

KANSAS STATE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION AND TITLE SERVICES

REPORT OF COMPLAINT  
FILED AGAINST  
UNIFIED SCHOOL DISTRICT #490  
ON SEPTEMBER 10, 2024

DATE OF REPORT: OCTOBER 4, 2024

This report is in response to a complaint filed with our office by ----- on behalf of preschool students residing in USD #490. For the remainder of this report, ----- will be referred to as "the complainant."

The Butler County Special Education Interlocal (BCSEI) provides services for special education for students who are enrolled in USD #490. For the remainder of this report, BCSEI will be referred to as "the Interlocal." USD #490 will be referred to as "the district." April Hilyard, Director of the Interlocal, will be referred to as "the director." The Superintendent of USD #490, Jenifer Davis, will be referred to as "the superintendent."

Kate Hedley, the spouse of the complainant and a speech/language pathologist for the district, will be referred to as "the wife of the complainant" or "the speech/language pathologist." Amy Brewer is the school psychologist who was interviewed during this investigation. Ms. Brewer will be referred to as "the school psychologist."

A number of children were identified by name in discussions during the course of this investigation. However, circumstances involving only two of these individuals will be discussed in detail in this report. These students will be referred to as "Student A" and "Student B."

### **Investigation of Complaint**

On September 12 and 27, 2024, the investigator spoke with the director of the interlocal and the superintendent of USD #490. On September 17, 2024, the complaint investigator spoke via telephone with the director. The investigator spoke by telephone with the complainant on September 16, 2024. On September 17, 2024, the investigator spoke with the wife of the complainant. On September 27, 2024, the investigator spoke with a school psychologist who serves buildings containing both Early Childhood Special Education and at-risk preschools. On September 27, 2024, the investigator spoke by telephone with the mother of Student A. On September 27, 2024, the investigator also spoke by telephone with the mother of Student B.

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

- Initial Application and Criteria Checklist for Student A dated May 17, 2024
- Notice of Meeting dated August 23, 2024
- Evaluation and Eligibility Report for Student A dated September 6, 2024

- IEP for Student A dated September 6, 2024
- Prior Written Notice for Identification, Special Education and Related Services, Educational Placement, Change in Services, Change in Placement, and/or Request for Consent dated September 6, 2024
- Email exchanges dated September 6, 2024 between the speech/language pathologist and the Director of Instructional Supports for the district
- Email exchanges dated September 8, 2024 between the speech/language pathologist, the Director of Instructional Supports, a building principal, a school psychologist, and an Assistant Director for the Interlocal
- Email exchange dated September 9, 2024 between the speech/language pathologist and the superintendent
- Email dated September 10, 2024 from the complainant's spouse to staff at KSDE
- Email dated September 13, 2024 from the superintendent to the State Preschool Programs Consultant for the Early Childhood Department of the Kansas State Department of Education
- Kansas State Department of Education Information Sheet – Early Childhood Funding Considerations for 2024-25 and 2025-26
- Kansas State Department of Education 2024-25 Preschool-Aged At-Risk Program Requirements

## **Background Information**

The complainant is a graduate of USD #490. Though not a resident of the district, he reports that he has family members who are currently served by or employed by USD #490. While able to identify family members who have interacted with district staff regarding preschool services, the complainant told the investigator in a telephone call on September 16, 2024 that he does not personally know the names of individual students whose circumstances he has addressed in his complaint. Rather, he has become aware of these situations through conversations with his wife and other staff members. The complainant provided contact information for those individuals as well as for a family member with a preschool-aged child.

The website for the district includes a section entitled "Preschool Programs" (<https://www.usd490.org/pagepreschool-programs>) which states that the district offers

*"...half day preschool programs at [three elementary school sites]... taught by certified, high-quality teachers who provide a solid educational and social foundation for children to learn in a developmentally appropriate setting. Children attend a half-day preschool program, either in morning or afternoon sessions, at their residence elementary school."*

In addition to Early Childhood Special Education preschool classrooms that serve students who have been determined eligible for special education support, the district offers two other

preschool options. These general education options fall under the supervision of the superintendent and members of her staff.

- Role Models: “Role Model” students are – according to the superintendent – children who demonstrate age appropriate skills and are enrolled in Early Childhood Special Education preschool classrooms. Applicants for these slots must have a completed application on file and must complete screening using the ASQ (ASQ: SE-2 and ASQ-3), developmental and social-emotional screening tools for children from birth to 6 years. They must be *3 years old on or before February 28 of the current year and no older than 5 years old on or after August 31 of the current year*. A “Try Out” for the program is required and students must live in the district. These try outs are conducted in the Spring for positions in August and again in the late Fall for openings in January. Approval during try out is based on the following factors:
  - The date of Application, school of residence, and the availability of openings; and
  - screening in the areas of language, speech, motor, social, self-help, and pre-academic skills.
- Pre-Kindergarten Program: Children applying for this program must be *3 years old on or before August 31 of the current year and no older than 5 years old on or after August 31 of the current year*. Students must live in the district. Application approval is based on the date of application and “boundary school,” in addition to the following “Qualifying Factors” which mirror the “At-Risk” criteria established under the 2024-5 Preschool-Aged At-Risk Program Requirements established by the Kansas State Department of Education. These factors include:
  - Eligible for food assistance;
  - Single-parent family;
  - Limited English Proficiency;
  - Either parent lacking high school diploma or GED;
  - Teen parent when child was born;
  - Agency referral;
  - Concern for developmental delays based on screening results; and
  - Child qualifies for migrant or transitional housing status.

Applicants are required to meet at least one of these criteria in order to be considered eligible under the “at-risk” category.

Pre-Kindergarten classrooms are located in district elementary schools. These programs are funded through at-risk funds from the State of Kansas and through a Kansas Preschool Pilot (KPP) grant which establishes criteria regarding the classrooms. The adult-to-child ratio for the Pre-Kindergarten classrooms must be no more than 1:10 at all times, with a classroom size not to exceed 20 students, although districts may request a waiver for unique circumstances that lead to class size exceeding 20 students. The district currently maintains a maximum class size of 15 students for each of the Pre-Kindergarten classrooms.

According to the grant application submitted by the district, the Pre-Kindergarten classrooms serve both at-risk and not at-risk students. Across the three district programs, the ratio of at-risk to not at-risk students cannot at any time include more not at-risk students than students who are designated as at-risk.

Applications for the Role Models and Pre-Kindergarten preschool programs are, according to the district website, available at any school or district administrative office or online. Parents are also asked to provide the child's birth certificate and immunization record.

As noted on the application form, a child's application is considered "completed" only when the paper application has been submitted and the two required ASQ screening questionnaires have been finalized. If parents submit only an application without the ASQ forms, the child is placed on an "ASQ needed" list where the date the paper application was received is shown. Parents are subsequently notified that completed ASQs are needed in order to finalize the application process.

As stated on the district website,

*"Submitting an application/interest form does not guarantee admittance. [Applicants] will be placed per review of district policies and qualifying factors set forth by the Kansas State Board of Education."*

Once a child's application is complete, he or she is either given a slot in a Pre-Kindergarten classroom or his/her name is placed on a waiting list which is maintained by the district and is used when filling vacancies in the Pre-Kindergarten programs. Children on the waiting list fall into two categories:

- students who meet criteria to be considered at-risk, and
- students who are not at-risk.

Vacancies are filled by the district in a manner that maintains a ratio of at-risk to non-at-risk students whereby no more than half of the Pre-Kindergarten class roster across the district is made up of not at-risk students. Classes are generally full at the start of the school year. As vacancies occur, the superintendent or her staff determines whether the vacancy is for an at-risk or not at-risk position. A child from the appropriate cohort is selected for enrollment based on the date his/her application was considered to be completed.

## **Issues**

The United States Code – a consolidation and codification by subject matter of the general and permanent laws of the United States prepared by the Office of the Law Revision Counsel of the United States House of Representatives - cover a wide range of areas beyond education including such topics as National Park services, Patents, Highways, Banks and Banking, and Navigable Waters. The complainant asserts that the district's actions in the case of Student A are representative of systemic violations of Title 20 of these laws – those related to education.

Title 20 includes 80 chapters addressing a broad range of education-related subjects including the National Zoo, Foreign and Exchange Students, and the Education of Individuals with Disabilities. Sections 1412 and 1414 (referenced by the complainant) establish standards regarding how States are deemed eligible to receive federal assistance for the provision of services to students with disabilities. To receive such support, the state of Kansas is required to provide assurances that policies and procedures are in effect to ensure that the State meets requirements in a number of areas.

The complainant asserts that the district has violated four elements of Title 20:

- 1) Denial of FAPE (free appropriate public education): 20 USC 1412(a)(1);
- 2) Violation of Least Restrictive Environment (LRE): 20 USC 1412(a)(5);
- 3) Failure to Fulfill Child Find Obligations: 20 USC 1412(a)(3); and
- 4) Violation of IEP requirements: 20 USC 1414(d).

The State has complied with requirements to provide Title 20 assurances and has developed regulations associated with the four areas identified by the complainant. In his complaint, the complainant does not assert that the State has failed to provide assurances that it is complying with these four elements. Rather, the complainant asserts that the district has violated special education laws regarding the implementation of statutes and regulations established by the State with regard to each of these areas. Relevant state statutes and regulations will be cited below as each of these areas is addressed later in this report.

In his complaint, the complainant alleges multiple violations of the Individuals with Disabilities Education Act (IDEA) regarding the provision of services to preschool-aged children with disabilities. Specifically, the complainant asserts that the superintendent for the district and the district's administration have taken actions that delay the provision of special education services to children aged 3 to 5 years in order to manipulate grant requirements and funding structures to the benefit of the district. According to the complainant, the superintendent has stated that children who qualify for special education services (specifically speech therapy) are being denied access to the district's preschool program despite there being available openings. The complainant asserts that the superintendent has stated that these students do not qualify as "at-risk" for the program if they are receiving special education services, and that the reclassification has had an impact on the funding the district receives from the State.

The complainant contends that parents are being forced to choose between enrolling their child in the preschool without accessing needed special education services or receiving "walk-in" speech therapy without the benefit of full preschool participation.

The complainant cites the case of one particular child who was determined eligible for speech therapy under an IEP who was denied a spot in the district's preschool program where openings existed because the superintendent stated that "receiving special education services makes the child ineligible to be counted as "at-risk." When asked if the student could

potentially receive services later in the year while enrolled in the preschool program, the superintendent is alleged to have replied that “it was not a count day issue, but due to KPP grant assurances that run the length of the year.” Therefore, according to the complainant, the family had to decide between preschool enrollment with no special education services or “walk-in” speech with no preschool participation for this year and potentially next year depending upon at-risk numbers, enrollment, and available openings.

## **Issue One**

### **Denial of FAPE**

#### **Complainant’s Position Regarding a Denial of FAPE:**

The complainant asserts that the district is denying students their right to FAPE by refusing to provide special education services in a timely manner and forcing parents to choose between receiving necessary services or enrolling in preschool. The complainant contends that this is a violation of IDEA because FAPE must be provided to all children with disabilities, regardless of their classification as “at-risk.”

#### **Applicable Statutes and Regulations Regarding FAPE:**

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.

An IEP must be developed within 30 calendar days of a determination that the child needs special education and related services and must be implemented within 10 school days after written parent consent is granted for the services in the IEP unless reasonable justification for a delay can be shown. It is important to keep in mind the requirements of IEP development and implementation of the IEP are both part of the 60 school day timeline of initial evaluation (K.S.A. 72-3429(a)(1); K.A.R. 91-40-8(h), (i); K.A.R. 91-40-16(b)(1)–(3); K.A.R. 91-40-16(c); 34 C.F.R. 300.323(a), (c)).

#### **Investigative Findings Regarding the Denial of FAPE:**

The complainant did not – in either his written complaint or in a subsequent telephone call with the investigator – name any specific child who had been denied FAPE by the district. Rather, the complainant referenced a written statement in an email exchange between the superintendent and the complainant’s wife wherein the superintendent stated that in certain situations parents would be asked to choose between having their child (who had been determined eligible for special education support) participate in a district preschool program

OR having their child receive special education services. The complainant wrote that if the parent opted to have the student participate in the preschool program, the IEP proposed for the student would not be implemented, thereby denying the student FAPE.

The complainant referred the investigator to his wife, a speech/language pathologist employed by the Interlocal to provide services in the school district. When the investigator spoke by telephone with the complainant's wife, she identified one student (Student A) who had been evaluated and determined eligible for speech language support. It was this student who had been the subject of email exchanges between the complainant's wife and the superintendent which contained the statement referenced by the complainant.

The paper application for Student A to participate in the Pre-Kindergarten program was submitted by the parent on May 17, 2024. The application did not, however, include completed ASQ forms. An email was sent to the parents on May 21, 2024 to let them know the application was considered incomplete. In mid-July, staff contacted the parents to let them know that Student A's application remained incomplete. The parents submitted completed ASQ forms on July 30, 2024.

Student A's name was added to the waiting list for the Pre-Kindergarten as a "not at-risk" student. On the paper application form, the parent noted possible communication and adaptive delays, but none of Student A's scores on the ASQ fell at level 3 ("further assessment with a professional may be needed").

The student participated in the district Child Find process and demonstrated problems in the area of speech sound production. On August 23, 2024, the parents of Student A provided written consent for an evaluation to determine his eligibility for special education services. That evaluation was completed, and an eligibility meeting was held on September 6, 2024. Following eligibility determination, an IEP was proposed. The mother of Student A told the team that she wanted to discuss recommendations with her husband and said she would get back to staff with a decision soon.

The parents of Student A gave written consent for the student to be provided special education services under the district's proposed IEP on the same day this complaint was filed (September 10, 2024). The superintendent contacted Student A's mother on September 13, 2024 to discuss Pre-Kindergarten program options – including enrollment in a preschool program with an opening for a not at-risk student.

The student's mother told the superintendent that she preferred that the student participate in the program at the school Student A's siblings were attending. Because there were no "not at-risk" vacancies in the program at the preferred school, Student A's mother opted to have him put on the waiting list for a future opening for not at-risk students in her preferred school.

Walk-in speech services for the student were initiated on September 23, 2024, less than 10 school days after consent for services was given by the parents.

In a telephone conversation with the investigator on September 27, 2024, the mother of Student A reported that after only three speech sessions, she had already seen improvements in her son's articulation skills.

Neither the complainant's wife nor a school psychologist with whom the investigator spoke could identify any other student whose parents had been asked to choose between receiving special education services or participating in a district-sponsored preschool program. In a telephone conversation with the investigator on September 17, 2024, the complainant's wife stated that this situation was a "one off" – the first time she had been told that parents would be required to make such a choice.

### **Summary and Conclusions Regarding the Denial of FAPE**

This investigation did not uncover any evidence of a systemic denial of FAPE by the district. Neither the complainant nor any other individual to whom the investigator was referred by the complainant identified more than one child who may have been denied FAPE.

When facts associated with that identified student were investigated, the investigator determined that the district had followed legal requirements regarding his evaluation and subsequent placement in special education services. The written email statement by the superintendent (which will be discussed in greater detail below with regard to LRE and Placement) in no way impacted the decision of the parent with regard to the provision of special education services to Student A nor the decision by the parent to have the student remain on a waiting list for the preschool program at the parent's preferred school.

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

### **Issue Two**

#### **Least Restrictive Environment (LRE)**

#### **Complainant's Position Regarding LRE**

The district is not placing children in the least restrictive environment. By denying preschool enrollment to children solely based on their eligibility for special education services, the district is preventing the children from being educated alongside their typically developing peers in an inclusive setting.

#### **Applicable Statutes and Regulations Regarding LRE and Relevant Grant Information**

The Kansas Preschool Pilot Grant provides a funding opportunity for districts to provide preschool services to children who are considered to be at risk of entering Kindergarten socially, emotionally, or academically unprepared for success. The school district applied for and received a KPP grant for the 2024-25 school year.



At-risk criteria for the KPP grant include

- “1. Poverty – Qualifies for free or reduced-price meals under the National School Lunch Program on September 20, 2024 (family income is less than 185% of the Federal Poverty Level).*
- 2. Single Parent families – Custodial parent is unmarried on the first day of school.*
- 3. Children in foster care, custodial grandparents/kinship care, or out of home placement, or children who have been referred by the Department for Children and Families – Child is in foster care, custodial grandparents/kinship care, or out of home placement at the time of enrollment. For children referred by DCF, the reason for referral must describe the need for the child to attend the Pre-K program or receive the early childhood service and be documented and signed by the DCF agent.*
- 4. Teen parents – At least one parent was a teenager (19 or younger) when the child was born.*
- 5. Either parent is lacking a high school diploma or GED – At least one parent is lacking a high school diploma or GED on the first day of school.*
- 6. Limited English Proficiency – Documentation that the student qualifies for bilingual weighting and ESOL services must be provided. Forms must be in the child's file...*
- 7. Lower than expected developmental progress in at least one of the following areas: cognitive development; physical development; communication/literacy; social emotional/behavior; adaptive behavior/self-help skills – Based on appropriate and valid assessment results, the developmental progress of the child has been determined by a trained professional to be lower than typically expected for his/her chronological age, yet above what would be considered eligible for special education services (based on the procedural manual and guidance materials of specific assessment instruments). Scores that fall at or below the 40th percentile indicate 'at-risk'.*
- 8. Child qualifying for migrant status – Copy of Certificate of Eligibility must be on file.*
- 9. Children who experience chronic or episodic homelessness – Residence of homeless student while homeless must be completed in the KIDS Collection System as determined by local educational liaison.*
- 10. Children lacking health insurance – At the time of enrollment, the child has no health insurance coverage.”*

The guidelines require children to meet one or more of the above criteria in order to be considered “at-risk.”

Having an IEP neither automatically conveys at-risk status nor precludes a student from being considered at-risk. Page 7 of a document entitled Kansas Preschool Pilot (KPP) Grant Requirements and Application contains the following statement:

*"[School districts who apply for this grant] should prioritize services for children most at-risk of entering kindergarten socially, emotionally, or academically unprepared for success. At a minimum, 50% of students served using Kansas Preschool Pilot grant funds must meet one or more of the at-risk criteria...A student with a disability who also meets an at-risk criterion may be included as an at-risk student when determining that 50% of students served by the Kansas Preschool Pilot meet an at-risk criterion"* (emphasis added).

As noted in Chapter 6 of the Kansas Special Education Process Handbook:

*"For preschool children ages 3-5 with disabilities, placement and LRE requirements are the same as for school-aged children (K.A.R. 91-40-21(b)(c)). This means that preschool children with disabilities are to have a continuum of placement options available and have the right to be educated with their peers without disabilities to the maximum extent appropriate. As with school-aged children, the needs of preschoolers are to be considered individually. The individual needs of the child would determine the most appropriate setting for services to be provided. Most preschoolers benefit from placement in a preschool program with typically developing peers.*

*School districts that do not operate programs for preschool children without disabilities are not required to initiate general education programs solely to satisfy the LRE requirements. However, various educational placement options are possible, both within the community and at the school. School districts that do not operate early childhood programs for children without disabilities may seek alternative means to provide inclusive options for young children through collaborative relationships with private preschool programs or other community-based settings. The key question for the IEP Team to consider is where this child would be if the child did not have a disability. The full continuum of placement options at K.A.R. 91-40-21(b), including integrated placement options with typically developing peers, must be available to preschool children with disabilities. Examples include Head Start, community-based preschools (may be in churches, whether or not religiously affiliated), child care centers or family child care homes, mothers'-day-out programs, Title I programs, at-risk 4- year-old preschools, migrant or bilingual programs, Even Start, play groups, and other such early childhood programs. If a preschool child with a disability is already attending a general education preschool program, the IEP team should consider whether special education and related services can be provided in that setting with the use of supplementary aids and services, or supports for school personnel (Federal Register, August 14, 2006, p. 46589)."*

## **Investigative Findings Regarding LRE**

The district offers preschool programs for at-risk students in three elementary schools in the district. Two classrooms at Blackmore Elementary serve 3-year-olds in the morning and 4-year-olds in the afternoon. Grandview Elementary houses one classroom where 4-year-olds are served in morning or afternoon sessions. Skelly Elementary is the site of one classroom where 4-year-olds are served in the morning and 3-year-olds are served in the afternoon. The district is responsible for staffing and overseeing these programs.

The district has established a procedure for families to apply for acceptance into the KPP supported at-risk preschool program. Applicants must complete a paper application and submit two developmental screening forms before an application is considered to be completed. Applications are reviewed by the superintendent and her staff to determine whether a child meets at-risk criteria. Children are accepted into the program based upon the date of their completed application and slots are filled in a manner that maintains a balance of no more than 50% not at-risk enrollment. Once a base level of openings has been filled – typically no more than 15 students per class – remaining applicants are placed on a waiting list for future openings and flagged as at-risk or not at-risk. As of September 27, 2024, the ratio of at-risk to not at-risk students across all three site locations was 60% at-risk and 40% not at-risk.

On May 17, 2024, the parent of Student A completed a paper application for the student to participate in the district's Pre-Kindergarten program. When completing the application, the parent noted that she was concerned that her son was demonstrating lower than expected developmental progress in the areas of communication/literacy and adaptive behavior/self-help skills. No other at-risk criteria were cited by the parent.

The initial paper application was not accompanied by the required developmental screenings. Those requirements were not completed until July 30, 2024 at which time the student's application was considered completed and his name was added to the wait list for openings in the KPP program.

Student A was, on August 23, 2024, evaluated to determine his eligibility for special education services. An eligibility meeting for Student A was held on September 6, 2024. At that meeting, the team determined that Student A did not demonstrate overall developmental delays in any area including adaptive/self-help skills or language development that would warrant early childhood special education intervention. However, Student A did evidence significant delays with regard to the production of speech sounds. The team recommended that he receive direct speech therapy. According to his evaluation and eligibility report, "services [could] be provided if he attends the 3-year-old preschool classroom or on a walk-in appointment basis."

The student no longer could be considered "at-risk" because of a developmental delay because – as stated in the KPP criteria – his speech deficit fell low enough to qualify for special

education services under an IEP (criteria #7). Student A evidenced none of the other at-risk criteria. He could, however, continue to be listed on the wait list as a “not at-risk” student.

At the time the student was being considered for an opening in the program, 48% of the students in the KPP preschool were “not at-risk” while 52% were “at-risk.” Three of the students who were already enrolled in the preschool class were being evaluated for special education – an action that could lead to them being re-categorized as “not at-risk.”

Additionally, 7 other students who were attending classes did not yet have documentation of eligibility under their lunch status (criteria #1). The possibility remained that some of these students would have to move to “not at-risk” status. If any of these students were moved to not at-risk status, that action would mean a longer wait for Student A to enter the program as a not at-risk student since the already enrolled students would not be removed from the program.

The team presented a “draft IEP” to the parent of Student A on September 6, 2024 proposing the provision of 30 minutes per week of speech services. The parent told the team that she wanted to speak to her husband about the services and would get back to the team with a decision within a few days.

Following the eligibility meeting, the speech/language pathologist (the complainant’s wife) and the Director of Instructional Supports exchanged a series of emails regarding placement of the student in a KPP program. On Friday, September 6, 2024, the speech/language pathologist wrote the director stating that the student qualified for “speech only” support. The speech/language pathologist wrote that the eligibility team had discussed with the parent of Student A the option of enrollment of the student in an afternoon preschool program at Skelly (an elementary school that is the site of one of the KPP preschool programs) or “walk-in speech at Blackmore [another elementary school where another KPP classroom is located].” The Director of Instructional Supports responded that there were no openings for the student in the Skelly program and the student would “need to stay on [the] waitlist.” The director also stated that Student A would “need to receive walk-in services at [Blackmore]. Please contact the mom and let her know.”

The speech/language pathologist wrote back to the director, including the school psychologist, building principal for Blackmore, and an Assistant Director for the Interlocal. The pathologist asked

*“Can you explain why there is not space for him when they’re sitting at 7 out of 10 students and his application was submitted in May [the date the student’s paper application was received minus the developmental screening information]? Some of the other students listed on that same class roster submitted applications in August? Also, [the school psychologist] has an email dated from 8/23/24 when our team initially emailed about [Student A], and at that time you said you there was a spot.”*

The director responded

*"This has to do with grant funding for the KPP, and the associated count day and audit paperwork. Because of [Student A's] classification, he cannot be counted under at risk numbers and would have to be paid for under KPP. It all comes down to where we are in relation to the threshold, and right now we are not in a position to allow another not at risk acceptance at this time. That is why the waiting list is used. If the balance shifts, that could change at a later date.*

*Additionally, I have located the email in question. My statement on the 23rd was only that he was on the waitlist pending evaluation results. No placement was guaranteed. We have to be very careful with state-provided grant funding and we cannot surpass the mandated threshold."*

The speech/language pathologist responded

*"I guess it confuses me as to why he wasn't already offered a spot, since his preschool application was submitted on 5/17/24, and all other students currently placed in that 3-year-old program are dated from 6/12/24 and later? I know his Child Find was in May, but his evaluation could've taken place while he was already in school this August.*

*Since we just had a student in green (that KPP covers) move to a role model spot at Blackmore, could [Student A] take that spot instead? Wouldn't the numbers be the same for funding?"*

The school psychologist included on the email chain responded that she too was confused about the situation. The Director of Instruction suggested that the group meet in person the following Friday to discuss the issue.

On September 9, 2024, the speech/language pathologist sent an email to the superintendent stating

*"I spoke with [the assistant director of the Interlocal assigned to work with this district] on the phone this afternoon. I asked her a question that she wanted me to clarify with you about [Student A] before I call his mother. If she decides to decline the speech IEP so that he may attend Skelly, can he be monitored and receive RTI and eventually be picked up after count day? Or do I need to tell her that he can be monitored and receive RTI this year, and we can look at a speech IEP placement before next year if it is still needed?"*

The superintendent responded on September 9, 2024, writing

*"It's not count day that is the concern- it's our grant assurances that run the length of the school year. We have to maintain assurances as an At Risk preschool program. He would count as at risk with no sped services – sped services would make him ineligible to be counted as at risk. We can't offer him a preschool spot when he is a non-at risk student on an iep- that is the conflict.*

*His parents would have to decide between preschool enrollment with no sped services or walk in speech with no preschool for at least this year and possibly next year depending on at risk numbers, spots, and enrollment."*

The speech/language pathologist wrote back asking

*“Based on that information, does that mean moving forward throughout this year that any other students that may need services in those rooms can also not be identified due to the grant assurances that run through the length of the year? I just want to make sure I'm understanding correctly, as I already have speech referrals and I believe the [speech pathologists from other schools] do as well.”*

The superintendent responded

*“Any preschooler could qualify for speech services anytime throughout the year, but the parents would need to make a decision about which supports to engage: either Speech with SpEd (ie. walk in) and no more At Risk programs (ie. give up spot in preschool) or no SpEd program supports but keep spot in the preschool At Risk program.”*

In a telephone call with the investigator on September 17, 2024, the speech/language pathologist stated that this statement from the superintendent represented what the pathologist considered to be a new position. According to the pathologist, she was not aware of any other family having been asked to choose between enrolling their child in preschool or having that child receive special education services.

The parent gave written consent on September 10, 2024 for the student to receive speech services. In a telephone conversation with the investigator on September 27, 2024, Student A's mother reported that the superintendent, in a telephone call with the parent on September 13, 2024, had told her that there was an opening for Student A in the preschool program at Skelly. According to the parent, the superintendent offered two speech service options for Student A: one 30-minute session per week at Blackmore (the walk-in option) or two 15-minute sessions per week if the student enrolled at Skelly.

According to both the superintendent and the parent, the parent opted for the student to participate in walk-in speech services, did not want to have the student attend the Pre-Kindergarten classroom at Skelly, and preferred to have him remain on the waiting list for the Blackmore classroom located in the same school attended by Student A's siblings. The student began receiving speech/language services on September 23, 2024. The student has – based on the decision of his mother – remained on the waiting list for the parent's preferred school (Blackmore). Another student, whose application was completed after the application for Student A was finalized, was placed in the KPP program at Skelly, the position that would have gone to Student A had his mother allowed him to be enrolled there.

As of September 27, 2024, eight of the students being served in the KPP preschool programs were receiving speech services. Three other students in these programs have been referred for additional speech screening. Five of the 8 students currently receiving speech support also demonstrate another at-risk factor but are not currently being counted as “at-risk” for the KPP class roster.

There is no evidence to show that any student enrolled in the KPP preschool program has been removed from that program if he/she was determined to be eligible for speech support. No evidence was found to show that the evaluation of a child has been delayed in order to preserve his/her status as "at risk."

### **Summary and Conclusions Related to LRE**

Despite written email statements from the superintendent to the wife of the complainant, there is no evidence of any systemic action on the part of the district to require the parents of prospective preschool students to make a choice between enrolling their child in a district KPP program with no special education services or having their child receive special education speech support. Further, there is no evidence to show that students have been removed from a preschool program they were attending if they were subsequently determined to be eligible for and in need of special education speech services. Currently, there are a number of students who are receiving speech services while concurrently being enrolled in the district KPP preschool.

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

It should be noted, however, that while this investigation did not identify a current violation regarding LRE, a violation would have been substantiated had the district acted in accordance with the written email statement made by the superintendent on September 9, 2024 that Student A's parents would

*"have to decide between preschool enrollment with no sped services or walk in speech with no preschool [because the district] can't offer him a preschool spot when he is a non-at risk student on an iep – that is the conflict."*

In an email to the State Preschool Programs Consultant for the Early Childhood Department of the Kansas State Department of Education dated September 13, 2024, the superintendent wrote

*"Just to clarify: We have 15 total spots in each of our PreK program classrooms- all funded by KPP. I understand that we could offer [a] spot to [Student A]- however, doing so while the student also receives SpEd services would either throw our current KPP 50/50 ratios or take a classroom spot from another At Risk student. This is the immediate concern. Last year during our audit, we had to drop many SpEd students from our KPP roster because of their "not at risk" factor status changes to SpEd. This changed our ratio with remaining KPP students (almost voiding the assurances) and ended up tying up many of our spots that should have been for At Risk students."*

In a conference call with the investigator on September 27, 2024, the superintendent continued to assert that a child who was being served under an IEP could not be counted as

at-risk if they demonstrated another at-risk factor unrelated to the developmental delay that led to the student being served under an IEP.

The district cannot ask the parent to choose between having the student attend the preschool program without special education support **OR** having the student continue to receive walk-in speech services at the same school. Rather, Student A's IEP should continue to be implemented while the student also participates in the preschool program.

State funding requirements can be complicated. A school district cannot collect funding under both the IDEA and the Preschool-Aged At-Risk slots that are available. However, children with disabilities must have an equal opportunity to participate in at-risk classrooms, even though they cannot participate in this preschool aged at-risk source of funding. For that reason, a district might try to avoid putting special education students in their at-risk classrooms. That practice would result in an LRE violation because the school has made placement decisions for funding reasons, and not based on an IEP team decision that is addressing each student's individual needs.

### **Additional Issue**

While the complainant did not specifically call out federal regulations at 34 C.F.R. 300.110, it became clear during the course of this investigation that this regulation is central to the facts of this complaint.

Federal regulations, at 34 C.F.R. 300.110, state that school districts must make the same variety of educational programs and services that are available to general education students, also available to special education students. This federal regulation is the IDEA's counterpart to the Section 504 regulation at 34 C.F.R. 104.4 which says that no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives federal financial assistance.

34 C.F.R. 300.110 requires that when schools are filling at-risk program slots, decisions must be made in a neutral way so the children with disabilities are neither excluded from the at-risk classrooms nor given an unfair disadvantage in being selected.

This means that the fact that a child has an IEP cannot, by itself, be used to deny that child an equal opportunity to participate in any program or service available to nondisabled children. It also means that a district cannot interpret state guidance to allow it to deny a child with a disability an equal opportunity to participate in any program or service available to nondisabled students.

When we say a district cannot "interpret "indicator 7 in a way that places an extra burden on a child with a disability, what does that mean? An example might be a child with a disability who attends preschool for three hours a day to get special education and related services and only



appears to qualify as at-risk under factor 7. That child could be placed in the non-at-risk group due to having an IEP. That would not be a disadvantage for that student because that student would not have to choose either speech services or pre-school. The student would receive services as a non-at-risk student and would not take up any at-risk funding, regardless of the ratio the district uses to fill its at-risk slots. What a district can't do is to interpret indicator 7 in a way that makes it more difficult for a child with a disability to participate in pre-school, which may be more likely to occur when the child's IEP consists of only 30 minutes of speech services per week.

This provision in 300.110 in the federal regulations makes no exception for how district programs are funded. When funding and the right of children with disabilities to participate in public school programs clash, the participation rights of children with disabilities must prevail.

In the case of this district, acceptance into the KPP program is determined in a manner that maintains an equal balance of at-risk and not at-risk students. A balanced classroom roster is developed before the start of the school year with students being selected for enrollment from these two categories based on the date their completed application was received. Applicants who were not selected for participation in the program before the start of the school year are put on a waiting list – divided into two categories in order of application date. As vacancies occur throughout the school year, waiting list students are moved into the program based upon the nature of the vacancy – at-risk or not at-risk.

The district continues to accept into the Preschool program students with an IEP whom they have categorized as “not at-risk.” Student A was placed on the waiting list as a not at-risk student based on criteria established for the KPP program. Should an opening for a not at-risk student arise at Student A's parents' preferred school for which Student A was eligible based on the completion date for his application, Student A will be enrolled in the KPP program without regard for the fact that he has an IEP.

The enrollment criteria adopted by a district should be applied in a neutral manner to fill all available slots. The fact that a child has an IEP should not affect the selection of students for the at-risk classrooms, positively or negatively. The fact that a child has an IEP should not put a child at the front or the back of the line, it should, instead, be a nonfactor. That means when a district sets its criteria for a student to qualify for an at-risk program that criteria cannot include the fact that a child has an IEP.

In the case of this district, children are placed in the preschool based on a “first come, first served” basis, looking at the date the child's application for the program was finalized, and are identified for enrollment in a manner that keeps a 50/50 balance of at-risk to not at-risk. If a not at-risk vacancy arises and Student A is next in line to fill such a vacancy, he should fill it, regardless of the fact he has an IEP.

At the time this report was completed, there was no opening in the parent's preferred school for Student A to fill. Should an opening arise in that preferred school, another child could still fill that vacancy ahead of Student A if that child's completed application had been received prior to the date Student A's completed application had been received. His status as a student with an IEP would neither disadvantage him nor give him priority in the process.

If the ratio of at-risk to not at-risk students in this program changes in a manner that reflects an imbalance between these two categories whereby more at-risk students are placed than not at-risk students, the fact that this student is considered not at-risk because he has an IEP could result in a violation. However, at this time, a violation of special education statutes and regulations is not substantiated on this issue.

Through the course of this investigation, it became evident that there is confusion among staff as to how a student with a speech only IEP is to be managed with regard to his/her participation in the KPP preschool program. There also appears to be confusion as to where such students stand on the waiting list for entry into these programs. The superintendent remains reluctant based on her past experience with the audit process to count as "at-risk" on the KPP roster those students with IEPs who demonstrate additional at-risk qualifying criteria. The superintendent is encouraged to seek out additional direction from the Early Childhood division of the Kansas State Department of Education in this regard.

While no corrective actions are required in response to this complaint, training for staff is strongly encouraged in order to ensure that there is a clear understanding as to how to proceed should another student with similar circumstances to Student A be identified.

### **Issue Three**

#### **Child Find**

#### **Complainant's Position**

The complainant asserts that the district has a duty to identify, locate, and evaluate all children who may have disabilities. It is the position of the complainant that delaying evaluations and services, or denying services based on grant funding requirements, violates the Child Find provision of the Individuals with Disabilities Education Act (IDEA).

#### **Applicable Statutes and Regulations**

A formal complaint must allege that a violation of special education laws has occurred within the twelve-month period prior to the date the complaint is received (K.A.R. 91-40-51(b)(1)).

At K.A.R. 91-40-7, Kansas statutes establish requirements regarding "child find." Districts are required to adopt and implement policies and procedures to

*"identify, locate, and evaluate all children with exceptionalities residing in [their] jurisdiction...[P]olicies and procedures under this regulation shall include age-appropriate screening procedures that meet the following requirements:*

- (1) For children younger than five years of age, observations, instruments, measures, and techniques that disclose any potential disabilities or developmental delays that indicate a need for evaluation, including hearing and vision screening...*

*Each board, at least annually, shall provide information to the public concerning the availability of special education services for exceptional children, including child find activities conducted by the board.*

Programs are required to ensure each child receives a valid, reliable developmental screening. The tool must be approved by KSDE, and programs must share results with the child's family. Programs may determine whether children receive screenings prior to the start of the school year or once school begins. Students who enroll after the beginning of the school year must receive a screening within 90 days of enrollment. KSDE recommends but does not require that the program select the ASQ:3 and ASQ:SE-2 developmental and social-emotional screenings for preschool-aged students.

### **Investigative Findings**

Child Find screenings are conducted monthly at the three elementary school locations that house the district's KPP funded preschool programs. The district website at <https://www.usd490.org/pagepreschool-programs> states that

*"[the district] also offers early childhood special education classes at [three] elementary schools to qualifying children ages three to five. The [interlocal] offers free Child Find developmental screenings for infants and preschool children throughout the school year. The purpose of the screening is to help parents identify potential learning problems and find help.*

*If your child has difficulty walking, talking, seeing, hearing, or learning, please call the Special Education office... to schedule a free appointment.*

*If you have developmental concerns about an infant or toddler (0-3 years), please call Rainbows of Butler County at 316-320-1342.*

*Please note that Child Find screenings are by appointment only."*

As a part of the application process for participation in the district's KPP preschool program, parents are asked to complete ASQ developmental screening questionnaires regarding their child. These ASQs are reviewed by the superintendent and her staff. If these questionnaires yield results that show that further assessment may be needed, parents are provided information regarding the Child Find screenings. If the majority of the areas on the ASQ suggest that the child may need further assessment, the ASQ data and parent information is

forwarded to a school psychologist for follow-up and possible special education evaluation to determine eligibility and need for special education services.

Information regarding Child Find screenings is shared with the district's KPP-related Task Force.

Referrals from outside agencies that come through the Interlocal are also funneled through the Child Find process.

The complainant did not – in either his written complaint or during a telephone call with the investigator on September 16, 2024 – identify any specific instances when the district had failed in its child find responsibilities. Instead, he referred the investigator to others who he felt could provide that information. These individuals included the complainant's wife, a school psychologist, and the complainant's sister.

In a telephone call on September 27, 2024, the investigator spoke with the sister of the complainant regarding her son, hereafter referred to as Student B. According to Student B's mother, he has a diagnosis of Autism. While the parent stated that she had called the district about having her son enrolled in the Pre-Kindergarten (KPP) program, the district has no record of a paper application for the student nor any other application-related documentation.

Student B's mother told the investigator that she did receive a call from the Interlocal and that Student B was evaluated, but she reports that no one from the district has contacted her about the preschool classroom.

Records show that the student was evaluated on September 6, 2024. The parent reports that the Interlocal staff clearly explained the evaluation process. She acknowledged that staff spoke with her about services for the student. According to the parent, she did not feel comfortable having the student start school "late" and opted not to move ahead with the process.

The parent stated that she was disappointed that no one from the district contacted her about the district's (general education KPP) preschool program, noting that she would have been "open to any school."

In a telephone call on September 27, 2024, the school psychologist was asked by the investigator whether she knew of students who had been missed by the preschool-level Child Find process. The school psychologist identified one student who is now in first grade and is receiving services under an IEP. The school psychologist stated that the student – who was also referenced by the complainant's wife during a telephone call with the investigator – experienced problems shortly after the start of his Kindergarten year. It is the opinion of both the school psychologist and the complainant's wife that this student should have been identified earlier. However, this student would have gone through the preschool child find process more than two years ago, well outside the 12-month period prior to the date this complaint was received. The case of this student was not investigated.

The school psychologist spoke about another student who went through the process last year at age 3 and was identified as needing special education services but the parent opted not to place the student in services offered in a school outside the student's area of attendance.

### **Summary and Conclusions Regarding Child Find**

The district and Interlocal have policies and procedures in place related to Child Find. No specific evidence was provided by the complainant or those individuals contacted by the investigator to show that the district or Interlocal have failed in their Child Find responsibilities. A violation of special education statutes and regulations *is not substantiated* on this issue.

### **Issue Four**

#### **Violation of IEP Requirements**

#### **Complainant's Position Regarding IEP Requirements**

The complainant asserts that children with IEPs are legally entitled to receive all services outlined in their IEPs. It is the complainant's position that the district's refusal to allow preschool attendance unless the parents opt out of special education services violates this legal requirement because the child's IEP should be implemented in a manner that provides both educational opportunities and the necessary support services.

#### **Investigative Findings, Summary, and Conclusions Regarding IEP Requirements:**

As shown above under Issue Two, evidence has not been found in the course of this investigation to show that the IEP for Student A has not been implemented. In fact, the student is currently receiving walk-in speech and language support, and Student A's mother feels that he is making progress.

Neither the complainant nor any other individual to whom the investigator spoke have identified any other student whose parents have agreed to the provision of special education services but whose IEP has not been implemented. The only examples provided are students whose parents have declined to complete the identification/eligibility process or declined proposed services.

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 an issue presented in this complaint. Therefore, no corrective actions are warranted.



Diana Durkin  
Complaint Investigator

## **Right to Appeal**

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

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

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

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

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

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

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