providing the

accommodation for the use of specialized paper as required by the IEP during the 2019-20 school year. In addition, a violation of special education statutes and regulations is substantiated for failing to ensure that IEPs adequately describe the anticipated frequency of services and modifications in a manner that is clear to all parties involved in the development and implementation of the IEP.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. A violation has occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   In this case, interviews and documentation found USD #___ failed to implement the student's IEP by not providing the accommodation for the use of specialized paper in all subject areas every day as required by the IEP during the 2019-20 school year.

B. Federal regulations at 34 C.F.R. 300.320(a)(7) require the public agency to ensure that IEPs adequately describe the anticipated frequency of services and modifications in a manner that is clear to all parties involved in the development and implementation of the IEP.

   In this case, interviews and documentation found USD #___ failed to adequately describe the frequency of the accommodation for the use specialized paper in a manner that was clear to both the parent and school staff. Use of the term "as needed" is vague and is open to different interpretations by the relevant parties.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a. Comply with federal regulations, at 34 C.F.R. 300.323(c)(2) which requires school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

    b. Comply with Federal regulations at 34 C.F.R. 300.320(a)(7) require the public agency to ensure that IEPs adequately describe the anticipated frequency of services and modifications in a manner that is clear to all parties involved in the development and implementation of the IEP.

2. No later than September 1, 2020, USD #___ will provide training to all general education and special education teachers and related services providers at _____ Elementary School regarding the requirement that the accommodations must be provided in accordance with the IEP as soon as possible following the development of the IEP. In addition, this training must address using clearly stated language in a manner that can be understood by all involved in the development and implementation of the IEP when describing the frequency for each of the various services to be provided in an effort to lessen the chance for misunderstandings to occur between all members of the IEP team. No later than September 2, 2020, USD #___ shall provide to SETS a description of the content of the training, the name and position of the person who conducted the training and sign-in sheets signed by all persons who attended the training.

3. No later than September 30, 2020, USD #___ will reconvene the student's IEP team to review and revise the accommodation regarding the use of specialized paper to clarify and clearly define the term "as needed." USD

#___ shall provide a copy of the revised accommodation to SETS no later than October 7, 2020

4. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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(f). While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report.

For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

Nancy Thomas
Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON APRIL 30, 2020

DATE OF REPORT: MAY 29, 2020

This report is in response to a complaint filed with our office by _____ _____ and _____ _____, the father and mother respectively, on behalf of their son, _____ _____. In the remainder of this report, _____ _____ will be referred to as "the student", _____ _____ will be referred to as "the father", _____ _____ will be referred to as the "mother", and both will be referred to as "the parents."

The complaint is against USD #___, which contracts with the ____ _____ _____ Special Education Cooperative (_____) to provide special education services. In the remainder of this report the terms "USD #___", "public agency", and "school district" shall refer to both of these responsible public agencies.

The Kansas State Department of Education (KSDE) received the complaint on April 30, 2020. The KSDE allows for a 30-day timeline to investigate the child complaint, which ends on May 29, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parents by telephone on May 15, 2020 as part of the investigation process. In addition, _____ _____, Superintendent of USD #___ was interviewed on May 15, 2020.

In completing this investigation, the Complaint Investigator reviewed the following materials:

- Email written by the mother to _____ ___, Principal of _____ Elementary School in USD #___, dated March 19, 2019 at 7:31 p.m.
- Email written by the mother to Mr. ____ [principal] dated March 20, 2019 at 6:54 p.m.
- Email written by Mr. _____ [superintendent] to the mother dated October 9, 2019 at 8:19 a.m.
- Email written by the mother to Mr. _____ [superintendent] dated November 7, 2019 at 4:28 p.m.
- Email written by Mr. ____ [principal] to the father dated November 21, 2019 at 10:50 a.m.
- Email written by the father to Mr. ____ [principal] dated February 19, 2020 at 6:39 p.m.
- Email written by the father to Mr. ____ [principal], dated March 9, 2020 at 5:03 p.m.
- Email written by Mr. ____ [principal] to the father dated March 9, 2020 at 5:27 p.m.
- Email written by Mr. ____ [principal] to the father dated March 9, 2020 at 5:32 p.m.
- Email written by Mr. ____ [principal] to the father dated March 23, 2020 at 5:37 p.m.
- Email written by Mr. ____ [principal] to the father dated March 30, 2020 at 7:34 a.m.
- Email written by the father to Mr. ____ [principal] dated March 30, 2020 at 8:07 a.m.
- Email written by Mr. ____ [principal] to the father dated March 30, 2020 at 9:27 a.m.
- Email written by the father to Mr. ____ [principal] dated March 30, 2020 at 2:29 p.m.
- Email written by the father to Mr. ____ [principal] dated April 7, 2020 at 10:23 a.m.
- Email written by Mr. _____ [superintendent] to the father dated April 7, 2020 at 10:28 a.m.
- Email written by the father to Mr. _____ [superintendent] dated April 7, 2020 at 10:31 a.m.

- Email written by Mr. _____ [superintendent] to the father dated April 7, 2020 at 10:36 a.m.
- Email written by Mr. _____ [superintendent] to the father dated April 7, 2020 at 11:22 a.m.
- Email written by the father to Mr. _____ [superintendent] dated April 7, 2020 at 11:27 a.m.
- Email written by Mr. _____ [superintendent] to the father dated April 7, 2020 at 11:31 a.m.
- Email written by the father to Mr. _____ [superintendent] dated April 14, 2020 at 1:13 p.m.
- Email written by the father to Mr. _____ [superintendent] dated April 24, 2020 at 6:46 p.m.
- Email written by Mr. _____ [superintendent] to the father dated April 24, 2020 at 7:35 p.m.
- Email written by the father to Mr. _____ [superintendent] dated April 24, 2020 at 7:52 p.m.
- Email written by the father to Mr. ____ [principal] dated April 27, 2020 at 10:23 a.m.
- Email written by Mr. ____ [principal] to the father dated April 27, 2020 at 10:28 a.m.
- Email written by Mr. ____ [principal] to the father dated April 27, 2020 at 10:41 a.m.
- Email written by the father to Mr. ____ [principal] dated April 27, 2020 at 3:14 p.m.
- Email written by the Mr. _____ [superintendent] to _____ _____, Assistant Special Education Director for _____ [the Cooperative], dated May 1, 2020 at 5:36 p.m.
- Email written by Dr. _____ [Assistant Special Education Director] to Mr. _____ [superintendent] dated May 1, 2020 at 5:40 p.m.
- Email written by Mr. _____ [superintendent] to Dr. _____ [Assistant Special Education Director] dated May 1, 2020 at 5:43 p.m.
- Email written by Dr. _____ [Assistant Special Education Director] to the father dated May 5, 2020 at 10:04 a.m.

- Email written by Dr. _____ [Assistant Special Education Director] to the complaint investigator dated May 6, 2020 at 10:22 a.m.
- Email written by Mr. ____ [superintendent] to the complaint investigator dated May 6, 2020 at 10:29 a.m.
- Email written by Dr. _____ [Assistant Special Education Director] to Mr. ____ [superintendent] dated May 6, 2020 at 10:38 a.m.
- Email written by Mr. ____ [superintendent] to Dr. _____ [Assistant Special Education Director] dated May 6, 2020 at 10:54 a.m.
- Email written by the mother to the members of the USD #___ School Board dated May 6, 2020 at 8:04 p.m.
- Email written by Mr. _____ [superintendent] to the complaint investigator dated May 18, 2020 at 10:42 a.m.
- Email written by the father to Mr. ____ [superintendent] dated May 19, 2020 at 12:33 p.m.
- Email written by Mr. ____ [superintendent] to the father date May 19, 2020 at 1:44 p.m.
- Email written by the father to Mr. ____ [superintendent] dated May 19, 2020 at 2:29 p.m.
- Email written by the father to Mr. ____ [superintendent] dated May 19, 2020 at 9:41 p.m.
- Email written by Mr. ____ [superintendent] to the father dated May 19, 2020 at 10:44 p.m.
- Email written by the father to Mr. ____ [superintendent] dated May 20, 2020 at 5:48 a.m.
- Email written by Mr. ____ [superintendent] to the father dated May 20, 2020 at 9:23 a.m.
- Email written by the father to Mr. ____ [superintendent] dated May 20, 2020 at 12:47 p.m.
- Email written by Mr. ____ [superintendent] to the father date May 20, 2020 at 1:05 p.m.
- Email written by the father to Mr. ____ [superintendent] dated May 20, 2020 at 9:23 a.m.
- Email written by Mr. ___ [principal] to the father dated May 21, 2020 at 10:20 a.m.

- Email written by the father to Mr. ___ [principal] dated May 21, 2020 at 10:51 a.m.
- Email written by Mr. _____ [superintendent] to the father dated May 21, 2020 at 11:01 a.m.
- Email written by the father to Mr. _____ [superintendent] dated May 21, 2020 at 11:12 a.m.
- Ten Screenshots of USD #___ Facebook posts dated between March 25, 2020 and April 27, 2020
- Screenshot of PowerSchool SIS showing Net Access to the student's file on October 12, 2019 by the parent
- Copy of the 2019-20 School Calendar for USD #___
- Copy of the Kansas Governor's Executive Order 20-07 temporarily closing K-12 school buildings to slow the spread of COVID-19 dated March 17, 2020
- Copy of USD #___ School Board Policy on Records provided by Mr. _____ [superintendent] in an email to the complaint investigator
- Copy of USD #___ Bullying Prevention Plan provided to the father by Mr. ___ [principal]
- Guidance document from the United States Department of Education (USDE) titled "FERPA and the Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs)" dated March 2020
- Guidance document from the USDE titled "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities" dated March 21, 2020
- Report to Congress of U.S. Secretary of Education Betsy DeVos dated April 27, 2020

## Background Information

This investigation involves a male student who was enrolled in the 6th grade at _____ Elementary School in USD #___ during the 2019-20 school year. He has attended USD #___ since second semester of 2nd grade. Per parent report, the student has medical diagnoses of oppositional defiant disorder (ODD),

attention deficit hyperactivity disorder (ADHD), and depression. USD #___ conducted an initial special education evaluation of the student during the first semester of the 2018-19 school year resulting in a determination that the student was not eligible for special education services on January 17, 2019.

The parent did not agree with the evaluation provided by the district and requested an independent educational evaluation (IEE) at public expense on March 4, 2019. USD #___ contracted with Lauren Spears, psychologist at Neuroeducational Associates, to conduct the IEE. The multidisciplinary team including the parent considered this IEE on November 25, 2019 and the student was determined eligible for special education and related services due to the exceptionality of emotional disturbance.

USD #___ convened an Individualized Education Program (IEP) team meeting on December 18, 2019 for the purpose of developing an initial IEP for the student. However, the student did not begin to receive the special education services until February 19, 2020. In a previously investigated complaint on April 15, 2020, a finding of noncompliance was made against USD #___ for the delay in implementing services and the district was required to offer a minimum of 1,920 minutes of compensatory special education services to the student.

## Issue

Based upon the written complaint, the parents raised one issue that was investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to provide the parent with access to the students' educational records in a timely manner during the 2019-20 school year.

The investigator notes that the parents also made this same allegation in regard to another one of their children who attends school in USD #___; however, that child has not been identified as a child with a disability. Under the IDEA and the Kansas Special Education for Exceptional Children Act, the Kansas State

Department of Education only has the authority to investigate complaints concerning alleged violations of state or federal special education laws. The protections of the IDEA, aside from certain protections within the context of discipline, are only available to students with disabilities and therefore the allegation with respect to the child who does not have a disability will not be investigated. Allegations of violations of the Family Education Rights and Privacy Act (FERPA) concerning a student without a disability should be addressed to the Family Policy Compliance Office in the U.S. Department of Education.

## Positions of the Parties

The parents reported USD #____ did not respond in a timely manner to their request for access to the educational records of the student made on March 9, 2020. They also believe the records that were finally provided to them in May 2020 did not contain all the student's educational records collected and maintained by the school district. They reported that school staff insist that all of the student's educational records are available in PowerSchool but they are only able to access the student's grades.

USD #___ reported they responded as soon as possible to the parent's request for access to inspect and review the student's records in light of the COVID-19 pandemic restrictions and school building closure that was ordered by Kansas Governor Laura Kelly on March 17, 2020. School staff believe the parent was provided access to the student's general education records through the electronic records available to the parent in PowerSchool and the special education records that were mailed to the parents by the _____ [the Cooperative] on May 5, 2020.

## Findings of the Investigation

Documentation showed the father sent an email to _____ ____, Principal of _____ Elementary School, on March 9, 2020 at 5:03 p.m. requesting a copy of all the student's school records or to view such records. Mr. ____ [principal] acknowledged this request for records on that same date at 5:32 p.m. indicating

that he would discuss the request with _____ ____, Superintendent of USD #___, and "get back to you on when we can fulfill your request."

Interviews found and documentation showed that the spring break for USD #___ was March 13, 2020 through March 20, 2020. Mr. ____ [superintendent] reported that the school district was closed by order of Governor Kelly on March 17, 2020 in response to the COVID-19 pandemic. This closure required individuals to restrict activities and persons at high risk of severe illness from COVID-19 to remain at home. For these reasons, Mr. ____ [superintendent] reported that the office staff at USD #___ began working from home beginning on March 23, 2020.

On March 23, 2020, Mr. ___ [principal] emailed the father stating, "I just wanted to let you know that, despite our 10 day break, we have not forgotten about you. We will get in touch with you later this week."

On March 30, 2020 at 7:34 a.m., Mr. ___ [principal] emailed the father indicating "Just about everything has been gathered up and counted. Given our current situation, we will have to continue this process when school is back open for business." On that same date, the father responded to the email asking for an estimated timeline to receive the student's records and Mr. ___ [principal] answered via email indicating the timeline was unknown as the school was closed through the end of April.

On April 7, 2020 at 10:23 a.m., the father emailed Mr. ___ [principal] and Mr. ____ [superintendent] stating,

> I have seen that the school is allowing parents to come and pick up packets. Considering the circumstances that we find ourselves in, not knowing for sure when the school will reopen this year, I am making a reasonable request for the records that are ready for me to view to be sent by certified mail or arranged for me to pick up in person, the same as one of these packets for other parents.

Mr. ____ [superintendent] responded on the same date at 10:28 a.m. indicating the office staff who normally print the copies of school records were working from home and unable to print off the copies at this time. He indicated that the only records that Mr. ___ [principal] could access were in PowerSchool and that the parent already had access to those records. The father answered via an email at 10:31 a.m. stating, "So from the first email sent on March 30th, _____ [principal] says the records are gathered up and counted. That sounds like they are printed."

Mr. ____ [superintendent] reported and documentation showed that USD #___ has a school board policy requiring advanced payment for the expense of copying records. Mr. ____ [superintendent] emailed the father on April 7, 2020 at 11:22 a.m. stating, "The count had been started [for billing purposes] but it is not complete yet." The father then emailed Mr. ____ [superintendent] offering to "come in and make the copies under the supervision of the staff." Mr. ____ [superintendent] responded via email at 11:31 a.m. stating, "Appreciate the offer however we don't have keys for nurse files, and sped files. The individual staff members have those keys."

On April 14, 2020, the father emailed Mr. ____ [superintendent] again asking the school to make accommodations so that he would be able to have access to the student's files.

On April 24, 2020, the father again emailed Mr. ____ [superintendent] asking for an approximate date to get the copies of the student's records from USD #___ and Mr. ____ [superintendent] replied via email stating, "As the previous emails have stated, once the Governor lifts the stay at home order." The father responded to this email indicating that the stay at home order was set to expire on May 1, 2020 and again requested an approximate date to access the student's records because he would need to make arrangements to take off work in order to have access to the records during school hours.

On April 27, 2020, Mr. ___ [principal] emailed the father stating, "Once we come back to school, we will get these [copying the records] completed as soon as

possible. Once they are completed, we will let you know so you can make arrangements with your work to pick them up." The father responded via email again requesting to be able to pick up the student's school records just as other parents had been able to pick up paper packets for their students from the school.

On May 1, 2020, Dr. _____, Assistant Special Education Director at _____ [the Cooperative], and Mr. ____ [superintendent] were notified of the parent complaint and investigation via email from the Special Education and Title Services (SETS) office in the Kansas State Department of Education. Dr. _____ [Assistant Special Education Director] indicated this was the first time she became aware of the parent's request for access to the student's educational records.

Mr. ____ [superintendent] emailed Dr. ____ _____ [Assistant Special Education Director] on that same date stating,

> I have received the formal complaint. In the email chain, I verified with the father that he had access to PowerSchool. The vast majority of the records are available online for him to access. In cooperation with our County Health agency, our offices are closed meaning the staff is working from home. This was done based on the age and current health of the majority of our office staff. I also mentioned file cabinets that would have additional information. Our school Psychologist lives in the _____ ____ ____ area, which was under travel restrictions. We were concerned with her health as well. We were not able to give a date and still can not [sic] give a definite date that staff will be back in the office. At this time, it will be after consultation with our local health officials before we open and at that time, we can honor his request to have them printed. We honestly thought this upcoming week may [sic] have been when we were able to have the offices open however with current order we can not [sic] at this point. The father also mentioned that others are picking up educational packets. Those are from individual teachers, not office staff.

Dr. _____ [Assistant Special Education Director] responded to Mr. ____ [superintendent] on that same date indicating that _____ [the Cooperative] would be copying "all that's in his file here at the Coop and get it sent out as soon as possible." Interviews and documentation showed the parent received the following documents via email from Dr. _____ [Assistant Special Education Director] on May 5, 2020:

Notification of Meeting (NOM) dated November 18, 2019
Multidisciplinary Staffing Summary dated November 25, 2019
Evaluation/Reevaluation Eligibility Report dated November 25, 2019
12/3/19 NOM dated December 3, 2019
Multidisciplinary Staffing Summary dated December 18, 2019
Prior Written Notice (PWN) dated December 18, 2019
NOM dated February 18, 2020
Multidisciplinary Staffing Summary dated February 18, 2020
Individualized Education Program (IEP) dated February 18, 2020
Continuous Learning Plan letter dated March 30, 2020
Continuous Learning Plan dated March 30, 2020
PWN dated March 30, 2020

On May 6, 2020, Mr. ____ [superintendent] noted "PowerSchool online access has everything except for special education records and anything that would be handwritten in the nurse's files. The family has had access to that for quite some time". Interview and documentation showed that the parent had only accessed PowerSchool one time during the 2019-20 school year on October 12, 2019.

On May 18, 2020, Mr. ____ [superintendent] emailed the complaint investigator with the following information:

> Over the weekend, the county eased up on restrictions therefore allowed [sic] offices to open back up. This morning I have learned that the student's family has had all the information all along. I have confirmed that all of the general education information is in PowerSchool and all of the Special Education information had

> been sent late December early January. (Same documents that were emailed recently by _____ [Assistant Special Education Director]). In addition, I found out that the student was taken into KVC custody and exited from our school on 4-10-2020."

On May 19, 2020 at 12:33 p.m., the father emailed Mr. _____ [superintendent] again requesting a timeline to have access to the student's records. Mr. _____ [superintendent] responded via email at 1:44 p.m. on that same date stating, "You currently have everything in electronic version between PowerSchool and what you have received in the mail from special education and via email. If you want it printed we can do that for .25 per page."

On May 20, 2020 at 5:48 a.m., the father responded in an email to Mr. _____ [superintendent] that he did want paper copies of the records and again asked if the documents referenced in the earlier email were all of the student's records. Mr. _____ [superintendent] replied on that same date at 9:23 a.m., indicating that a final count for payment of the copies would be sent and stating, "Everything should be there. If you think something is missing let us know."

On May 20, 2020 at 12:47 p.m., the father emailed Mr. _____ [superintendent] stating:

> There is [sic] missing documents. The 504 plan, the paperwork that you received on January 16th of 2019 from the SEK mental health therapist, so you could give my son a 504 plan. Medicine log, from when the school nurse administered the student's medicine. The documentation from you and _____ ___ [principal] documenting bullying of the student by a teacher, students, and retaliation by _____ ___ [principal]. I have in emails that you and _____ [principal] have documented multiple occasions. Where is the documentation?

On May 20, 2020 at 1:05 p.m., Mr. _____ [superintendent] replied in an email to the father stating:

> The 504 plan is no longer active. You did receive an email copy of it however. We no longer administer meds. Those [sic] are removed when the administration ceases. Bullying is documented in a desk file as it holds multiple names.

Mr. ____ [superintendent] explained that the student's 504 plan is maintained in PowerSchool and indicated that the parents initially received a copy of the 504 plan when it was originally developed. He stated that the parents continue to have access to the 504 plan through PowerSchool. Mr. ____ [superintendent] reported that while the student has not taken medication at school for several years, the student's medication administration records are kept in paper form in a locked file cabinet by the school nurse.

In an email to Mr. ____ [superintendent] sent at 4:34 p.m., the father stated:

> So once again, I have the right to access to all of my son's records. Electronic and paper. The reson [sic] the school has 45 days to comply is because they may have to black out names from documentation. It is the school's fault not mine that they did not use their 45 days plus their additional 26 days and counting to prepare the electronic documents for me to have access to them. So when can I get access to the remainder of the records?

Mr. ___ [principal] sent an email to the father on May 21, 2020 at 10:20 a.m. indicating that he has printed a total of 144 pages of records and the total owed is $36. On that same date, Mr. ____ [superintendent] also emailed the father stating, "Everything you currently have electronically was printed and will go in the mail. That is everything that makes up the student file."

## Applicable Regulations and Conclusions

Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), at 34 C.F.R. 300.613(a), require school districts to permit parents to inspect and review any education records relating to their child that are

collected, maintained, or used by the agency. School districts must comply with a request without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made.

Federal regulations at 34 C.F.R. 300.611(b) state that “education records mean the type of records covered under the definition of ‘education records’ in 34 C.F.R. part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1947 (FERPA)).”

34 C.F.R. part 99 which states that "education records “ are records that are (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for or on behalf of the agency or institution. “Record” means any information recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, and microfiche.” Personal notes made by teachers and other school officials that kept in the sole possession of the maker and not shared with others are not considered education records. Additionally, law enforcement records created and maintained by a school or school district's law enforcement unit for a law enforcement purpose are not education records.

When education records include information on more than one child, federal regulations implementing the IDEA at 34 C.F.R. 300.615 require school districts to allow the parents of these children to inspect and review only the information relating to their child or to be informed of that specific information.

Two issues related to the parent’s request for access to the student’s educational records need to be addressed. The first issue is whether access to the records was provided to the parent in a timely manner. The second issue is which educational records the parent must be allowed to inspect and review because of the request.

In regards to the first issue, federal regulations at 34 C.F.R. 300.613(a) require USD #___ to provide the parent with access to the educational records used by the school district without unnecessary delay and in no case more than 45 days from the date of the request. In this case, documentation and interviews found

that the parent requested access to the student's educational records on March 9, 2020 in an email to the school principal and that this request was acknowledged by USD #___ on that same date. Based on this information, USD #___ was required to provide the parent with access to the student's educational records no later than April 23, 2020.

The school district reported the parent had ongoing electronic access to the student's general education records through PowerSchool and that access to the special education records was provided on May 5, 2020 when _____ [the Cooperative] emailed copies of all the student's special education records to the parent. This is beyond the 45-day timeline but the school district argues that the 45-day timeline should be extended beyond April 23, 2020 in light of the restrictions and school closure ordered by the Governor on March 17, 2020.

USD #___ reported that because of the Governor's order, office staff were not available to make copies of the educational records and administrators lacked access to any records contained in locked file cabinets because the nurse and school psychologist were in sole possession of the keys. However, interviews and documentation showed that the parents offered to come to the schools to make copies of the records under the supervision of school staff in an effort to access the student's records but that this offer was declined.

It is noted that under the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the United States Department of Education was tasked with making recommendations in regards to IDEA timelines. These recommendations were presented to Congress on April 27, 2020 with the only recommended change in special education timelines being related to the identification of infants and toddlers for special education and related services. No other changes were recommended to any other special education timeline. For this reason, the 45-day timeline to provide the parent with access to the student's educational records cannot be extended.

In regards to the second issue, federal regulations at C.F.R. 300.611(b) define an educational record as any record that is directly related to a student and is

maintained by an educational agency or institution. Interviews and documentation showed USD #___ administrators believed that the electronic version of the records in PowerSchool combined with the special education records provided by _____ [the Cooperative] constituted "everything that made up the student file" when responding to the parent's request for access to the student's educational records. However, the parents reported the existence of three other documents collected and maintained by USD #___ that were directly related to the student and contained personally identifiable information.

The first document was the student's 504 plan. USD #___ argues that this document is not part of the student's educational records because the 504 plan is no longer active and the parent had previously been provided with a copy of the 504 plan. It is clear that the student's 504 plan is directly related to the student, contains personally identifiable information and meets the definition of an educational record. As such, the parents should have been provided access to the 504 plan following the March 9, 2020 request even though a copy had previously been provided to the parent. While it is noted that USD #___ did make the 504 plan available for the parent to inspect and review on PowerSchool, the parents were unaware of how to access this educational record.

It is noted that Mr. _____ [superintendent] expressed the same mistaken belief that the provision of special education records following an IEP team meeting fulfills the requirement to provide the parent with access to educational records when he stated, "I have confirmed that all of the general education information is in PowerSchool and all of the Special Education information had been sent [to the parent] in late December early January. (Same documents that were emailed recently by _____ [Assistant Special Education Director])."

The second document was the student's medication administration records. USD #___ contends that this document is not part of the student's educational record because the records related to the administration of medication had been removed because the student was no longer being administered medication at school. Again, this document is clearly related to the student,

contains personally identifiable information, and meets the definition of an educational record. As such, the parent should have been provided access to the medication administration records following the March 9, 2020 request.

The third type of document that the parent requested was any report of bullying that involved the student. USD #___ has a school board policy that requires reports of bullying to be documented and acknowledged that the records of bullying were kept in a desk file. However, USD #___ argued that the student's parents did not have access to those educational records because they also contained the names of other students. Federal regulations at 34 C.F.R. 300.615 require school districts to provide the parents access to information in records containing the names of multiple students by only sharing the information that was directly related to their student. Thus, the parent should have been provided with a redacted version of the bullying records that were directly related to their student following the March 9, 2020 request.

Based on the foregoing, a violation of special education statutes and regulations for failing to provide the parent with access to all of the student's educational records collected, maintained, or used by the school district within 45 days after the request was made is substantiated.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. A violation has occurred in the following area:

A. Federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.613(a) that require school districts to permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency without unnecessary delay, but in no case more than 45 days after the request has been made.

In this case, interviews and documentation found USD #___ failed to provide the parent with access to all of the student's educational records collected, maintained, or used by the agency within 45 days of the parent's request dated March 9, 2020.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a. Comply with Federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.613(a) that require school districts to permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency without unnecessary delay, but in no case more than 45 days after the request has been made.

2. No later than August 30, 2020, USD #___ shall review and revise or create written procedures to ensure parents are provided with access to inspect and review all of their student's educational records that are collected, maintained, or used by the school district within the timeline required by 34 C.F.R. 300.613(a). This procedure must address, at a minimum, all of the following: ensure that there are multiple methods in place to access all locations where student education records are stored in the event one method is not available; provide for a method to access student education records in the event of school building closure; and provide a method for determining what records exist for a given child to ensure the parent is being provided with full access to the child's education record. No later than September 1, 2020, USD #___ will provide documentation of this written procedure to SETS in order for SETS to review and approve the procedure before staff are trained on the procedure as required in Corrective Action 3.

3. No later than September 30, 2020, USD #___ will provide training to all staff in the district who are involved in the process of providing parents access to educational records of students with IEPs regarding the requirements related to providing parents the right to inspect and review any educational records related to their student within the required timeline. At a minimum, this training must instruct staff on the requirements of the written procedure developed as a result of Corrective Action 2, address what constitutes an education record, and the required timeline for providing access to such education records. No later October 1, 2020, USD #___ will provide documentation to SETS of the name and position of the USD #___ staff member who conducted the training, the date and content of the training as well as a sign-in sheet signed by all individuals who attended the training.

4. No later than July 1, 2020, USD #___ shall provide the student's parents with access to inspect and review the three types of educational records identified by the parent as not being provided following the March 9, 2020 request. These records should include the following: 1) records related to the student's 504 plan, 2) redacted bullying records, and 3) medication administration records. No later July 15, 2020, USD #___ will provide documentation to SETS of the date the access was provided, the method of the access, and a list of documents the parent had access to inspect and review.

5. Further, USD #___ shall, within 10 calendar days of the date of this report, submit to 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(f). While KSDE offices are closed and not able

to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. While KSDE offices are closed and not able to accept postal mail due to the COVID-19 outbreak, appeals must be emailed to formalcomplaints@ksde.org. The notice of appeal must be emailed to the aforementioned address within 10 calendar days from the date of this report.

For further description of the appeals process, see Kansas Administrative Regulations 91-40-51 (f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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 AND TITLE SERVICES

REPORT OF COMPLAINT
FILED AGAINST
UNIFIED SCHOOL DISTRICT #___
ON June 18, 2020

DATE OF REPORT: JULY 27, 2020

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

The complaint is against USD #___ (_____ ____ Public Schools). In the remainder of this report, USD #___ may also be referred to as the "district" or the "local education agency (LEA)."

The Kansas State Department of Education (KSDE) received the complaint on June 18, 2020. The KSDE allowed for a 30-day timeline to investigate the child complaint, which ended on July 18, 2020. However, KSDE granted the investigator a nine-day extension to the 30-day timeline. During this extension, both the district and parent provided additional information. For this reason, the investigation timeline ended on July 27, 2020.

## Investigation of Complaint

Nancy Thomas, Complaint Investigator, interviewed the parent by telephone on July 8 and July 17, 2020 as part of the investigation process. Although USD #___ did not arrange for any district staff members to be interviewed, the district did provide a written response to the allegations.

In completing this investigation, the Complaint Investigator reviewed the following materials provided by the parent and USD #___:

- Individualized Education Program (IEP) dated April 25, 2019

- IEP team meeting notes written by school staff dated November 12, 2019
- Score report for the Woodcock Johnson Tests of Achievement – 4th edition (WJ-IV) dated January 21, 2020
- IEP dated February 25, 2020
- IEP team meeting notes dated February 25, 2020 written by the parent
- Meeting Summary dated February 25, 2020 written by _____ _____, Assistant Principal at _____ Middle School
- Prior Written Notice for Identification, Special Education and Related services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) dated March 12, 2020 resulting from the continuation of the February 25, 2020 IEP team meeting
- Continuous Learning Plan for USD #___ dated March 31, 2020
- Special Education Individualized Continuous Learning Plan (ICLP) dated April 13, 2020
- Student's Grade Report for the 2019-20 school year
- Student schedule for the 2019-20 school year
- Copies of worksheets from the social studies class
- Copies of worksheets from the reading class
- Copies of worksheets from the math class
- Copies of worksheets from science class
- Screenshot of private comment from the parent to _____ _____, Science teacher, regarding online science assignment
- Screenshot of the ICLP's Google Classroom meeting list
- Screenshot of Google Classroom assignment dated April 13, 2020
- Screenshots of the daily schedule from the ICLP dated April 13, 2020
- Screenshot of email between ___ ____, the teacher of the Family Advocacy (FA)* class, and the parent (*note that the FA class is the homeroom at _____ Middle School)
- Screenshot of science class assignment dated April 9 -10, 2020
- Screenshot of science class worksheet
- Screenshot of Google Classroom assignments for ICLP, FA class, PE, science, and _____ Library

- Screenshots of Infinite Classroom grades and progress reports for the second and third quarters of 2019-20 school year
- Contact log for Ms. _____ [special education teacher] dated April 8, 2020 through May 13, 2020
- Contact log for related services staff dated April 9, 2020 through May 20, 2020
- USD #___ written response to the allegations dated July 10, 2020
- USD #___ written response to the allegations dated July 22, 2020

## Background Information

This investigation involves a female student who was enrolled in the 7th grade at _____ Middle School in USD #___ during the 2019-20 school year. She has attended schools in USD #___ since kindergarten. The student was initially evaluated in first grade and found eligible for special education and related services due to the exceptionality category of intellectual disability. In addition, the student has medical diagnoses of Attention Deficit Disorder (ADD) and anxiety. The student's most recent reevaluation was conducted during the 2019-20 school year and showed that the student demonstrated academic skills for reading, writing and math at the kindergarten and first grade level.

## Issues

Based upon the written complaint, the parent raised two issues that were investigated.

> ISSUE ONE: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to implement the student's Individualized Education Program (IEP) as written, specifically by not providing the accommodations/modifications for homework and assignments during the 2019-20 school year.

## Positions of the Parties

The parent reported USD #___ did not provide modified assignments for the student as required by the student's IEP during the 2019-20 school year. The parent indicated that her allegation in the complaint was specifically concerning the IEP

accommodation/modification that stated, "Student's independent reading, writing, and math will be at her independent level." The parent specified that this accommodation/modification is referring to homework and assignments the student is expected to complete in her 7th grade general education classes.

However, the parent indicated that the student's assignments and homework were not modified on multiple occasions and in multiple classes during first, second, and third quarters for in-seat instruction as well as during fourth quarter for remote instruction. The parent reported she shared her concerns with multiple staff in USD #___ including _____ _____, the student's special education teacher; _____ _____, the assistant principal at _____ Middle School; _____ _____, the special education coordinator; _____ _____, the general education science teacher; and ___ ____, the general education family advocacy teacher. The parent indicated she made telephone calls, sent emails and texts as well as shared her concerns with USD #___ district staff at the April 25, 2019, the November 12, 2019 and the February 25, 2020 IEP team meetings.

USD #___ believes there is no merit to the parent's complaint and that "It is unclear from the complaint what specific situations are at issue." The investigator suggested that the district provide copies of any documentation showing the implementation of the accommodations/modifications for modifying the student's homework and assignments to her independent reading, math and writing levels during the 2019-20 school year. USD #___ stated, "Homework assignments are not typically maintained, and any such records that may exist are not readily available due to restricted access due the COVID-19 and the summer recess."

## Findings of the Investigation

Documentation showed there were two IEPs and an ICLP developed for the student during the 2019-20 school year. At the beginning of the school year, the student's IEP dated April 25, 2019 was in effect. This IEP required special education be provided in both the general and special education settings and included an accommodation/modification that stated, "Student's independent reading, writing, and math will be at her independent level."

USD #___ noted that the parent requested a reevaluation of the student during the November 12, 2019 IEP team meeting. This reevaluation was completed and a new IEP was written on February 25, 2020; however, the parent reported she did not agree with the special education services proposed in this IEP. Documentation shows the IEP team then suspended the meeting so that the parent could visit other placement options in the building.

The IEP team reconvened on March 12, 2020 and USD #___ provided the parent with a Prior Written Notice for Identification, Special Education and Related services, Educational Placement, Change in Services, Change in Placement, and Request for Consent (PWN) because of that IEP team meeting. The parent reported that she continued to disagree with the proposed IEP services and placement and "did not sign the IEP." USD #___ also reported "to date, Complainant has refused to sign this IEP."

It is noted that this investigation will not address whether or not the change is services described in the February 25, 2020 IEP was in effect during the 2019-20 school year because this is not relevant to the parent's allegation regarding the failure to provide accommodations/modifications. Both the February 25, 2020 and the April 25, 2019 IEP contained an accommodation/modification that required the student's independent reading, writing, and math assignments and homework to be provided at her instructional level.

Because of the school closure from the COVID-19 pandemic in March 2020, USD #___ developed a Continuous Learning Plan on March 31, 2020 as required by the Kansas Department of Education (KSDE). This plan states,

> The goal of continuous learning in USD___ is to ensure the District continues to provide instruction beyond the classroom so that students stay connected and on track with their learning. A combination of online, grade level learning packets and choice boards focused on critical grade and course level content will be used to support Pre-K-12$^{th}$ grade instruction.

Documentation included a Special Education Individualized Continuous Learning Plan (ICLP) for the student dated April 13, 2020, which states "Supports, accommodations,

consultation, and services will be provided to ensure access to educational materials and help student make continued progress on IEP Goal(s) and Objectives." The ICLP includes the IEP Goals/Objectives to be addressed, a schedule of services that will be provided to the student, and a description of the plan for the USD #___ special education providers to consult with the parent and student. However, the section of the ICLP form where the description of the accommodations/modifications and other supports such as Supplementary Aids and Supports that are necessary to enable the student to access educational materials being made available during the school building closure is left blank. This information is also not found anywhere in the ICLP rendering the ICLP mute on the need to provide any of these supports for the student to ensure access to the 7th grade educational materials.

Documentation shows that the parent and Ms. _____ [special education teacher] discussed the ICLP on April 16, 2020 and the parent remembers talking with Ms. _____ [special education teacher] and being assured that accommodations/modifications would be provided during the school closure. The parent noted that she has consistently requested that the student's homework and assignments be modified to the student's instructional level. Based on the discussion, the parent believed that the student's assignments and schoolwork would continue to be provided at her independent reading, writing, and math levels consistent with the accommodations/modifications that were required in the student's IEPs prior to the school closure. The parent's written communication with Ms. _____ [general education science teacher] and Ms. ____ [general education FA teacher], two of the student's general education teachers, confirms the parent's belief in regards to the continuation of this accommodation/modification during the school closure.

Documentation shows the student's independent academic skills fall within the very low range as compared to her same age peers as measured by the Woodcock Johnson Tests of Achievement – 4th edition (WJ-IV). The student scored at an age equivalent of 6 years-0 months for both reading and math and at an age equivalent of 6 years-6 months for written language, all of which are significantly below her chronological age of 13 years-3 months. The student's standard scores for all academic areas fell below a score of 40 as compared to average standard scores falling between 85 and 115.

Documentation showed three worksheets from the math class for telling time with a.m. and p.m., addition number sentences, and sums and differences. All of these worksheets included visual cues. The Automated Readability Index rated the text as appropriate for 3- to 5-year-olds (preschool).

In addition, documentation showed two worksheets from the reading class with four daily reading assignments related to theme and vocabulary copyrighted from Read Write Middle 2017. The Automated Readability Index rated the text as appropriate for 11- to 13-year-olds (sixth and seventh grade).

Documentation also showed a social studies assignment, which included a reading passage on Buffalo Soldiers and an accompanying worksheet. The Automated Readability Index rated the text as appropriate for 17- to 18-year-olds (twelfth grade).

Documentation additionally showed a science assignment, which included a reading passage on earth science and an accompanying worksheet. The Automated Readability Index rated the text as appropriate for 15- to17-year-olds (tenth and eleventh grades).

The November 12, 2019 IEP team meeting notes kept by district staff reflect the parent's concern that the student's schoolwork was not being modified as required by the IEP and stated, "Mom wants modified work sent home to see if her work is being modified." The February 25, 2020 IEP team meeting notes written by the parent and the Meeting Summary written by Ms. _____ [assistant principal at Middle School] both show the parent again expressed concerns to the IEP team that the student's homework and assignments were not being modified. The notes from the IEP team meeting written by the parent indicated that Mrs. ____ [special education teacher] "admitted to slacking off" in regards to modifying the student's schoolwork.

A screenshot of communication between the parent and Ms. ___, the FA class teacher, showed the parent expressed her concern about the work provided during the school closure by stating,

> how [sic] is the student supposed to do this [sic] It [sic] is not on her level [sic] you [sic] know that her work is two [sic] be modify [sic]."

Another screenshot of a communication between the parent and Ms. _____, the general education science teacher, regarding a remote assignment stated,

> The student cann't [sic] do this work [sic] it [sic] is not modify [sic] or on her level. so [sic] please send work that is on her level or I will let mrs. _____ [sic] [special education coordinator] know. It [sic] is in her iep [sic] all the teacher [sic] know that her work is two [sic] be modify [sic] on her level.

## Applicable Regulations and Conclusions

Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

In this case, the student's IEPs developed on April 25, 2019 and February 25, 2020 both included an accommodation/modification requiring that the student's independent reading, writing, and math will be at her independent level. Documentation and interviews with the parent showed that the student's independent reading level was at the kindergarten and first grade level. However, the samples of assignments provided by the parent from the student's science, reading, and social studies classes were at the middle school and high school reading levels. It is noted that the samples of math assignments were provided below the student's independent reading, writing and math level.

In addition, federal regulations, at 34 C.F.R. 300.320(a)(4), require the IEP to include a statement of the program modifications that will be provided to enable the child to be involved in and make progress in the general education curriculum. Because of the exceptional circumstances caused by the COVID-19 pandemic, this must be examined in light of guidance provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE. This guidance is contained in a document titled *Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.*

Question A-2 in this document asks, "What special education and related services must be provided to students with exceptionalities when a school is closed due to COVID-19, but is implementing its Continuous Learning Plan?"

The Answer to Question A-2 states:

> The services and supports in a child's IEP prior to the implementation of the district's Continuous Learning Plan contemplated the traditional educational environment, which most students are no longer in. The child's IEP Team should think of the district's Continuous Learning Plan as the general education curriculum in place at this time. All services and supports are intended to support the child in accessing the general education curriculum with their nondisabled peers to the maximum extent appropriate.

The Answer to Question A-2 goes on to explain:

> The child's IEP Team should think about supplementary aids and services, program modifications, and supports for school personnel in the context of "to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate" (in this instance to participate in the district's Continuous Learning Plan with their nondisabled peers). K.S.A. 72-3429(c)(4); K.A.R. 91-40-1(ttt).

The investigator notes that there is nothing in the guidance that indicates a school district may bypass the IDEA or the Special Education for Exceptional Children Act procedural requirements regarding how IEPs may be changed.

Because of the school closure due to the COVID-19 pandemic, USD #___ developed a Continuous Learning Plan dated March 31, 2020, which included a goal to continue to provide students with instruction focused on critical grade and course level content through remote learning opportunities. USD #___ then developed an ICLP for the student on April 13, 2020 and shared this plan with the parent on April 16, 2020. The ICLP states "Supports, accommodations, consultation, and services will be provided to ensure access to educational materials and help student make continued progress on IEP Goal(s) and Objectives."

However, the section of the ICLP where the accommodations/modifications and other supports such as Supplementary Aids and Supports that are necessary to access educational materials being made available during the school building closure was left blank and this information is not included anywhere else in the ICLP. Therefore, it is unclear if the intent of the IEP team was not to provide program modifications to the remote assignments or if this section of the ICLP was simply overlooked when completing the paperwork. If the IEP team intended to remove the program modifications during implementation of the continuous learning period, it was required to notify the parent of that removal with a PWN. It did not do so. Therefore, to the extent the ICLP was to act as the IEP for this student during school closure, it was incomplete. The result is that the program modifications in this student's IEP were still in force.

The documentation of the parent's communication to multiple school district staff make it clear that the parent believed the student's assignments were to continue to be modified to her independent reading, writing, and math level consistent with the two other IEPs developed and implemented during 2019-20 school year.

Interviews and documentation showed that the student's independent academic levels fall significantly below those of her grade-level peers and, that prior to the school building closure in spring 2020, multiple IEPs for the student required modified assignments in order to access the general education curriculum. Based on this information, there is evidence to support the need for the student to continue to be provided with modified assignments and homework in order to participate in the district's Continuous Learning Plan with her nondisabled peers.

Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to implement the student's IEPs, specifically the accommodation/modification that required the student's independent reading, writing, and math to be at her independent level.

> ISSUE TWO: The USD #___, in violation of state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), failed to

provide the student with a free appropriate public education (FAPE) during the school building closure due to the COVID-19 pandemic in spring 2020.

## Positions of the Parties

The parent reported Ms. _____ [special education teacher] called her on April 16, 2020 to go over the student's ICLP, which was developed by the school staff on April 13, 2020. She indicated that the student did not receive all of the services required by this ICLP during the school building closure in spring 2020 and that the services provided did not begin at the same time as the educational services, which were provided to other students in the district. The parent also indicated that the homework and assignments provided through remote instruction as part of continuous learning were often not modified to the student's instructional level even though she specifically asked for and was assured that this was in the student's ICLP. In addition, there were numerous issues with technology, which made access to remote instruction difficult. Due to the lack of services combined with the lack of modified homework and assignments during the fourth quarter of the school year, the parent does not believe the final grades are an accurate reflection of the student's progress.

USD #___ reported that when the school buildings closed in March due to the COVID-19 pandemic, school staff made several attempts to contact the parent in order to obtain her input for the development of the student's ICLP. School staff reviewed and discussed the plan with the parent on April 16, 2020 and, at that time, the district reported that the parent agreed with the ICLP. School staff subsequently communicated with the parent on numerous occasions during April and May to try to assist in the student receiving educational benefit during the extended school building closure. USD #___'s Continuous Learning Plan includes information explaining the grading policies and procedures, which were established to ensure equity for all students and to minimize any negative effects of the school building closure on students.

## Findings of the Investigation

The parent's allegation regarding the student not being provided with modified homework and assignments during the school building closure will not be investigated

in Issue Two as this concern was already addressed in Issue One. Note that the findings in Issue One are incorporated herein by reference.

USD #___'s district-wide Continuous Learning Plan dated March 31, 2020 required implementation for all students beginning April 6, 2020 and ending on May 21, 2020, the last day of the 2019-20 school year. The plan calls for special education teachers to:

> Provide weekly lessons that focus on maintaining and reinforcing skills identified in the IEP and state standards. In addition, teacher will provide instruction, which includes a mix of online learning tools, video conferencing, and learning packets. Teachers should be coordinating with all related services providers to ensure students have access to communication tools, visuals, behavior intervention plans, etc. Teachers will design instruction to address students' unique and individual needs and are encouraged to use small group lessons/direct instruction using Zoom or other web conferencing tools to deliver instruction to students. Special education teachers and related services providers will follow the suggested learning timeframes as identified in the USD___ 2020 Continuous Learning Plan specific to students' grade levels.

The Contact Log showed Ms. _____ [special education teacher] called the parent on April 10, 2020 at 3:05 p.m. and left a message on the answering machine to set up a time to do the ICLP. Ms. _____ [special education teacher] call the parent again on April 13, 2020 at 10:19 a.m. and left another message on the answering machine to set up the ICLP meeting. The parent called and spoke to Ms. _____ [special education teacher] that same day at 12:12 p.m. The contact log for that phone call states, "Talked to mom about the need for the ICLP. She said that she would get back to us about it after she contacted and set up a time with the person that she wanted to attend. Reminded her that it needed to be done by April 21." Ms. _____ [special education teacher] contacted the parent again by telephone on April 16, 2020 at 1:00 p.m. and noted in the contact log entry for the phone call that she "Went over the ICLP / answered questions about daughter's assignments."

The parent reported that she does not remember getting the messages about setting up an ICLP meeting. She confirmed that Ms. _____ [special education teacher] did contact her on Thursday, April 16, 2020 and told her what the ICLP developed on April 13, 2020 was going to provide. The parent indicated that her input was not requested during the April 16, 2020 phone call in regards to the IEP goals to be addressed in the ICLP or the special education and related services required to make progress towards those goals. The parent also indicated that she had not been provided with PWN regarding the ICLP to date.

The student's ICLP dated April 13, 2020 includes four goals. The first goal is to solve word problems at her instructional level involving one-digit by one-digit solutions; this same goal is only found in the February 25, 2020 IEP. The second goal is to decode words at her instruction reading level; this same goal is found in both the April 25, 2019 and the February 25, 2020 IEPs. The third goal is to compose written work using correct capitalization and punctuation; this same goal is found in both the April 25, 2019 and the February 25, 2020 IEPs. The fourth goal is to respond to inferential questions and explain how she determined her answer; this same goal is only found in the February 25, 2020 IEP.

The student's ICLP requires 120 minutes per week of special education services through remote instruction beginning April 13 and ending May 21, 2020. Documentation shows Ms. _____ [special education teacher] contacted the parent on April 9 and April 10, 2020 to arrange for the remote instruction and explained that the student could access the special education teacher through Zoom office hours Monday through Friday at 9:00 – 10:00 a.m. and again at 2:00 – 3:00 p.m. The student could also access the special education teacher during weekly check-in meetings on Zoom for 10:00 – 11:00 a.m. on Wednesdays. This schedule offered the student a total of 660 minutes per week of access to remote instruction from the special education teacher during the identified period.

The Contact Log shows Ms. _____ [special education teacher] contacted the parent and student during the weeks of April 6-10, April 13-17, April 20-24, April 27-May 1, May 4-9, and May 11-15, 2020. Documentation shows that Ms. _____ [special education teacher] was in contact with the parent and student during the week of April 6-10,

2020 on April 8, April 9, and April 10 in regards to accessing the remote learning platform and the remote instruction through Zoom meetings. On April 10, 2020, Ms. _____ [special education teacher] confirmed that the student had received her certificates of mastery for work already completed and offered to provide additional work. The documentation also shows that Ms. _____ [special education teacher] began providing a daily schedule of work for the student in phonics, reading, math, writing, and science on April 13, 2020 and arranged regularly scheduled Zoom meetings for the student and two of her peers.

Although office hours were made available, documentation shows the parent complained about technology not working to school staff four separate times on April 13, 2020. On April 19, 2020, documentation shows that Ms. _____ [special education teacher] offered to provide weekly work packets if the technology issues were not yet resolved. The parent did not respond until May 6, 2020 when she told Ms. _____ [special education teacher] that "Everything's fine for now." The parent complained again on May 13, 2020 and requested for the student's password be reset.

The ICLP also required the student receive related services of 20 minutes per week of speech/language therapy (SLT) in the home setting beginning April 6, 2020 and ending on May 21, 2020. In addition, the ICLP requires 10 minutes per month of occupational therapy (OT) in the home setting. The parent reported that she does not remember the student receiving any SLT or OT services during the school building closure in April and May 2020.

Documentation provided by USD #___ showed _____ _____, the speech/language therapist working with the student, provided 20 minutes of SLT services on April 9 (week of April 6- April 10), April 14 (week of April 13-17), April 22 (week of April 20-24), April 27 (week of April 27-May 1), May 7 (week of May 4-8), May 11 (week of May 11-15), and May 20 (week of May 20-21). Documentation also shows _____ _____, the occupational therapist working with the student, provided 10 minutes of OT services on April 27 (month of April) and May 14 (month of May).

The 2019-20 grade card shows the student earned the following grades:

| Class | 3rd Quarter | 4th Quarter | 2nd Semester |
|---|---|---|---|

| | | | |
|---|---|---|---|
| Integrated Reading/Writing 7 | 73 | 73 | Pass |
| Math 7 | 76 | 76 | Pass |
| Physical Education 7 | 93 | 93 | Pass |
| Science 7 | 72 | 72 | Pass |
| Social Studies 7 | 79 | 79 | Pass |
| Study Skills | 94 | 94 | Pass |

USD #___'s Continuous Learning Plan states the following in regards to grading during the school building closure:

> The goal for developing the grading system will be to minimize any negative effects on students. Work scored during the closure will only be counted to provide feedback on student's academic learning or to move from a failing to a passing grade. The passing grade will not impact the student's grade point average but will be used for the purpose of acquiring credit in order for the student to progress on to the next grade, course, or meet graduation requirements.

## Applicable Regulations and Conclusions

Federal regulations, at 34 C.F.R. 300.101, require states to ensure a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulation and statute, at K.A.R. 91-40-2(b)(1), require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the OCR, the OSERS, and the SETS team of the KSDE in a document titled *Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.*

Question A-2 in this document asks, "What special education and related services must be provided to students with exceptionalities when a school is closed due to COVID-19, but is implementing its Continuous Learning Plan?"

The Answer to Question A-2 states:

> When a school is closed due to a COVID-19 outbreak, but is implementing its Continuous Learning Plan, the school must ensure that each student with an exceptionality also has equal access to the same opportunities, including, to the greatest extent possible under these unprecedented circumstances, a free appropriate public education (FAPE).

The Answer to Question A-2 goes on to explain:

> FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, through instructional materials sent home, or telephonically. The determination of how FAPE is to be provided may need to be different during the time when a school is closed and implementing its Continuous Learning Plan.

The Answer to Question A-2 then goes on to explain how decision are to be made in determining the provision of FAPE:

> The child's IEP Team should develop a contingency learning plan to enable the child: (1) To advance appropriately toward attaining the child's annual IEP goals; (2) to be involved in and make progress in the general education curriculum (in this instance, the district's Continuous Learning Plan), or appropriate activities for children ages 3–5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled peers to the maximum extent appropriate, in all of these activities (in this instance to participate in the continuous learning plan with their nondisabled peers). K.S.A. 72-3429(c)(4).
>
> The child's IEP Team should think about the definition of specially designed instruction, in the context of the district's Continuous Learning

> Plan. "Specially designed instruction" means adapting, as appropriate to the needs of each exceptional child, the content, methodology or delivery of instruction for the following purposes: (1) To address the unique needs of the child that result from the child's exceptionality; and (2) to ensure access of any child with a disability to the general curriculum [in this instance, the district's Continuous Learning Plan], so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children. K.A.R. 91-40-1(lll).
>
> The child's IEP Team should think about related services in the context of what specially designed instruction (special education services) means within the district's Continuous Learning Plan. Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with an exceptionality, to benefit from special education services. K.A.R. 91-40-1(ccc).
>
> The child's IEP Team should think about supplementary aids and services, program modifications, and supports for school personnel in the context of "to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate" (in this instance to participate in the district's Continuous Learning Plan with their nondisabled peers). K.S.A. 72-3429(c)(4); K.A.R. 91-40-1(ttt).

Based upon this compliance guidance, it is clear that the expectation is for FAPE to be provided during periods of remote learning and that the IEP team is responsible for determining what constitutes FAPE for each individual student and then documenting the decisions regarding how to serve and support the child during periods of school building closures in a plan. Again, the investigator notes that nothing in this guidance indicates that the procedural requirements of the IDEA or the Special Education for Exceptional Children Act do not apply to this process.

In this case, USD #___ was closed due to the COVID-19 pandemic in spring 2020 and was implementing their Continuous Learning Plan dated March 31, 2020. USD #___ created a Special Education Individualized Continuous Learning Plan (ICLP) for the student on April 13, 2020, which was intended to serve as the plan for providing FAPE during the time when USD #___ was closed and implementing the district-wide

Continuous Learning Plan. The student's ICLP required special education and related services to be provided "through remote instruction" and "in the home setting."

Documentation show USD #___ had a procedure for having an ICLP in place for every student with an IEP no later than April 21, 2020. This is 21 calendar days from the date of the district's Continuous Learning Plan in which to provide notification of an IEP meeting and to reconvene each student's IEP team in order to develop an ICLP.

Documentation and interviews showed Ms. _____ [special education teacher] first contacted the parent on April 10, 2020 via a phone call to schedule the ICLP meeting but did not speak to the parent and left a voice message; however, the parent indicated she does not remember receiving this message. Ms. _____ [special education teacher] contacted and spoke to the parent on Monday, April 13, 2020 and the contact log entry for this phone call states, "Talked to mom about the need for the ICLP. She said that she would get back to us about it after she contacted and set up a time with the person that she wanted to attend. Reminded her that it needed to be done by April 21."

Ms. _____ [special education teacher] contacted the parent again by telephone on Thursday, April 16, 2020 at 1:00 p.m. and noted in the contact log entry for this phone call that she "Went over the ICLP / answered questions about daughter's assignments." The parent confirmed that Ms. _____ [special education teacher] did review the ICLP developed on April 13, 2020 with her on April 16, 2020. However, the parent also reported that she did not have input into decisions regarding goals or special education and related services included in the ICLP developed on April 13, 2020. The parent also reports she was not provided with PWN related to the ICLP.

Federal regulations, at 34 C.F.R. 300.323(a)(1), require the parent to be a member of the IEP team. Because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE. The guidance provided in the document titled *Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act*

*during the COVID-19 Pandemic* continues to ensure parents, as members of the IEP team, have the opportunity to participate fully in the development of the plan to serve and support the child.

In this case, documentation interviews show the student's ICLP was developed on April 13, 2020 and that school staff simply "went over the ICLP" with the parent on April 16, 2020. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to include the parent as a member of the IEP team and to provide the parent with the opportunity to participate fully in the ICLP development process.

Federal regulations, at 34 C.F.R. 300.503, require public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to identification, evaluation, placement, or the provision of FAPE. Once again, because of the exceptional circumstances caused by the COVID-19 pandemic, this requirement must be examined in light of guidance provided by the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS), and the Special Education and Title Services (SETS) team of the KSDE in the document titled *Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic*

Question A-21 in this document asks, "If an IEP team creates a contingency learning plan to be triggered during school closure due to COVID-19, is notice needed? Must parent consent be obtained?

The Answer to Question A-21 states,

> Prior Written Notice (PWN) has broad application. A PWN must be given to parents whenever a school district proposes any change to any matter related to identification, evaluation, placement, or the provision of a FAPE, or when a school district refuses a parent's proposal regarding any of these matters (34 C.F.R. § 300.503). The United States Supreme Court has interpreted FAPE to mean an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances (Endrew F. v. Douglas County School Dist. RE–1, 580 U.S. ___ (2017)). In

> short, any change by a school district to the education program for a child with a disability requires a PWN. In an emergency situation, where all children are to be served virtually for a period of time, serving an exceptional child virtually for that same period of time is not a substantial change in placement or material change in services and does not require consent. The district is simply responding to the Governor's Executive Order to close school buildings and move to continuous learning for the remainder of the school year. This was not a district or IEP Team decision. This is similar to a contingency plan being created for a student during the time a student is in a juvenile detention center or psychiatric residential treatment facility. The district did not act to place a student in that environment. The district is simply recording within the contingency learning plan the way in which it will provide special education services to the greatest extent possible under the circumstances until the student returns to their typical educational environment. Because the decision to close school buildings was not the district's decision, any contingency learning plan developed for a student does not constitute a material change in services or a substantial change in placement.

This guidance makes it clear that parents are to be provided with PWN whenever an ICLP is developed for a student as a result of a governor's executive order to close building site services in public schools. In that situation, consent is not required in order to provide educational services remotely, even if that is inconsistent with an IEP because the changes being made were not the result of a district IEP team decision but rather the result of an emergency situation.

In this case, USD #___ developed an ICLP for the student because of the building closure caused by the Governor's Executive Order and the implementation of the district-wide Continuous Learning Plan. However, interviews found the parent was not provided with PWN regarding the changes to the provision of FAPE described in the student's ICLP dated April 13, 2020. Based on the foregoing, a violation of special education statutes and regulations is substantiated for failing to provide the parent with PWN of changes made to the provision of FAPE to the student.

Regardless, the parent believes USD #___ did not provide FAPE to the student during the school building closure during spring 2020. The parent expressed five specific concerns related to the provision of FAPE based on the implementation of the student's ICLP developed on April 13, 2020. First, the services were not provided as described in the ICLP; second, the services that were provided did not begin at the same time as those provided to other students in USD #___; third, the student's homework and assignments were not modified to her instructional level; fourth, the student could not access remote instruction due to technology issues; and fifth, the student's grades are not accurate due to the lack of services combined with the lack of modified homework and assignments.

Federal regulations, at 34 C.F.R. 300.101, require states to ensure a free appropriate public education (FAPE) is made available to all children with disabilities residing within the state. Accordingly, Kansas regulation and statute, at K.A.R. 91-40-2(b)(1), require that each school district makes FAPE available to each child with a disability residing in its jurisdiction. Federal regulations, at 34 C.F.R. 300.17, defines the term "free appropriate public education," in part, as providing special education and related services that are provided in conformity with the IEP.

Again, compliance with this regulation must be considered in light of the guidance provided in the document titled *Compliance with the Individuals with Disabilities Education Act and the Kansas Special Education for Exceptional Children Act during the COVID-19 Pandemic.*

The Answer to Question A-2 states,

> The services and supports in a child's IEP prior to the implementation of the district's Continuous Learning Plan contemplated the traditional educational environment, which most students are no longer in. The child's IEP Team should think of the district's Continuous Learning Plan as the general education curriculum in place at this time. All services and supports are intended to support the child in accessing the general education curriculum with their nondisabled peers to the maximum extent appropriate.

> The child's IEP Team should develop a contingency learning plan to enable the child: (1) To advance appropriately toward attaining the child's annual IEP goals; (2) to be involved in and make progress in the general education curriculum (in this instance, the district's Continuous Learning Plan), or appropriate activities for children ages 3–5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled peers to the maximum extent appropriate, in all of these activities (in this instance to participate in the continuous learning plan with their nondisabled peers). K.S.A. 72-3429(c)(4).

This guidance makes it clear that LEAs should develop a plan designed to provide students with FAPE during periods of school closure. The plan should describe the special education and related services that will be required to support the student during periods of school closure and provide the student with FAPE.

Because of the parent's specific concerns related to FAPE, the investigation will focus on the requirement to provide FAPE to the student ensuring that the student can be educated and participate with her nondisabled peers in the district-wide Continuous Learning Plan to the maximum extent appropriate.

The parent's first concern is directly related to the provision of the special education and related services during the school building closure. The student's ICLP required 20 minutes per week of SLT in the home setting beginning April 6, 2020 and ending on May 21, 2020 as well as 10 minutes per month of OT in the home setting, and 120 minutes per week of special education through remote instruction beginning April 13, 202 and ending May 21, 2020.

Documentation and interviews showed that the student had access to 660 minutes per week of remote special education instruction during the specified period. Documentation also shows the student was provided 20 minutes per week of SLT and 10 minutes per month of OT between the dates of April 6 and May 21, 2020. In this

case, USD #___ is found to comply with special education statutes and regulations based on the documentation.

The second concern is related to the delay in providing special education and related services as compared to the educational services provided to general education students during the school building closure. In this case, USD #___'s district-wide Continuous Learning Plan required weekly contact and instruction to begin on April 6, 2020. Documentation showed Ms. _____ [special education teacher] was in contact with the parent and student during the week of April 6-10, 2020 on April 8, April 9, and April 10 in regards to accessing the remote learning platform and the remote instruction through Zoom meetings. Assignments were provided and Ms. _____ [special education teacher] confirmed that the student had received her certificates of mastery for work already completed on April 10, 2020. In addition, documentation showed that the required SLT services were provided on April 9, 2020 during the district's first week of remote instruction. In this case, USD #___ is found to comply with special education statutes and regulations based on the documentation.

The third concern is related to remote assignments being modified. Again, this concern was addressed through the findings in Issue One, which are incorporated herein by reference.

The fourth concern is related to the difficulty in accessing the remote instruction and assignments. Documentation showed the parent first expressed concerns with technology on April 13, 2020 and that Ms. _____ [special education teacher] responded to the parent concerns that same day. Ms. _____ [special education teacher] attempted to make follow-up contact with the parent on April 19, April 22, and April 29, 2020 but received no response. On May 6, 2020, the parent told Ms. _____ [special education teacher] that "Everything's fine for now." On May 13, 2020, which is one week prior to the end of the school year, the parent requested the student's password be reset. In this case, USD #___ is found to comply with special education statutes and regulation based on the documentation.

The parent's fifth concern is related to the student's grades during the school closure; however, special education statutes and regulations do not address how grades are

assigned and therefore no findings can be made. The parent is encouraged to review USD #___'s Continuous Learning Plan for information regarding the district's grading policy and procedures.

## Corrective Action

Information gathered in the course of this investigation has substantiated noncompliance with special education statutes and regulations. Violations have occurred in the following areas:

A. Federal regulations at 34 C.F.R. 300.323(c)(2) require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

   In this case, the student's IEPs required the accommodation/modification for the student's independent reading, writing, and math to be at her independent level. Interviews and documentation found that the student's independent reading level was at the kindergarten and first grade level but that assignments from the student's reading, social studies, and science classes in USD #___ were provided to the student at middle school and high school reading levels.

B. Federal regulations, at 34 C.F.R. 300.320(a)(4), and Kansas regulation and statute, at K.S.A. 72-3429(c)(4) and K.A.R. 91-40-1(ttt), require the IEP to include a statement of the supplementary aids and services, program modifications, and supports for school personnel that will be provided in order to enable the child to be educated and participate with other children without disabilities to the maximum extent appropriate, and, in the case of the school building closure in spring 2020, to enable the student to participate in the district's Continuous Learning Plan with their nondisabled peers.

   In this case, USD #___'s Continuous Learning Plan dated March 31, 2020, includes a district-wide goal to continue to provide students with instruction focused on critical grade and course level content through remote learning opportunities during the school closures resulting from the COVID-19

pandemic. Interviews and documentation found the student's academic skills fall significantly below those of her grade-level peers and that previous IEPs included a requirement for modified assignments and homework to be provided in order to ensure the student had access to the educational materials; however, USD #___ failed to Include any statement in the student's April 13, 2020 ICLP which was intended to function as the student's IEP regarding the necessary program modifications that would be required to ensure the student had access to the educational materials used in these remote learning opportunities.

C. Federal regulations, at 34 C.F.R. 300.323(a)(1), require the parent to be a member of the IEP team and, in the case of the school building closure in spring 2020, to ensure that parents, as members of the IEP team, have the opportunity to fully participate in the development of the plan to serve and support the child during periods of school building closures.

   In this case, documentation and interviews show the student's ICLP was developed on April 13, 2020 and that school staff simply "went over the ICLP" with the parent on April 16, 2020.

D. Federal regulations, at 34 C.F.R. 300.503, require public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to identification, evaluation, placement, or the provision of FAPE.

   In this case, interviews and documentation show USD #___ created an ICLP on April 13, 2020 to describe the special education and related services that were necessary in order to provide the student FAPE during the period of school building closure due to the COVID-19 pandemic. The ICLP included changes to the provision of FAPE; however, USD #___ failed to provide the parent with PWN of these changes.

Based on the foregoing, USD #___ is directed to take the following actions:

1. Within 15 calendar days of the date of this report, USD #___ shall submit a written statement of assurance to Special Education and Title Services (SETS) stating that it will:

    a. Comply with Federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.323(c)(2) that require school districts to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

    b. Comply with federal regulations implementing the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. 300.320(a)(4), and Kansas regulation and statute, at K.S.A. 72-3429(c)(4) and K.A.R. 91-40-1(ttt), requiring the IEP to include a statement of the supplementary aids and services, program modifications, and supports for school personnel that will be provided in order to enable the child to be educated and participate with other children without disabilities to the maximum extent appropriate, and, in the case of the school building closure in spring 2020, to enable the student to participate in the district's Continuous Learning Plan with their nondisabled peers.

    c. Comply with federal regulations, at 34 C.F.R. 300.323(a)(1), requiring the parent to be a member of the IEP team and, in the case of the school building closure in spring 2020, to ensure that parents, as members of the IEP team, have the opportunity to fully participate in the development of the special education plan to serve and support the child during periods of school building closures.

    d. Comply with federal regulations, at 34 C.F.R. 300.503, requiring public agencies to provide parents with prior written notice whenever the school district proposes or refuses any change related to the provision of FAPE.

2. No later than August 28, 2020, USD #___ shall draft a procedure detailing how it will develop plans for serving children with disabilities during school building closures in a way that will ensure IDEA procedural safeguards, specifically

including parent participation to the extent the plan is inconsistent with the IEP, are preserved. No later than August 31, 2020, USD #___ will provide a copy of this new procedure to SETS for review. No later than 10 school days after SETS approves this new procedure, USD #___ will share this new procedure with all special education staff responsible for the development of IEPs as well as school administrators. USD #___ will implement the procedure beginning with the 2020-21 school year. USD #___ will provide SETS with documentation of when and with whom the procedure was shared.

3. No later than 30 calendar days following the first day of the 2020-21 school year, USD #___ will reconvene the IEP team, including the parent, to allow the parent the opportunity to participate fully in the development of the plan to serve and support the student during periods of school building closures. In addition, because USD #___ failed to modifying work to be at the student's instructional level as required by IEPs, the IEP team must identify the student's assignments above the student's academic level that were assigned during the period of the school building closure in spring 2020. These identified assignments must be modified to the student's instructional level and provided to the student in an effort to allow the student access to material taught during spring 2020. At a minimum, the assignments referenced in the findings for Issue One will be modified and provided to the student. USD #___ shall provide SETS with a listing of all the modified assignments that were provided to the student no later than 31 days following the first day of the 2020-21 school year.

4. No later than 45 calendar days following the first day of the 2020-21 school year, USD #___ will provide training to all general education teachers, special education teachers, and administrators at _____ Middle School regarding the provision of IEP accommodations/modifications. At a minimum, this training must instruct these staff on the requirements for providing the IEP accommodations/modifications as well as how to modify the reading level of homework and assignments. No later 46-calendar days following the first day of the 2020-21 school year, USD #___ will provide documentation to SETS of the name and position of the USD #___ staff member who conducted the training, the date and content of the training as well as a sign-in sheet signed by all individuals who attended the training.

5. No later than September 4, 2020, USD #___ shall develop and send to SETS for approval, a written plan describing how it will: (a) monitor the assignment for the student in Reading, Writing, and Math to ensure that these assignments are modified to the student's independent academic level; and (b) how the results of this monitoring will be reported in writing to the parent no less than monthly. The plan must include a statement that it will be in force for at least six months.

6. No later than 45 calendar days following the first day of the 2020-21 School Year, USD #___ will provide training to all special education staff and administrators at _____ Middle School regarding the requirement to provide PWN to parents when any plan is developed for a student that makes changes to the provision of FAPE. At a minimum, this training must include a review of the requirements related to PWN and program modifications as well as provide these staff with instructions for completing the documentation of the plan developed for a student with an IEP during school building closure as well as completing the PWN documentation. No later than 46 calendar days following the first day of the 2020-21 school year, USD #___ will provide documentation to SETS of the name and position of the USD #___ staff member who conducted the training, the date and content of the training as well as a sign-in sheet signed by all individuals who attended the training.

7. Further, USD # ___ shall, within 10 calendar days of the date of this report, submit to 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(f). Due to COVID-19 restrictions, appeals may either be emailed to formalcomplaints@ksde.org or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612.

## Right to Appeal

Either party may appeal the findings in this report by filing a written notice of appeal. Due to COVID-19 restrictions, appeals may either be emailed to formalcomplaints@ksde.org or mailed to Special Education and Title Services, 900 SW Jackson St, Ste. 602, Topeka, KS, 66612. The notice of appeal must be emailed or mailed within 10 calendar days from the date of this report.

For further description of the appeals process, see Kansas Administrative Regulations 91-40-51(f), which can be found at the end of this report.

*Nancy Thomas*

Nancy Thomas, 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)